

Hawes, Kurt O.

October 4, 2017

1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF)	
AMERICA,)	Deposition of:
)	
Plaintiff,)	KURT O. HAWES
)	
vs.)	
)	
RAPOWER3, LLC,)	Case No. 2:15-cv-00828 DN
INTERNATIONAL)	
AUTOMATED SYSTEMS,)	Judge David Nuffer
)	
INC., LTBl, LLC, R.)	
)	
GREGORY SHEPARD,)	
)	
NELDON JOHNSON and)	
)	
ROGER FREEBORN,)	
)	
)	
Defendant.)	

October 4, 2017 * 9:07 a.m.

Location: United States Attorney's Office
111 South Main Street, Suite 1800
Salt Lake City, Utah

Reporter: Dawn M. Perry, CSR

Notary Public in and for the State of Utah

**Plaintiff
Exhibit**

672

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<p>1 A P P E A R A N C E S</p> <p>2 FOR THE PLAINTIFF:</p> <p>3 Christopher R. Moran</p> <p>4 Erin Healy Gallagher</p> <p>5 Erin R. Hines (Telephonically)</p> <p>6 UNITED STATES DEPARTMENT OF JUSTICE</p> <p>7 Trial Attorneys, Tax Division</p> <p>8 P.O. Box 7328</p> <p>9 Washington, D.C. 20044</p> <p>10 (202) 307-0834</p> <p>11 (202) 514-6770 (fax)</p> <p>12 christopher.r.moran@usdoj.gov</p> <p>13 erin.healygallagher@usdoj.gov</p> <p>14 erin.r.hines@usdoj.gov</p> <p>15</p> <p>16 FOR ALL DEFENDANTS:</p> <p>17</p> <p>18 Steven R. Paul</p> <p>19 Attorney at Law</p> <p>20 Nelson, Snuffer, Dahle & Poulson</p> <p>21 10885 South State Street</p> <p>22 Sandy, Utah 84070</p> <p>23 (801) 576-1400</p> <p>24 (801) 576-1960 (fax)</p> <p>25 spaul@nsdplaw.com</p>	<p>1 NO. DESCRIPTION PAGE</p> <p>2</p> <p>3 Exhibit 651 Expert witness report of Kurt O. Hawes, 78</p> <p>4 JD, MBA</p> <p>5 Exhibit 652 Acknowledgement and Waiver of Service 108</p> <p>6 Exhibit 653 United States' Notice of Intent to 108</p> <p>7 Subpoena Documents</p> <p>8 Exhibit 654 Nickeson v. C.I.R. 140</p> <p>9 Exhibit 655 Section 465 of the Internal 213</p> <p>10 Revenue Code</p> <p>11 Exhibit 656 Treasury regulation 1.48-9 237</p> <p>12 Exhibit 657 Letter dated August 28, 2017, to 255</p> <p>13 Messrs. Snuffer, Paul and Garriott from</p> <p>14 Kurt O. Hawes</p> <p>15 Exhibit 658 Handwritten notes 256</p> <p>16</p> <p>17 * * *</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
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<p style="text-align: right;">6</p> <p>1 KURT O. HAWES, 2 called as a witness, being first sworn, 3 was examined and testified as follows: 4 EXAMINATION 5 BY MR. MORAN: 6 Q. Mr. Hawes, as I just said, my name is 7 Chris Moran. I represent the United States. And I 8 will be taking your deposition today. 9 Have you ever been deposed before? 10 A. No. 11 Q. Have you ever conducted a deposition 12 before? 13 A. Yes. 14 Q. About how many times? 15 A. I've conducted, oh, two or three. Maybe 16 defended another handful of depositions. 17 Q. So you've defended a handful and taken -- 18 A. Taken two or three and defended probably 19 another five or six. 20 Q. Okay. So I take it you're familiar with 21 the rules? 22 A. Fairly familiar. 23 Q. Okay. We're going to run through them 24 again today. I'm sorry if that's redundant, but to 25 make sure -- we want to make sure everything is clear</p>	<p style="text-align: right;">8</p> <p>1 do the same. So that means that you need to let me 2 finish asking my question before you start your 3 answer. And I'll try to do the same for you. 4 Do you understand? 5 A. Yes, I do. 6 Q. Okay. My obligation today is to ask you 7 questions that are understandable. So if I ask you a 8 question, you provide an answer, I'll assume that you 9 understand the question. 10 Do you understand? 11 A. Yes. 12 Q. If you don't understand the question, ask 13 me to clarify, and I'll do my best to ask a better 14 question. 15 Do you understand? 16 A. Yes. 17 Q. Okay. Throughout the deposition it's 18 possible that another attorney in the room will place 19 an objection on the record. If that occurs, all that 20 attorney is doing is making their objection for the 21 record. You still need to provide an answer. 22 Do you understand? 23 A. Yes. 24 Q. You're appearing here today without your 25 own attorney, correct?</p>
<p style="text-align: right;">7</p> <p>1 before we get started. 2 A. No problem. 3 Q. Throughout today I'm going to ask you a 4 series of request questions. Your obligation is to 5 provide truthful answers. 6 Do you understand that obligation? 7 A. Yes. 8 Q. Okay. And answer the questions fully and 9 completely? 10 A. Yes. 11 Q. Okay. My questions and your answers are 12 going to be recorded by the court reporter sitting 13 here to my right. Quite frankly, she is the most 14 important person in the room because she is recording 15 everything that is said here today between you and I 16 and anyone else who may say something. Towards that 17 end, I need you to speak loudly enough for madam 18 court reporter to hear you and I need you to answer 19 my questions verbally. So that means no uh-huhs or 20 shaking of the head. 21 Do you understand? 22 A. Yes. 23 Q. In casual conversation we have a tendency 24 to start to speak over one another. I am going to 25 ask you to try to refrain from doing that, and I'll</p>	<p style="text-align: right;">9</p> <p>1 A. That's correct, in the sense that I'm not 2 represented personally. 3 Q. Do you believe that you are represented in 4 any other capacity? 5 A. No, other than I've been engaged by 6 defense counsel to provide an expert witness 7 testimony, but that's -- that's the extent of it. 8 Q. Okay. As we go through the series of 9 questions today, it's possible that later on you 10 realize you would like to expand upon an answer that 11 you gave earlier or that an answer that you gave 12 earlier wasn't correct. If that happens, just let me 13 know that you would like to go back and clear up a 14 question that was asked earlier and I'll give you the 15 chance to do that. 16 Do you understand? 17 A. Yes. 18 Q. We'll probably try to take a break about 19 every 90 minutes or so. Today I do anticipate going 20 past lunch, so we'll take a lunch break probably 21 around 12:30. If you need a break for any other 22 reason, bathroom, stretch your legs, that's fine. 23 I'd just ask that you not take a break while a 24 question is pending. 25 Do you understand?</p>

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<p style="text-align: right;">10</p> <p>1 A. Yes. Yes.</p> <p>2 Q. Mr. Hawes, we're here today to get as</p> <p>3 accurate a record as possible of your knowledge of</p> <p>4 the facts and of this case and the facts that -- and</p> <p>5 opinions that are contained in your expert report.</p> <p>6 Towards that end I need to ask, is there anything</p> <p>7 that would prevent you from answering and</p> <p>8 understanding my questions today?</p> <p>9 A. No.</p> <p>10 Q. Okay. Have you had anything alcoholic to</p> <p>11 drink in the past eight hours?</p> <p>12 A. No.</p> <p>13 Q. Any drugs that would cause you to have an</p> <p>14 inability to recall facts or -- the facts of this</p> <p>15 case?</p> <p>16 A. No.</p> <p>17 Q. Feeling sick or unwell today?</p> <p>18 A. No.</p> <p>19 Q. Okay. So is there any reason that you can</p> <p>20 think of that you can't answer my questions fully and</p> <p>21 completely today?</p> <p>22 A. None that I can think of.</p> <p>23 Q. Okay. We're going to start out with your</p> <p>24 background to kind of understand how you come to have</p> <p>25 some knowledge of the facts of this case and why you</p>	<p style="text-align: right;">12</p> <p>1 from high school. I graduated from the University of</p> <p>2 Utah in 1997.</p> <p>3 Q. Okay. Where did you do your mission?</p> <p>4 A. Montreal, Canada.</p> <p>5 Q. All right. What did you study at the</p> <p>6 University of Utah?</p> <p>7 A. I studied several things, but ultimately</p> <p>8 got a degree in French, a bachelor of arts degree.</p> <p>9 Q. BA in French?</p> <p>10 A. Uh-huh (affirmative).</p> <p>11 Q. Okay. Your time being in Montreal</p> <p>12 probably helped you with that?</p> <p>13 A. It did, yes.</p> <p>14 Q. You said you studied many things. What</p> <p>15 are the other things that you studied?</p> <p>16 A. I had studied some architecture and then</p> <p>17 just some general business courses as well.</p> <p>18 Q. Take any tax classes?</p> <p>19 A. Not as an undergraduate, no.</p> <p>20 Q. Okay. We're just talking about</p> <p>21 undergraduate right now.</p> <p>22 A. Yep.</p> <p>23 Q. Any accounting classes?</p> <p>24 A. No.</p> <p>25 Q. So would you say your expertise in this</p>
<p style="text-align: right;">11</p> <p>1 may or may not be an expert.</p> <p>2 Where were you born and raised?</p> <p>3 A. Salt Lake City, Utah.</p> <p>4 Q. Did you go to high school around here?</p> <p>5 A. Yes, I did.</p> <p>6 Q. Did you graduate from high school?</p> <p>7 A. I did.</p> <p>8 Q. Where?</p> <p>9 A. Where?</p> <p>10 Q. Where did you graduate from high school?</p> <p>11 A. The name of the high school here is</p> <p>12 Cottonwood High School.</p> <p>13 Q. Okay. What year did you graduate high</p> <p>14 school?</p> <p>15 A. Graduated in 1990.</p> <p>16 Q. What did you do after high school?</p> <p>17 A. I went to one year of college at the</p> <p>18 University of Utah.</p> <p>19 After that year I left for two years to</p> <p>20 serve a religious mission for the LDS church.</p> <p>21 And then when I came home, finished up my</p> <p>22 undergraduate education at the University of Utah.</p> <p>23 Q. So how many years did you attend the</p> <p>24 University of Utah the second time around?</p> <p>25 A. So I -- I graduated from 19 -- in 1990</p>	<p style="text-align: right;">13</p> <p>1 case comes from anything you studied at the</p> <p>2 University of Utah?</p> <p>3 A. No, likely not.</p> <p>4 Q. All right. So you graduated from the</p> <p>5 University of Utah in 1997. What did you do after</p> <p>6 that?</p> <p>7 A. For a couple of years I just worked. I</p> <p>8 ran my own little landscaping business both on my own</p> <p>9 and with a friend of mine.</p> <p>10 And then went back to graduate school</p> <p>11 beginning in the fall of 1999.</p> <p>12 Q. Okay. Where did you go to graduate</p> <p>13 school?</p> <p>14 A. I went to Brigham Young University, which</p> <p>15 is also here in Utah.</p> <p>16 Q. Okay. Were you a part-time student or</p> <p>17 full-time?</p> <p>18 A. Full-time student.</p> <p>19 Q. Okay. So you had stopped your landscaping</p> <p>20 business?</p> <p>21 A. Yes.</p> <p>22 Q. And what was your -- what degree were --</p> <p>23 what graduate degree were you pursuing at BYU?</p> <p>24 A. I -- it was a joint degree that I entered</p> <p>25 into to get a JD, a juris doctorate degree, and an</p>

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<p style="text-align: right;">14</p> <p>1 MBA, a master's of business administration.</p> <p>2 Q. How many years is that program?</p> <p>3 A. Four years.</p> <p>4 Q. Okay. What classes did you take at --</p> <p>5 give me an idea what classes you took, you know,</p> <p>6 besides -- I assume you took the general 1L classes.</p> <p>7 A. Right.</p> <p>8 Q. What else did you focus on at BYU?</p> <p>9 A. I did some security works, took secured</p> <p>10 transactions, business entities. I took tax</p> <p>11 classes -- a couple of tax classes at the law school.</p> <p>12 Secured transactions. Evidence. Different things.</p> <p>13 You know, a general smattering of legal classes.</p> <p>14 I -- I don't know if you could say I was</p> <p>15 starting to specialize then. I didn't feel like I</p> <p>16 was specializing then. But I did take a couple of</p> <p>17 the -- they called them Fed Tax 1 and Fed Tax 2.</p> <p>18 Q. Okay. So you took Fed Tax 1, Fed Tax 2.</p> <p>19 Anything else?</p> <p>20 A. At law school -- that relate to tax?</p> <p>21 Q. That relate to tax, yes.</p> <p>22 A. I mean, as I've been involved in tax, it</p> <p>23 seems tax winds its way into most everything, but</p> <p>24 nothing that specifically focused on tax, that I can</p> <p>25 recall.</p>	<p style="text-align: right;">16</p> <p>1 A. Yeah. Yeah.</p> <p>2 Q. All right. So when did you graduate from</p> <p>3 BYU?</p> <p>4 A. 2003. Spring of 2003.</p> <p>5 Q. What did you do after you graduated from</p> <p>6 law school?</p> <p>7 A. For a few months I clerked at a law firm</p> <p>8 here in town called Clyde, Snow & Sessions. And that</p> <p>9 was principally waiting for a position I had -- I had</p> <p>10 the opportunity to do, which was to clerk for a</p> <p>11 federal judge here in Salt Lake City as well.</p> <p>12 Q. Okay.</p> <p>13 A. And that didn't -- so I graduated spring</p> <p>14 of 2003. My clerkship wasn't scheduled to start</p> <p>15 until January 2004. So I worked with a law firm for</p> <p>16 those few months until then.</p> <p>17 Q. As an intern?</p> <p>18 A. As an in -- well, I hadn't passed the bar</p> <p>19 yet so -- I passed the bar while I was working there,</p> <p>20 so I don't know if they officially made me an</p> <p>21 associate when I passed the bar, but I knew -- they</p> <p>22 knew I was leaving in a few months; I knew I was</p> <p>23 leaving. So we didn't worry about a lot of that</p> <p>24 stuff.</p> <p>25 Q. I understand. So you did take a bar exam?</p>
<p style="text-align: right;">15</p> <p>1 Q. Okay. How about as part of your MBA</p> <p>2 courses?</p> <p>3 A. Took accounting classes, finance classes.</p> <p>4 Those would probably be the most -- the most relevant</p> <p>5 to the tax arena. Statistics as well, I guess has</p> <p>6 some relevancy.</p> <p>7 Q. Okay. Can you tell me what -- the</p> <p>8 accounting classes you took? Were they general</p> <p>9 business accounting or was it tax accounting?</p> <p>10 A. They -- so to start with, took general</p> <p>11 business accounting. And I recall taking a tax</p> <p>12 accounting class as well, but it's -- it's been so</p> <p>13 long ago that I don't remember the details of that.</p> <p>14 Q. So you don't remember -- recall what was</p> <p>15 taught in the MBA tax accounting class?</p> <p>16 A. I was piggy -- it was piggybacking in --</p> <p>17 in my memory I was taking it at about the same time I</p> <p>18 was taking the law school tax accounting stuff, so</p> <p>19 all of that kind of melded together. If you ask</p> <p>20 me if I learned principles in one and not in the</p> <p>21 other, I couldn't tell you.</p> <p>22 Q. Principles of what?</p> <p>23 A. Just general tax principles.</p> <p>24 Q. Okay. So, like, income, deductions, stuff</p> <p>25 like that?</p>	<p style="text-align: right;">17</p> <p>1 A. Yes.</p> <p>2 Q. You took that in 2003?</p> <p>3 A. I took -- yes, 2003.</p> <p>4 Q. What state?</p> <p>5 A. Here in Utah as well.</p> <p>6 Q. Okay. Did you pass?</p> <p>7 A. Yes.</p> <p>8 Q. All right. So in 2003, graduate, take the</p> <p>9 bar exam, worked at Clyde, Snow & Sessions.</p> <p>10 And after that you clerked for a federal</p> <p>11 judge?</p> <p>12 A. Uh-huh (affirmative).</p> <p>13 Q. Which federal judge?</p> <p>14 A. His name was Dee Benson.</p> <p>15 Q. Okay. And were you a paid clerk?</p> <p>16 A. Yes.</p> <p>17 Q. How long was the term?</p> <p>18 A. It's about 19 months -- 18, 19 months. I</p> <p>19 think I finished end of August, first part of</p> <p>20 September, 2005.</p> <p>21 Q. Okay. So it sounds like about a year?</p> <p>22 A. Well, it was -- if I started January 2004,</p> <p>23 it was a little more than a year and a half.</p> <p>24 Q. Oh, okay.</p> <p>25 And I don't want to ask any specifics of</p>

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<p style="text-align: right;">18</p> <p>1 what you worked on for the judge, but did any of your</p> <p>2 work for Judge Benson include tax cases?</p> <p>3 A. I had a couple of tax cases that I worked</p> <p>4 with. That was thrown into the general mix of all</p> <p>5 kinds of cases that we had.</p> <p>6 Q. Okay.</p> <p>7 A. But I do remember working on a few tax</p> <p>8 cases.</p> <p>9 Q. Okay. All right. So your term -- your</p> <p>10 term with Judge Benson was over when, again? I'm</p> <p>11 sorry.</p> <p>12 A. About end of August 2005.</p> <p>13 Q. Okay. What did you do after that?</p> <p>14 A. I went to work for a law firm here in Salt</p> <p>15 Lake City called Holme Roberts & Owen.</p> <p>16 Q. Were you an associate there?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. What was your practice group?</p> <p>19 A. I was in the tax group at Holme Roberts &</p> <p>20 Owen and focused -- at least initially focused on</p> <p>21 state and local tax issues. But those also pull in</p> <p>22 federal tax issues as well.</p> <p>23 Q. Okay. When you say "state and local tax</p> <p>24 issues," can you be more specific?</p> <p>25 A. Sure. Dealing with taxes imposed by the</p>	<p style="text-align: right;">20</p> <p>1 taxing authority, formal hearings in front of the</p> <p>2 taxing authority, any appeals that might go to</p> <p>3 district court. And then any appeals from that that</p> <p>4 might go to the supreme court.</p> <p>5 Q. Okay. When you say the district court, is</p> <p>6 that the trial court in Utah?</p> <p>7 A. Yeah, sorry. Yeah, the trial court here</p> <p>8 in Utah, which is where -- where -- they also serve</p> <p>9 as the tax court here in the state of Utah. Other</p> <p>10 states are similar. Other states might have their</p> <p>11 own separate tax court that we would deal with, but</p> <p>12 here in Utah those are combined in the -- the trial</p> <p>13 court and the tax court are the same body.</p> <p>14 Q. Okay. So any tax trials?</p> <p>15 A. Yes.</p> <p>16 Q. Okay.</p> <p>17 A. We had -- I did a few tax trials. Working</p> <p>18 at Holme Roberts & Owen I was -- most of the time I</p> <p>19 was working with other attorneys. During those --</p> <p>20 during my time there I was -- oh, I was lead counsel</p> <p>21 on a couple of cases, which I think was expected for</p> <p>22 how young I was in the practice, but...</p> <p>23 Q. Okay. During your time at Holme Roberts</p> <p>24 and...</p> <p>25 A. Owen.</p>
<p style="text-align: right;">19</p> <p>1 state of Utah principally. We -- we dealt with other</p> <p>2 states as well, but it -- we looked at taxing issues</p> <p>3 related to taxes imposed by state taxing authorities</p> <p>4 as -- as different from the fed taxing authority.</p> <p>5 Q. Okay. What I'm trying to understand is</p> <p>6 were you doing tax planning, so, in other words,</p> <p>7 advising clients on how to comply with their</p> <p>8 obligations under state and local tax laws, or was it</p> <p>9 more of a controversy practice?</p> <p>10 A. It was more of a controversy practice. We</p> <p>11 did a little tax planning and helped with</p> <p>12 transactions and things like that, the tax</p> <p>13 implications of transactions, but the majority of our</p> <p>14 work was tax controversy work.</p> <p>15 Q. Okay. So that's when either a state or</p> <p>16 local taxing authority has done an audit and they're</p> <p>17 saying that your client owes more taxes, right?</p> <p>18 A. Right.</p> <p>19 Q. Okay.</p> <p>20 A. Right.</p> <p>21 Q. So tell me, what did that involve?</p> <p>22 A. It involved everything from helping</p> <p>23 clients through the audit process, responding to the</p> <p>24 taxing authority for -- with questions, and trying to</p> <p>25 work with them, to informal hearings in front of the</p>	<p style="text-align: right;">21</p> <p>1 Q. Owen. Did any of these state and local</p> <p>2 tax issues involve renewable energy and the tax</p> <p>3 implications there?</p> <p>4 A. Boy, not to my memory. We dealt with tax</p> <p>5 credits, in general, all the time, but I don't recall</p> <p>6 any specifically that were kind of renewal</p> <p>7 energy-based. There may have been, but I just can't</p> <p>8 recall.</p> <p>9 Q. Okay. All right. So how long were you</p> <p>10 with Holme Roberts & Owen?</p> <p>11 A. This is where my timing gets fuzzy. It</p> <p>12 was about five years. So I think about 2010, '05</p> <p>13 to -- to 2010.</p> <p>14 Q. Okay. So in 2010 it sounds like you left</p> <p>15 Holme Roberts & Owen?</p> <p>16 A. Yes.</p> <p>17 Q. Where did you go?</p> <p>18 A. Went to another law firm. It was actually</p> <p>19 with a law school classmate of mine. He had started</p> <p>20 up a law firm and they were looking to grow their</p> <p>21 practice. And so I -- I had an opportunity there,</p> <p>22 and decided to take the leap, so to speak, and went</p> <p>23 to work at his firm.</p> <p>24 Q. What firm was that?</p> <p>25 A. It's a long name. It's called Pia -- oh.</p>

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<p style="text-align: right;">22</p> <p>1 Pia, Anderson, Dorius, Reynard and Moss.</p> <p>2 Q. Okay.</p> <p>3 A. These new law firms, everybody has got to</p> <p>4 get on the billboard, so...</p> <p>5 Q. Were you an associate there or a partner?</p> <p>6 A. I was a -- I was a partner there.</p> <p>7 Q. Your name wasn't on there?</p> <p>8 A. But my -- right, I wasn't one of the named</p> <p>9 partners. They had already started the firm before I</p> <p>10 came over.</p> <p>11 Q. Okay. So you went there in 2010. What</p> <p>12 did you do at -- what are the first two names?</p> <p>13 A. Pia Anderson.</p> <p>14 Q. All right, let's call it Pia Anderson.</p> <p>15 A. Perfect.</p> <p>16 Q. What did you do at Pia Anderson?</p> <p>17 A. I focused -- again, still focused on tax.</p> <p>18 I was -- I helped with all kinds of other cases that</p> <p>19 they were dealing with as well, but still tried to</p> <p>20 focus on and grow my tax practice.</p> <p>21 Q. Were you the only tax attorney at Pia</p> <p>22 Anderson?</p> <p>23 A. I was the only kind of tax controversy</p> <p>24 person. There were some other estate lawyers who did</p> <p>25 estate planning and things like that, and I -- I</p>	<p style="text-align: right;">24</p> <p>1 Q. Okay. So it sounds like there was a</p> <p>2 handful of tax controversy issues you dealt with at</p> <p>3 Pia Anderson?</p> <p>4 A. Yeah. Yeah.</p> <p>5 Q. Okay. And were those clients you brought</p> <p>6 over from Holme Roberts & Owen?</p> <p>7 A. For the most part.</p> <p>8 Q. Okay.</p> <p>9 A. For the most part. And my memory of it is</p> <p>10 that they were more efforts to finish -- kind of</p> <p>11 finish up cases that I had started over at Holme</p> <p>12 Roberts.</p> <p>13 Q. Okay. While you were at Pia Anderson did</p> <p>14 any of your practice focus on -- or any -- any of the</p> <p>15 matters that you attended to, did any of them involve</p> <p>16 tax issues associated with renewable energy?</p> <p>17 A. No, not specifically.</p> <p>18 Q. Okay.</p> <p>19 A. Again, we dealt with credits, in general,</p> <p>20 but -- but not specifically, that I remember, energy</p> <p>21 credits.</p> <p>22 Q. Okay. When you say "credits in general,"</p> <p>23 what do you mean?</p> <p>24 A. Well, the -- there are all kinds of</p> <p>25 credits that the government offers.</p>
<p style="text-align: right;">23</p> <p>1 guess technically I would consider them tax</p> <p>2 practitioners.</p> <p>3 Q. Sure.</p> <p>4 A. We -- most of the attorneys there I think</p> <p>5 were involved in transactional or litigation-type</p> <p>6 things. But me and one or two others were -- were</p> <p>7 focused on tax-type things.</p> <p>8 Q. And tax controversy?</p> <p>9 A. Yeah.</p> <p>10 Q. Okay. All right. So what types of tax</p> <p>11 controversy matters did you do at Pia Anderson?</p> <p>12 A. You know what? At Pia Anderson -- I was</p> <p>13 there for -- for a short time. I -- I continued on</p> <p>14 some of the things that I was working on at Holme</p> <p>15 Roberts & Owen.</p> <p>16 Q. So you took some clients with you?</p> <p>17 A. Yeah. But there was -- apart from that, I</p> <p>18 didn't -- and trying to help the firm grow, we were</p> <p>19 just kind of doing anything that we could do. And so</p> <p>20 for the year, year and a half, however long I was</p> <p>21 there, I didn't have a ton of pure tax cases. There</p> <p>22 were cases that had tax issues that I got involved</p> <p>23 with, but I -- I was -- my memory of -- of being</p> <p>24 there was I was doing all kinds of stuff, as well as</p> <p>25 tax. But not exclusively tax there.</p>	<p style="text-align: right;">25</p> <p>1 Q. Can you give me an example?</p> <p>2 A. The child tax credit is one that a lot of</p> <p>3 individuals --</p> <p>4 Q. Sure.</p> <p>5 A. -- deal with. So there's various credits</p> <p>6 that are related to -- or that are in the tax code,</p> <p>7 and we'd look at whatever a client wanted us to look</p> <p>8 at.</p> <p>9 Q. Okay. What I'm trying to understand is</p> <p>10 specifically what credits were you focused on. You</p> <p>11 just mentioned the child tax credit. What else?</p> <p>12 A. Oh. I'll be honest. I do not recall</p> <p>13 specifically at Pia Anderson. And, like I said, it</p> <p>14 wasn't a ton during that year, year and a half. So</p> <p>15 it wasn't -- it wasn't anything that I can recall</p> <p>16 that was outside what I had done at Holme Roberts &</p> <p>17 Owen.</p> <p>18 Q. Okay.</p> <p>19 A. Or that was in addition to what I had done</p> <p>20 at Holme Roberts & Owen.</p> <p>21 Q. How about at Holme Roberts & Owen, do you</p> <p>22 remember any of the specific credits you were</p> <p>23 involved with?</p> <p>24 A. We -- we looked at -- we had one case</p> <p>25 where we were looking at -- it's kind of a foreign</p>

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<p style="text-align: right;">26</p> <p>1 income tax credit, but it has to do with taxes paid</p> <p>2 in different states.</p> <p>3 Q. Okay.</p> <p>4 A. So you get a credit for -- for -- for</p> <p>5 taxes -- you get credit in one state for taxes that</p> <p>6 you pay in another state.</p> <p>7 Q. Okay.</p> <p>8 A. I worked with a lot of different types of</p> <p>9 taxes as well on the state level. So sales taxes and</p> <p>10 property taxes. And there are lots of credits</p> <p>11 associated with that. There's a lot of sales tax</p> <p>12 credits or -- or exclusions that we dealt with.</p> <p>13 Similarly for property tax, there could be the</p> <p>14 agricultural exemption or various things like that.</p> <p>15 Q. Okay. All right. You mentioned you</p> <p>16 worked at Pia Anderson for about a year and a half?</p> <p>17 A. I think that's right.</p> <p>18 Q. So now are we somewhere in 2011?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. What did you do after Pia Anderson?</p> <p>21 A. After Pia Anderson I -- I went to work for</p> <p>22 another law firm -- or back, I guess I should say, to</p> <p>23 Clyde, Snow & Sessions. And went to work in their --</p> <p>24 in their tax group.</p> <p>25 Q. Why did you leave Pia Anderson?</p>	<p style="text-align: right;">28</p> <p>1 to Clyde Snow. And it sounds like you were in the</p> <p>2 tax group?</p> <p>3 A. Yes.</p> <p>4 Q. All right. How many other attorneys were</p> <p>5 in the tax group?</p> <p>6 A. When I first got there it was basically</p> <p>7 the two of us. It was the -- that one partner and</p> <p>8 myself.</p> <p>9 Q. Okay. So what type of matters did you</p> <p>10 attend to at Clyde Snow?</p> <p>11 A. There were a lot more federal tax matters</p> <p>12 there. We were dealing with -- again, mostly on the</p> <p>13 controversy side, but we did everything from offers</p> <p>14 and compromise to -- to tax planning, to handling tax</p> <p>15 controversies before the tax court and various things</p> <p>16 like that.</p> <p>17 Q. Okay. So you said tax planning, tax</p> <p>18 controversy?</p> <p>19 A. Uh-huh (affirmative).</p> <p>20 Q. OICs?</p> <p>21 A. (Witness nods head.)</p> <p>22 Q. Anything else?</p> <p>23 A. I'm -- I'm trying to be broad because --</p> <p>24 his practice had been -- had revolved around -- I</p> <p>25 mean, he was the only tax attorney, so if ever</p>
<p style="text-align: right;">27</p> <p>1 A. Oh, it was more internal strife in the</p> <p>2 firm than anything else. It -- it turned out to be</p> <p>3 not the opportunity that I had anticipated.</p> <p>4 And, you know, I think to be frank, I was</p> <p>5 still trying to figure out how I could build my</p> <p>6 practice and started to realize that I may not have</p> <p>7 the most success building my practice with that group</p> <p>8 of lawyers.</p> <p>9 Q. And Clyde Snow was a -- why did you go to</p> <p>10 Clyde Snow?</p> <p>11 A. Well, there -- it was a little more</p> <p>12 established firm. One of the main reasons was</p> <p>13 their -- their main tax lawyer was advancing in years</p> <p>14 and -- and they had -- they thought he was -- would</p> <p>15 consider retiring, and they didn't have anyone</p> <p>16 specifically to kind of take over his practice when</p> <p>17 he was going to retire. So we got together, and I</p> <p>18 looked at that as maybe a better opportunity to build</p> <p>19 my practice.</p> <p>20 Q. Okay. Do you recall approximately the</p> <p>21 month and date you went to Clyde Snow?</p> <p>22 A. I want to say August of '11.</p> <p>23 Q. Okay.</p> <p>24 A. I think that's right.</p> <p>25 Q. All right. So in August of 2011 you went</p>	<p style="text-align: right;">29</p> <p>1 anybody had tax problems, he was the guy they called.</p> <p>2 So we were kind of on call for -- for anything tax</p> <p>3 related.</p> <p>4 Q. Okay. Were your clients primarily</p> <p>5 individuals or businesses or both?</p> <p>6 A. They were both.</p> <p>7 Q. Okay.</p> <p>8 A. Yeah, they were both. I don't know a</p> <p>9 mixture, but...</p> <p>10 Q. Okay.</p> <p>11 A. We had a good chunk of both.</p> <p>12 Q. All right. So when you say "tax</p> <p>13 controversy," what do you mean by that?</p> <p>14 A. Again, helping clients go through an</p> <p>15 audit. If there was ever anything that went past the</p> <p>16 audit, maybe to the IRS appeals, we'd help in that</p> <p>17 regard. If it went beyond that to the tax court, we</p> <p>18 help in that regard as well.</p> <p>19 Q. You would represent your clients in the</p> <p>20 tax court?</p> <p>21 A. Yes.</p> <p>22 Q. So you were admitted to the tax court?</p> <p>23 A. Yes.</p> <p>24 Q. About how many tax court cases have you</p> <p>25 handled?</p>

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<p style="text-align: right;">30</p> <p>1 A. Oh, very few. Two or three.</p> <p>2 Q. Okay. You don't need to give me client</p> <p>3 names or anything, but what were the outcome of those</p> <p>4 cases? Did you go to trial? Were they settled on</p> <p>5 appeals?</p> <p>6 A. All the -- all the ones that I've dealt</p> <p>7 with we've been able to reach a settlement.</p> <p>8 Q. Okay. Any other -- when you say --</p> <p>9 withdrawn.</p> <p>10 When you say "tax controversy," anything</p> <p>11 else in the federal realm?</p> <p>12 A. No, not that I can recall specifically.</p> <p>13 Q. Okay. Ever handle a tax case in federal</p> <p>14 district court?</p> <p>15 A. No.</p> <p>16 Q. Okay. The tax controversy you did at</p> <p>17 Clyde Snow, did any of that involve renewable energy</p> <p>18 credits?</p> <p>19 A. I did have one client that came to me that</p> <p>20 wanted some help with -- in that case it was a</p> <p>21 biodiesel credit that they were working with. And so</p> <p>22 I -- I helped them -- or I started at Clyde Snow and</p> <p>23 continued on helping them with their -- with that --</p> <p>24 with that -- I consider that a renewable energy</p> <p>25 credit.</p>	<p style="text-align: right;">32</p> <p>1 in-house, and that was my next step --</p> <p>2 Q. Okay.</p> <p>3 A. -- was helping them in-house with this</p> <p>4 issue.</p> <p>5 Q. All right. We're going to get to your</p> <p>6 next -- your next employer in a minute.</p> <p>7 A. But the ultimate determination of the case</p> <p>8 didn't come until I was working with them.</p> <p>9 Q. At your next employer?</p> <p>10 A. At the next employer, yes.</p> <p>11 Q. Okay. All right. How about tax</p> <p>12 planning -- I want to finish up with Clyde Snow.</p> <p>13 A. Okay.</p> <p>14 Q. You mentioned you did some tax planning.</p> <p>15 Did any of that involve renewable energy credits?</p> <p>16 A. No, not that I recall.</p> <p>17 Q. Okay. And I assume your OIC practice</p> <p>18 didn't include any renewable energy credits; is that</p> <p>19 correct?</p> <p>20 A. Yeah, that's a fair assumption.</p> <p>21 Q. Okay. Besides what we've already talked</p> <p>22 about, anything else you did at Clyde Snow?</p> <p>23 A. In the tax world?</p> <p>24 Q. Sure, in the tax world.</p> <p>25 A. I think that covers -- I mean, we did</p>
<p style="text-align: right;">31</p> <p>1 Q. Okay.</p> <p>2 A. But it's in the same -- kind of the same</p> <p>3 realm.</p> <p>4 Q. All right, I understand. You don't have</p> <p>5 to give me the client name, but what was the outcome</p> <p>6 of that case?</p> <p>7 A. Ultimately we got -- we reached a</p> <p>8 settlement. This was several years later. Reached a</p> <p>9 settlement with appeals to -- they -- they ended up</p> <p>10 having to pay some, but it was far less than what was</p> <p>11 originally assessed.</p> <p>12 Q. Okay. When you say "they," you mean your</p> <p>13 client?</p> <p>14 A. The client, yes. Sorry.</p> <p>15 Q. Was it a hazard to litigation settlement?</p> <p>16 A. Say it again.</p> <p>17 Q. Was it, like, a hazard to litigation</p> <p>18 settlement, where the facts could go either way, so</p> <p>19 they made an offer?</p> <p>20 A. I -- I don't know what the -- the IRS's</p> <p>21 thinking was. We -- we started with -- and -- and I</p> <p>22 should clarify. This -- maybe this will give you a</p> <p>23 little more of the history.</p> <p>24 I did -- I started work with this client</p> <p>25 at Clyde Snow and then they asked me to come</p>	<p style="text-align: right;">33</p> <p>1 everything tax that came in, but I also was involved</p> <p>2 in other types of things. I did employment</p> <p>3 litigation and -- and helped -- they have a -- they</p> <p>4 have a white collar criminal practice that I helped</p> <p>5 with. I never got too deep into any of those. But</p> <p>6 when they needed some extra hands to do some research</p> <p>7 or something like that, I would -- I helped in those</p> <p>8 cases as well.</p> <p>9 Q. Okay. About what percentage of your time</p> <p>10 were you devoted to tax matters versus the other</p> <p>11 things you just mentioned?</p> <p>12 A. Oh, it was probably 75 percent to tax --</p> <p>13 75 percent, maybe even a little bit more, but...</p> <p>14 Q. And the rest was miscellaneous?</p> <p>15 A. The rest was miscellaneous whenever</p> <p>16 anybody needed some extra hands on some projects.</p> <p>17 Q. Okay. All right. So how long did you</p> <p>18 work at Clyde Snow?</p> <p>19 A. I was there close to two years.</p> <p>20 Q. Okay.</p> <p>21 A. Again. I can't remember what month we're</p> <p>22 in.</p> <p>23 Q. I think you started at Clyde Snow in</p> <p>24 August of 2011?</p> <p>25 A. Okay. I think that's right.</p>

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<p style="text-align: right;">34</p> <p>1 Q. Okay. So it sounds like somewhere in late 2 2013 you left?</p> <p>3 A. I think early 2013. March -- I want to 4 say March 2013 is when I went in-house with this 5 client.</p> <p>6 Q. Okay. Before we move on to that client, 7 why did you leave Clyde Snow?</p> <p>8 A. This opportunity was -- I had a client and 9 they were dealing with this heavy tax issue and they 10 anticipated that they were going to have lots of tax 11 issues, so they asked if I would come work with them.</p> <p>12 Q. And who is this client you are alluding 13 to?</p> <p>14 A. The name of the company is called Washakie 15 Renewable Energy.</p> <p>16 Q. Okay. And where are they located?</p> <p>17 A. They are here in Salt Lake. Their 18 corporate offices are here in Salt Lake. They have a 19 production facility up in -- oh, Plymouth, Utah.</p> <p>20 Q. Okay.</p> <p>21 A. Which is way up north, almost to Idaho.</p> <p>22 Q. Okay. What was their business?</p> <p>23 A. They produced, bought and sold biodiesel 24 fuel primarily.</p> <p>25 Q. They had been a client of Clyde Snow?</p>	<p style="text-align: right;">36</p> <p>1 mean a revenue agent who was doing an audit?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. So the IRS was challenging the 4 biodiesel credit that they already claimed on 5 previous tax returns?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. Why was the IRS challenging their 8 biodiesel credit?</p> <p>9 A. I think they -- their main issue was -- 10 this was my assessment of this -- the way this credit 11 works. You -- you have to justify the credit by 12 keeping appropriate records and various other things 13 to justify that what you are buying and selling and 14 mixing and whatever is the right product, the right 15 thing that this credit is designed to be given for.</p> <p>16 Q. Okay.</p> <p>17 A. So they were -- I get the impression -- or 18 I got the impression that it's fairly common to go 19 through this audit process just to clarify or 20 substantiate the -- the credits that were claimed.</p> <p>21 Q. And that's when you came on?</p> <p>22 A. (Witness nods head.)</p> <p>23 Q. The IRS had just opened an exam?</p> <p>24 A. Uh-huh (affirmative).</p> <p>25 Q. And verbal answers to --</p>
<p style="text-align: right;">35</p> <p>1 A. Yes.</p> <p>2 Q. Okay.</p> <p>3 A. Well, I -- let me take that back. They 4 were a client that I brought to Clyde Snow.</p> <p>5 Q. Okay. Had you had them when you were at 6 Pia Anderson?</p> <p>7 A. No.</p> <p>8 Q. How did you bring them in to Clyde Snow?</p> <p>9 A. It was a friend of mine that was working 10 in their legal department called me up while I was at 11 Clyde Snow and said, "We need some help."</p> <p>12 Q. Okay. All right. Then what was the help 13 that they needed?</p> <p>14 A. They were in the middle of a big audit for 15 their -- it related to several things, but the 16 biggest piece of it was their claiming this biodiesel 17 fuel credit.</p> <p>18 Q. Who was auditing them?</p> <p>19 A. The IRS.</p> <p>20 Q. Okay. What stage of the audit was it?</p> <p>21 A. It was -- it was early on when -- I mean, 22 I -- I still remember meeting with the investigator 23 as he was coming to gather information. So I got 24 involved fairly early in the process.</p> <p>25 Q. Okay. When you say "investigator," do you</p>	<p style="text-align: right;">37</p> <p>1 A. I apologize. Yes, yes, that's when I came 2 on.</p> <p>3 Q. Okay. And what types of -- what types of 4 things did you have to do as part of their in-house 5 counsel?</p> <p>6 A. So with respect to this audit, it was 7 working with the -- the revenue agent as he was 8 investigating, getting him documents, helping him get 9 all the things that he needed. And then ultimately 10 working with him when the -- when the assessment came 11 out, writing a response to the assessment. 12 Ultimately it was -- the case was forwarded to 13 another office, another revenue agent, his -- his 14 supervisor, to handle it. And then we worked through 15 that process and ultimately it went to appeals -- IRS 16 appeals, where we finally came to a resolution.</p> <p>17 Q. Okay. You said there was -- there was an 18 assessment?</p> <p>19 A. There was an assessment.</p> <p>20 Q. Okay.</p> <p>21 A. Yeah.</p> <p>22 Q. Okay. And then what happened in appeals?</p> <p>23 A. In appeals we came to an agreement on -- 24 on an amount that -- that they would be satisfied 25 with on -- on one small slice of the issue that -- it</p>

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<p style="text-align: right;">38</p> <p>1 ultimately turned on we didn't -- we hadn't kept the</p> <p>2 right documents for this portion of the audit, and</p> <p>3 nobody had them. We couldn't -- we couldn't find</p> <p>4 them, so we -- we said, "If we can't find those</p> <p>5 documents, then we'll accept the audit on those</p> <p>6 issues."</p> <p>7 Q. Okay. How many tax years were at issue?</p> <p>8 A. Say it again.</p> <p>9 Q. About how many tax years were at issue?</p> <p>10 A. Three.</p> <p>11 Q. Okay.</p> <p>12 A. I believe.</p> <p>13 Q. Was the biodiesel credit the only issue in</p> <p>14 the exam?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. So once you reached a settlement of</p> <p>17 the appeals, that was the end of it?</p> <p>18 A. Yes.</p> <p>19 Q. So you were brought into the general</p> <p>20 counsel's office of Washakie Renewable Energy, LLC,</p> <p>21 is that --</p> <p>22 A. Yes.</p> <p>23 Q. Okay. Where was your office?</p> <p>24 A. Where?</p> <p>25 Q. Yeah.</p>	<p style="text-align: right;">40</p> <p>1 that audit before you left?</p> <p>2 A. Oh, it was three or four months.</p> <p>3 Q. Okay. So not very long?</p> <p>4 A. Yeah. We were still at the -- at the</p> <p>5 document exchange stage.</p> <p>6 Q. Okay. All right. What other types of</p> <p>7 matters did you handle as -- in their general</p> <p>8 counsel's office?</p> <p>9 A. So we kind of tag-teamed everything. We</p> <p>10 had several litigation matters that we were handling.</p> <p>11 We had several employment matters that we dealt with.</p> <p>12 We had some real property issues that we had to deal</p> <p>13 with. My -- at least initially and for the first --</p> <p>14 boy -- for the first probably two years while we were</p> <p>15 working through that audit, that was the -- that was</p> <p>16 the bulk of what I did personally.</p> <p>17 Q. Okay.</p> <p>18 A. I think it was -- I spent more than half</p> <p>19 my time on that audit, until we got it all wrapped</p> <p>20 up.</p> <p>21 Q. Okay. About how many employees did</p> <p>22 Washakie have?</p> <p>23 A. When I started there were -- oh, I want to</p> <p>24 say about eight to ten.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">39</p> <p>1 A. Here in Salt Lake. I don't know if you</p> <p>2 need the exact address but --</p> <p>3 Q. Salt Lake is fine.</p> <p>4 A. Yeah, here in Salt Lake.</p> <p>5 Q. How many attorneys were in their counsel's</p> <p>6 office?</p> <p>7 A. When I got there, there were two. We did</p> <p>8 hire a third while I was there. But that was as -- I</p> <p>9 think that was as big as it got.</p> <p>10 Q. So including you, it's four?</p> <p>11 A. No, including me that's three.</p> <p>12 Q. So you were the second one?</p> <p>13 A. I was the second.</p> <p>14 Q. And then you brought in a third?</p> <p>15 A. Then we brought in a third, yeah.</p> <p>16 Q. In your time at Washakie, did you deal</p> <p>17 with any other tax issues?</p> <p>18 A. Before I left they were beginning another</p> <p>19 audit that I started with, but I -- I did not see</p> <p>20 that one through to conclusion.</p> <p>21 Q. Do you recall what was at issue in the</p> <p>22 second audit?</p> <p>23 A. It was the same issue, different tax</p> <p>24 years.</p> <p>25 Q. Okay. So how long were you involved in</p>	<p style="text-align: right;">41</p> <p>1 A. At its height, we probably had 30 to 40,</p> <p>2 something like that.</p> <p>3 Q. And you said they were in the biodiesel</p> <p>4 business. Were they manufacturing biodiesel?</p> <p>5 A. They were manufacturing. They were also</p> <p>6 trading, I guess is the best way to put it, buying</p> <p>7 and selling from different places around the world.</p> <p>8 Q. Okay.</p> <p>9 A. But they do have a manufacturing plant up</p> <p>10 in -- up in northern Utah.</p> <p>11 Q. You said Plymouth?</p> <p>12 A. Plymouth, right.</p> <p>13 Q. What were they making the biodiesel out</p> <p>14 of?</p> <p>15 A. Mostly soy -- soybean oil.</p> <p>16 Q. Okay.</p> <p>17 A. But they -- they were -- the facility was</p> <p>18 pretty brand-new, so they were -- they were trying to</p> <p>19 find other options. And they would -- they were</p> <p>20 testing other -- other things that they could make</p> <p>21 the biodiesel out of. But I think initially soy was</p> <p>22 probably the most common ingredient.</p> <p>23 Q. Do you recall anything else they were</p> <p>24 using as a raw ingredient?</p> <p>25 A. Oh. I remember them discussing -- I think</p>

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<p style="text-align: right;">42</p> <p>1 flaxseed was one that they were going to try and do.</p> <p>2 I can't remember any of the others.</p> <p>3 Q. All right. So you said at some point you</p> <p>4 left Washakie, right?</p> <p>5 A. Uh-huh (affirmative).</p> <p>6 Q. When was that?</p> <p>7 A. It was summer 2015.</p> <p>8 Q. Okay.</p> <p>9 A. July-ish, I think.</p> <p>10 Q. Why did you leave?</p> <p>11 A. Again, internal issues. Some of it had to</p> <p>12 deal with the tax audit I was up against -- the new</p> <p>13 tax audit I was up against. I was trying to get</p> <p>14 cooperation from management to get me documents and</p> <p>15 information, and I couldn't get the cooperation that</p> <p>16 I felt I needed and it -- it started to -- it started</p> <p>17 to be an issue. That was one of them; there were</p> <p>18 other issues as well, but mostly just personnel-wise,</p> <p>19 and so I decided to look for another opportunity.</p> <p>20 Q. Okay. Where else did -- where did you go</p> <p>21 after Washakie?</p> <p>22 A. After that I just opened up my own law</p> <p>23 firm.</p> <p>24 Q. Okay.</p> <p>25 A. It's called the overly creative name,</p>	<p style="text-align: right;">44</p> <p>1 didn't have anybody that I was -- that I could count</p> <p>2 as a client on the day that I left Washakie.</p> <p>3 Q. In your two years and a little bit more on</p> <p>4 your own, what types of tax cases have you handled?</p> <p>5 A. I've done a lot more personal tax cases.</p> <p>6 Q. When you say "personal," you mean</p> <p>7 individual?</p> <p>8 A. Individual, sorry. Yes. Individual tax</p> <p>9 cases. I have several offer in compromise cases I'm</p> <p>10 dealing with. Others that are in audit or</p> <p>11 starting -- starting the audit process that I'm</p> <p>12 trying to help individuals out with.</p> <p>13 Q. How do you find clients?</p> <p>14 A. Word of mouth is -- is the main way. I</p> <p>15 try and -- a lot of it comes from other attorneys I</p> <p>16 know that are in the tax world here in Utah. And if</p> <p>17 they have clients that they can't help or they're too</p> <p>18 busy for or they have a conflict or something like</p> <p>19 that, we'll talk and I'll -- I'll get clients that</p> <p>20 way.</p> <p>21 And then I do -- I mean, I just try and</p> <p>22 network and communicate with people I know.</p> <p>23 Q. Do any of the OICs or audits you've done</p> <p>24 in your individual practice involve renewable energy?</p> <p>25 A. No.</p>
<p style="text-align: right;">43</p> <p>1 K. Hawes Associates.</p> <p>2 Q. Okay. And that -- it sounds like you've</p> <p>3 been operating that for just over two years?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. Do you have an office?</p> <p>6 A. I do.</p> <p>7 Q. Where?</p> <p>8 A. I have -- the address is 1366 Murray</p> <p>9 Holladay Road here in Salt Lake City.</p> <p>10 Q. Okay. What's your practice area?</p> <p>11 A. I do -- I still do a lot of tax work. I'm</p> <p>12 kind of back in the mode of -- a lot of times I'll do</p> <p>13 whatever walks in the door as I try and build my</p> <p>14 practice. But I advertise myself as tax counsel, to</p> <p>15 help people with tax issues.</p> <p>16 Q. Okay. When you started your own</p> <p>17 business -- or your own practice, did you have any</p> <p>18 clients?</p> <p>19 A. Working in-house for two years, all my</p> <p>20 clients I had passed off to somebody else. So, no, I</p> <p>21 basically started from scratch.</p> <p>22 Q. Okay.</p> <p>23 A. I had a couple of contacts of past clients</p> <p>24 that I went out and told them what I was doing, and</p> <p>25 some of those turned in again to clients, but I</p>	<p style="text-align: right;">45</p> <p>1 Q. Okay. Specifically renewable energy</p> <p>2 credits?</p> <p>3 A. No.</p> <p>4 Q. Okay. So you said your current practice</p> <p>5 consists of individuals, and you do mostly OICs and</p> <p>6 audits, correct?</p> <p>7 A. Yes. It consists primarily of</p> <p>8 individuals.</p> <p>9 Q. Okay.</p> <p>10 A. I -- I do a little -- a little tax prep</p> <p>11 helping individuals prepare taxes. Generally not too</p> <p>12 complicated of tax returns. I -- I try not to do</p> <p>13 that, if I can help it.</p> <p>14 Q. Okay. So no litigation in tax court or</p> <p>15 any other?</p> <p>16 A. I've had -- I've had one -- or a couple of</p> <p>17 cases that are in tax court. They are pending and</p> <p>18 I've -- again, it's -- it's kind of been a referral,</p> <p>19 and I've arrived at the case where it's at a -- kind</p> <p>20 of at a standstill or -- or a stay. So I have -- I</p> <p>21 personally haven't gotten involved yet in those</p> <p>22 cases, but I have a couple that are in tax court</p> <p>23 right now.</p> <p>24 Q. Okay. So there's petitions you've filed</p> <p>25 recently?</p>

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<p style="text-align: right;">46</p> <p>1 A. Well, they -- again, they were filed 2 before I got involved. 3 Q. Okay. Those are referrals from other 4 attorneys you know? 5 A. From other attorneys I know, yeah. 6 Q. You mentioned you do tax return 7 preparation? 8 A. A little bit, yeah. 9 Q. Okay. You said you -- correct me if I'm 10 paraphrasing you wrong, but you -- you avoid it if 11 you can help it? 12 A. Well, it's not -- I -- I'm not an 13 accountant so I -- I think I'm -- I know enough to 14 help, primarily, individuals or small businesses with 15 basic tax returns, but I'm -- that's a lot of the 16 numbers issue and culling through spreadsheets and 17 documents and things like that that I -- if I can, 18 I'll help people find an accountant to help them do 19 their taxes, if they've got more than -- you know, a 20 more complicated tax return. 21 Q. Okay. So you don't consider yourself 22 qualified to prepare anything beyond a basic tax 23 return? 24 A. Well, I don't know if I'd say not 25 qualified as -- as not interested. I think I could</p>	<p style="text-align: right;">48</p> <p>1 A. Yeah, I think so. 2 Q. Okay. 3 A. I haven't had to do one of those yet, but 4 I would be okay to do that. 5 Q. Okay. What wouldn't you be okay to do? 6 A. Goll. Like I said, I -- I think I could 7 do anything. It would just be the time and effort 8 involved in -- in getting everything ready. 9 Q. Okay. 10 A. And -- I mean, there is a couple of 11 reasons. Number one, I'm on my own, so anything that 12 gets done, I have to do it personally. And -- and 13 I'm really -- my firm is not really set up to -- you 14 know, with assistants and accountants and other 15 things to do those kinds of things. So that's -- 16 that's the main reason I don't -- I don't do those. 17 Q. And you wouldn't -- no one would pay you 18 your lawyer rate to -- 19 A. Right. I don't think so. Maybe I should 20 go try, but I don't think so. 21 Q. Okay. You mentioned there is no one else 22 at your firm, so no other lawyers? 23 A. No other lawyers. 24 Q. Okay. Secretary or receptionist, anything 25 like that?</p>
<p style="text-align: right;">47</p> <p>1 go through and do one, I just would rather not. 2 Q. Okay. Is that because you're not an 3 accountant? 4 A. That's part of it. You know, and I think 5 it would -- base -- probably nobody would pay me my 6 legal rate to go through and do some -- some of the 7 accounting work that's required to get -- to get a 8 more complicated tax return done. 9 Q. About how many people do you prepare a tax 10 return for a year? 11 A. You know, I -- I just started doing these 12 last year. I probably did 30 -- 30 to 40. 13 Q. For individuals? 14 A. For individuals. Some of the individuals 15 had Schedule C income. 16 Q. Okay. 17 A. But mostly -- it was mostly W-2 income. 18 Q. Okay. So when we talk about what a basic 19 income return is, is that what you are talking about, 20 you've got W-2 income, maybe a relatively small 21 Schedule C? 22 A. That's it, yeah. 23 Q. So would you -- would you be comfortable 24 preparing a return that's got rental property and 25 might need a Schedule E?</p>	<p style="text-align: right;">49</p> <p>1 A. I mean, there is a receptionist that's in 2 my building that kind of is a receptionist for 3 everybody that's there. She's not my own 4 receptionist. But other than that, it's just me. 5 Q. So would she answer the phone? 6 A. That's -- yeah. Answers the phone and 7 greets people when they -- when they come for 8 meetings. 9 Q. Okay. But you -- you wouldn't task her 10 with making copies or anything like that? 11 A. Usually not, although she'll help if I 12 need a hand. 13 Q. Okay. The returns that you prepare, do 14 you recall any of them claiming a solar energy 15 credit? 16 A. No. 17 Q. Okay. Have you ever prepared a tax return 18 for someone associated with RaPower3 or International 19 Automated Systems? 20 A. No. 21 Q. Are you familiar with the code section -- 22 the Internal Revenue Code Section 6700? 23 A. Yes. 24 Q. How are you familiar with it? 25 A. Most of my familiarity has come in --</p>

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<p style="text-align: right;">50</p> <p>1 related to this case, but it has to do with tax</p> <p>2 shelters -- abusive tax shelters.</p> <p>3 Q. So before you became involved in this case</p> <p>4 had you had any encounter with Section 6700?</p> <p>5 A. No.</p> <p>6 Q. So when you say most of your familiarity</p> <p>7 with Section 6700 comes from this case, do you mean</p> <p>8 all of your familiarity?</p> <p>9 A. Well, I mean, I -- I know about abusive</p> <p>10 tax shelters; we looked at it in law school. I knew</p> <p>11 what they were. I haven't had a specific case -- not</p> <p>12 that I can recall -- where I've dealt with it. But I</p> <p>13 had heard of abusive tax shelters before, mostly from</p> <p>14 the educational side of things.</p> <p>15 Q. And I think, based on your previous</p> <p>16 testimony, that would be your Tax 1 and Tax 2 classes</p> <p>17 in law school?</p> <p>18 A. Yes.</p> <p>19 Q. What do you recall learning about abusive</p> <p>20 tax shelters in law school?</p> <p>21 A. Oh, nothing more than the general that,</p> <p>22 you know, it's a way that -- that the government</p> <p>23 tries to reign in or -- or -- what's the right word?</p> <p>24 Prevent individuals, companies, in whatever fashion,</p> <p>25 from -- from keeping money out of the tax system --</p>	<p style="text-align: right;">52</p> <p>1 Q. When did that start?</p> <p>2 A. So I left -- when I left Holmes Roberts &</p> <p>3 Owen, so that would have been 2010, I think.</p> <p>4 Q. Okay. What position did you have?</p> <p>5 A. The way it works in the tax section here</p> <p>6 is there are four executive positions in the tax</p> <p>7 section and you -- you kind of -- you come in as</p> <p>8 the -- I'm spacing on the name now -- the -- it's not</p> <p>9 activity coordinator but basically the grunt that</p> <p>10 organizes the -- a lot of the CLEs and the various</p> <p>11 things that the section tries to put on. And each</p> <p>12 year you work your way through each of those four</p> <p>13 positions until ultimately you are the president of</p> <p>14 the tax section.</p> <p>15 Q. So you started in 2010?</p> <p>16 A. Right.</p> <p>17 Q. And you organized CLEs?</p> <p>18 A. Principally, and then worked with the</p> <p>19 other members of the executive committee to -- you</p> <p>20 know, that -- that's a lot of what our section does,</p> <p>21 is provide CLEs to tax practitioners.</p> <p>22 Q. What else does the tax section do?</p> <p>23 A. We -- we give out a</p> <p>24 tax-practitioner-of-the-year award and then we</p> <p>25 help -- we -- at the time we gave some money to a</p>
<p style="text-align: right;">51</p> <p>1 from not paying money on -- on income that they</p> <p>2 should be paying money and from -- for helping others</p> <p>3 do the same thing. From sheltering funds from tax.</p> <p>4 Q. Do you know what Section 6700 provides</p> <p>5 for?</p> <p>6 A. What do you mean, "provides for"?</p> <p>7 Q. Well, tell me broadly your understanding</p> <p>8 of what Section 6700 does.</p> <p>9 A. That it -- it prevents principally the --</p> <p>10 the fraudulent marketing of a tax -- as they call it,</p> <p>11 a tax scheme provides for a penalty if it's found</p> <p>12 that there's -- there's -- there is fraudulent</p> <p>13 marketing of such a tax scheme.</p> <p>14 And my understanding of what fraudulent</p> <p>15 might be is advising somebody that they can get some</p> <p>16 tax treatment when the person knows that they -- that</p> <p>17 whoever they are advising, can't.</p> <p>18 Q. Okay. Now, the answer you just gave me,</p> <p>19 would you have been able to give it -- would you have</p> <p>20 known that answer -- the answer you just gave me</p> <p>21 before you became involved in this case?</p> <p>22 A. Probably not.</p> <p>23 Q. Okay. According to your CV, you have had</p> <p>24 some positions with the Utah State Tax Bar?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">53</p> <p>1 scholarship to -- for a student -- a law school</p> <p>2 student who was interested in tax.</p> <p>3 Q. Okay. So it sounds like between 2010 and</p> <p>4 2014 you were involved with the tax section of the</p> <p>5 Utah State Tax Bar.</p> <p>6 A. That's right.</p> <p>7 Q. You organized CLEs, you gave an award to a</p> <p>8 member and organized a scholarship?</p> <p>9 A. Uh-huh (affirmative).</p> <p>10 Q. Okay. Do you think that what you did with</p> <p>11 the tax section at the state bar gave you any of the</p> <p>12 expertise that you bring to this case?</p> <p>13 A. Well, I certainly got to associate with</p> <p>14 other tax lawyers and talk about tax issues. I don't</p> <p>15 recall specifically if I talked about solar energy</p> <p>16 credits or renewable energy credits in any of these.</p> <p>17 I don't recall a CLE where we dealt with any of those</p> <p>18 issues.</p> <p>19 But I guess the other aspect of it is I</p> <p>20 would go to -- I would represent the tax section of</p> <p>21 the bar at various other national or regional tax</p> <p>22 sections or conferences, things like that, and I</p> <p>23 would learn at those conferences, be involved in</p> <p>24 education in those conferences as well.</p> <p>25 Q. Were any of those conferences that you</p>

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<p style="text-align: right;">54</p> <p>1 were involved -- did they involve solar energy tax</p> <p>2 credits?</p> <p>3 A. As far as I remember, no.</p> <p>4 Q. How about Section 469?</p> <p>5 A. As far as I remember, no.</p> <p>6 Q. Okay. One other thing about your</p> <p>7 education. Now, you don't have a tax LLM?</p> <p>8 A. No.</p> <p>9 Q. Have you ever been accused of violating a</p> <p>10 professional or ethic obligation?</p> <p>11 A. No.</p> <p>12 Q. Have you ever been disciplined by the Utah</p> <p>13 State Bar?</p> <p>14 A. No.</p> <p>15 Q. Have you ever testified as an expert</p> <p>16 witness before?</p> <p>17 A. No.</p> <p>18 Q. Okay. Do you recall the general</p> <p>19 principles or what was at issue in the tax cases you</p> <p>20 worked with Judge Benson?</p> <p>21 A. I don't.</p> <p>22 Q. Okay.</p> <p>23 A. That was so long ago, I don't.</p> <p>24 Q. Do you believe that anything you worked on</p> <p>25 with Judge Benson gives you unique expertise in this</p>	<p style="text-align: right;">56</p> <p>1 business?</p> <p>2 A. Not a controversy. Dealing with helping</p> <p>3 people decide how to -- particularly in this last</p> <p>4 year, how to file their taxes. We've had some</p> <p>5 questions about is this a trade or business or not</p> <p>6 but it -- it's nothing in the controversy realm.</p> <p>7 Q. You don't have to give me names, but what</p> <p>8 were the factual issues that you advised on in</p> <p>9 this -- when you prepared this tax return?</p> <p>10 A. Again, all the ones that I've done are --</p> <p>11 are individuals. So it had to do principally with --</p> <p>12 with whether -- like a -- whether a home business --</p> <p>13 a home-type business qualified. They were calling it</p> <p>14 a business. We went through some discussion on, you</p> <p>15 know, were you doing it for profit, are you doing it</p> <p>16 just for a hobby, that kind of thing.</p> <p>17 Q. So can you tell me what statutes or</p> <p>18 regulations you analyzed to reach your conclusion?</p> <p>19 A. Well, there's -- and I'm -- now I'm</p> <p>20 blanking on the material participation -- I think</p> <p>21 it's 183 -- about whether or not there -- I'm sorry.</p> <p>22 It's -- I've got so many statutes running through my</p> <p>23 head. Is it 467? One of those two. But we looked</p> <p>24 at the -- the material participation requirements. I</p> <p>25 think it is 467. And the regs around those a little</p>
<p style="text-align: right;">55</p> <p>1 case?</p> <p>2 A. I'm -- I'm fairly confident that it was</p> <p>3 not a solar energy case -- solar energy credit case.</p> <p>4 Q. Okay.</p> <p>5 A. I -- I don't know if anything specific</p> <p>6 about those cases would have -- would give me any</p> <p>7 special qualifications.</p> <p>8 Q. Okay. So you don't recall what was at</p> <p>9 issue in those cases you worked on with Judge Benson?</p> <p>10 A. I don't.</p> <p>11 Q. Okay. Throughout your entire practice</p> <p>12 have you ever worked a case that involved Section</p> <p>13 6700, except for this one?</p> <p>14 A. Not that I recall.</p> <p>15 Q. In your entire practice, except for this</p> <p>16 case, have you ever dealt with anyone accused of</p> <p>17 promoting a tax shelter?</p> <p>18 A. No.</p> <p>19 Q. Okay. In your entire practice have you</p> <p>20 ever dealt with a case where the issue was whether or</p> <p>21 not they were in a trade or business?</p> <p>22 A. What -- say that one more time.</p> <p>23 Q. Throughout your entire practice have you</p> <p>24 ever encountered a controversy where the issue was</p> <p>25 whether or not the individual had a trade or</p>	<p style="text-align: right;">57</p> <p>1 bit. Again, we're -- like I said, I don't do very --</p> <p>2 in -- I don't do the real heavy-duty tax returns</p> <p>3 where there would be a -- a huge need to go delve too</p> <p>4 deep into them. I'm also --</p> <p>5 Q. Into what?</p> <p>6 A. Into the statutes and regs. I mostly just</p> <p>7 relied on my familiarity with them and the general --</p> <p>8 general principles with them.</p> <p>9 Q. Okay. What type of business was -- you</p> <p>10 said there was a home business?</p> <p>11 A. (Witness nods head.)</p> <p>12 Q. What was the business?</p> <p>13 A. The one that I'm remembering, they were</p> <p>14 selling -- oils and herbs I think was the -- it</p> <p>15 was -- I think that was the basic gist of it.</p> <p>16 Q. Okay. Did they have a profit?</p> <p>17 A. They did. Well, I take that back. No,</p> <p>18 this was their first year, so they had income but no</p> <p>19 profit.</p> <p>20 Q. Okay. So their expenses exceeded their</p> <p>21 income?</p> <p>22 A. Yeah, although it was -- it was kind of a</p> <p>23 zeroed-out-type thing.</p> <p>24 Q. Was this a multilevel marketing</p> <p>25 arrangement?</p>

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<p style="text-align: right;">58</p> <p>1 A. I didn't -- I don't think so. We -- we 2 got into it just a little bit, enough that I need -- 3 you know, she told me what she bought and how she 4 went about selling it. I don't know if she was 5 trying to get other people to be sellers as well. At 6 least that's how I view the multilevel marketing 7 arrangement. I think from -- from all we talked 8 about, she was just looking at doing -- how she 9 should handle the -- the purchase and sale of these 10 oils and -- and herbs and other things that she did. 11 Q. Let me ask you this. What does the term 12 "multilevel marketing arrangement" mean to you? 13 A. It -- there generally has to be some sort 14 of product. At least my experience -- my very 15 limited experience -- is there is some sort of 16 product, and you -- a person involved would not only 17 buy or sell the product, and maybe moreso they would 18 try and get others to sell the product as well, and 19 then they would make some money or income off of any 20 sales that -- that the people that they recruited 21 made and so on down the line. They would ask them to 22 recruit more people and those people to recruit more 23 people. And you build I'm -- I think what's called a 24 downline. And then the person at the top of the 25 downline makes a little bit on each sale that is</p>	<p style="text-align: right;">60</p> <p>1 in? 2 A. You know, just if she was keeping her 3 accounting separate -- from the business separate 4 from her personal accounts in her home. 5 Q. What do you mean when you say "separate"? 6 A. Well, if she -- if she tracked her 7 business expenses and -- and income separately from 8 her personal or household expenses and income. 9 Q. What do you mean "tracked"? Do you mean 10 that she had a separate bank account, or do you mean 11 that she -- 12 A. A separate bank account is one thing. Did 13 she keep separate records for -- for -- separate 14 records for what she does related to her business as 15 opposed to what she does related to her home -- or 16 her personal life. 17 Q. And how did this individual track her 18 expenses? 19 A. She did have -- she had a separate bank 20 account and -- she was new into it, so most of her 21 records were handwritten. But she kept track of her 22 inventory and -- and the income coming in, the 23 expenses that she was -- that she incurred in her 24 buying and selling. 25 Q. Did you ask her about how she kept these</p>
<p style="text-align: right;">59</p> <p>1 going on in his downline. 2 Q. And the client that we just talked about, 3 do you know if she was in someone else's downline? 4 A. Have no idea. 5 Q. Did you ask her? 6 A. I did not ask her. 7 Q. Okay. Why not? 8 A. I didn't get the impression that she 9 was -- that she was getting other people -- trying to 10 get other people to buy and sell this product. All 11 we talked about was her buying and selling the 12 products. 13 Q. Okay. When you were deciding whether or 14 not she was in a trade or business, what kinds of 15 questions did you ask? 16 A. You know, I asked her if she -- where she 17 did the business from. 18 Q. Where did she do the business from? 19 A. She did it out of her home. 20 I asked her how long had she had been 21 doing the business. Does she have records associated 22 with this business. Is she -- is she using her 23 vehicle for this business. How was she treating the 24 income from the business and things like that. 25 Q. What types of records were you interested</p>	<p style="text-align: right;">61</p> <p>1 records or when she kept these records? 2 A. You mean concurrent with making the 3 expense or -- 4 Q. Yes. 5 A. I assumed that -- well, I just took the 6 records that she gave me. I didn't -- I think she 7 was new enough in the business that everything she 8 did was -- she would just write down. That's how the 9 records looked when they got to me. 10 Q. Okay. 11 A. I didn't ask her if -- did you -- did you 12 write down this expense on the day you made the 13 expense or the week after. Or did you reconcile your 14 bank account or your credit card or whatever. I 15 didn't ask for those things. 16 Q. All right. And you also -- you said you 17 asked her about how she treated the income. What do 18 you mean by that? 19 A. Did she -- did she use that income to -- 20 to buy more inventory. Did she draw that income out 21 specifically for kind of a -- I guess to take out 22 profit from the business and was that a separate type 23 of transaction. That kind of thing. 24 Or did she -- I mean, the ultimate 25 question that I tried to get at was did she -- did</p>

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<p style="text-align: right;">62</p> <p>1 she use income from the business to make person -- or</p> <p>2 to cover personal expenses, and vice versa.</p> <p>3 Q. Why did you ask those questions?</p> <p>4 A. Well, I just -- if she's going to be in a</p> <p>5 trade or business, I think she needs to treat it as a</p> <p>6 trade or business and operate them separately from</p> <p>7 her personal life -- her personal finances. Excuse</p> <p>8 me.</p> <p>9 Q. Okay. And what did you conclude with</p> <p>10 respect to this trade or business?</p> <p>11 A. That she was -- she was engaged in a trade</p> <p>12 or business.</p> <p>13 Q. Okay. So she claimed a loss under</p> <p>14 Schedule C?</p> <p>15 A. It was -- my memory was it was about</p> <p>16 zeroed out. I don't think there was -- there may</p> <p>17 have been a tiny profit --</p> <p>18 Q. Okay.</p> <p>19 A. -- but not very much.</p> <p>20 Q. So it sounds like there's been one</p> <p>21 instance in your entire career where you had to</p> <p>22 decide if someone was in a trade or business; is that</p> <p>23 right? Let me rephrase that. One instance where you</p> <p>24 had to give legal advice on whether or not someone</p> <p>25 was in a trade or business.</p>	<p style="text-align: right;">64</p> <p>1 change, what percentage of your work is tax versus</p> <p>2 non-tax?</p> <p>3 A. I'm probably about 60, 65 percent tax, and</p> <p>4 the rest of it other stuff.</p> <p>5 Q. What is "other stuff"?</p> <p>6 A. I -- I do some contract work. I have some</p> <p>7 small businesses that I help draft contracts for. I</p> <p>8 do a little litigation. I don't think I've had an</p> <p>9 employment issue, but I -- I mean, I know right now I</p> <p>10 have a property issue that I'm in litigation with.</p> <p>11 Q. So you've got -- within your litigation</p> <p>12 practice there is a real property matter?</p> <p>13 A. Real property dispute.</p> <p>14 Q. Okay.</p> <p>15 A. Uh-huh (affirmative).</p> <p>16 Q. All right. So you said, I think,</p> <p>17 65 percent of your time is tax?</p> <p>18 A. Uh-huh (affirmative).</p> <p>19 MS. HEALY GALLAGHER: Yes.</p> <p>20 THE WITNESS: Yes. I apologize. Yes.</p> <p>21 Sorry.</p> <p>22 Q. (BY MR. MORAN) Of that 65 percent, how</p> <p>23 much of that is spent preparing tax returns?</p> <p>24 A. I just started preparing tax returns kind</p> <p>25 of semi consistently late last year, so I would -- I</p>
<p style="text-align: right;">63</p> <p>1 A. That's my memory at this point.</p> <p>2 Q. Okay.</p> <p>3 A. One that I can recall specifically.</p> <p>4 Q. Okay. Have you ever practiced in federal</p> <p>5 district court?</p> <p>6 A. I've never had a case in federal district</p> <p>7 court. Let me -- let me put that back. I'm admitted</p> <p>8 to the federal district court.</p> <p>9 Q. In Utah?</p> <p>10 A. In Utah.</p> <p>11 Q. Okay. Any others?</p> <p>12 A. No.</p> <p>13 Q. Okay.</p> <p>14 A. I've had experience in federal district</p> <p>15 court with my clerkship, but I haven't had a client</p> <p>16 that is in -- that has been in federal district</p> <p>17 court.</p> <p>18 Q. Okay. So it's fair to say you've never</p> <p>19 entered an appearance on behalf of a client in</p> <p>20 federal district court?</p> <p>21 A. That's true.</p> <p>22 Q. Okay.</p> <p>23 A. At least to the best of my recollection.</p> <p>24 Q. Within your own firm that you've been</p> <p>25 operating for about the last two years and some</p>	<p style="text-align: right;">65</p> <p>1 would say only a quarter of it, maybe, is tax</p> <p>2 returns. That might -- it might get bigger as we --</p> <p>3 I move forward, but -- so far it's only been about</p> <p>4 that.</p> <p>5 Q. Okay. Looping back to Section 6700,</p> <p>6 what's your understanding of the mens rea</p> <p>7 requirement?</p> <p>8 A. I think it's similar to just general</p> <p>9 fraud, that you have to know something is false</p> <p>10 and -- and then essentially claim that it isn't to</p> <p>11 somebody else, or market it -- in the tax shelter</p> <p>12 world, market that it isn't accurate. So you have to</p> <p>13 claim a tax benefit, or something along those lines,</p> <p>14 that you know is not -- is not true.</p> <p>15 Q. What if someone doesn't know that it is or</p> <p>16 is not true? What if they have no knowledge and they</p> <p>17 just make a statement about taxes?</p> <p>18 A. I think that would be tricky. I think</p> <p>19 there is a fraudulent requirement under 6700. And</p> <p>20 in -- in my understanding, fraud requires some --</p> <p>21 some knowledge of whether it's true or not. Again, I</p> <p>22 haven't had a case like this before, so I haven't</p> <p>23 delved deep into the details of 6700, but that's my</p> <p>24 understanding.</p> <p>25 Q. Do you consider yourself an expert in</p>

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18 (Pages 66 to 69)

<p style="text-align: right;">66</p> <p>1 Section 6700?</p> <p>2 A. I think I know enough about the tax code</p> <p>3 that I could -- I could do just fine in a case or a</p> <p>4 controversy that involved 6700.</p> <p>5 Q. My question, though, is, do you consider</p> <p>6 yourself an expert in Section 6700?</p> <p>7 A. I think I'm -- I think I'm as good an</p> <p>8 expert as any tax attorney would be.</p> <p>9 Q. I'm going to ask it again. Do you</p> <p>10 consider yourself an expert in Section 6700? Yes or</p> <p>11 no.</p> <p>12 A. Yes. Yes.</p> <p>13 Q. Okay. We've been going for about an hour</p> <p>14 and a half. I want to keep my promise to you that we</p> <p>15 would take a stretch break every hour and a half.</p> <p>16 Sounds good?</p> <p>17 A. Sounds good.</p> <p>18 Q. Five or ten?</p> <p>19 A. Ten is good.</p> <p>20 (A break was taken from 10:27 a.m. to</p> <p>21 10:34 a.m.)</p> <p>22 MR. MORAN: Go back on.</p> <p>23 Q. Mr. Hawes, in your entire legal career</p> <p>24 have you ever had a case dealing with the economic</p> <p>25 substance doctrine?</p>	<p style="text-align: right;">68</p> <p>1 Q. But you've never had occasion to deal with</p> <p>2 it in your professional career? When I say "it," I</p> <p>3 mean the economic substance doctrine.</p> <p>4 A. Not that I recall.</p> <p>5 Q. Okay. Do you believe yourself to be an</p> <p>6 expert in the economic substance doctrine?</p> <p>7 A. With the same caveats as the other issue,</p> <p>8 yes.</p> <p>9 Q. So your answer to the question is "yes"?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. Just a little more in background.</p> <p>12 Do you have any family?</p> <p>13 A. Yes.</p> <p>14 Q. Are you married?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. Any children?</p> <p>17 A. Yes.</p> <p>18 Q. How many?</p> <p>19 A. Three children.</p> <p>20 Q. Okay. When were you married?</p> <p>21 A. Say that again.</p> <p>22 Q. When were you married?</p> <p>23 A. Married in 1998.</p> <p>24 Q. Okay. That sounds like shortly after you</p> <p>25 graduated from college?</p>
<p style="text-align: right;">67</p> <p>1 A. No, not that I can recall.</p> <p>2 Q. Okay. Are you familiar with the economic</p> <p>3 substance doctrine?</p> <p>4 A. Yes.</p> <p>5 Q. How?</p> <p>6 A. Again, generally learning through law</p> <p>7 school principally is where I remember that.</p> <p>8 Q. Is that in your Tax 1 and 2 classes?</p> <p>9 A. Uh-huh (affirmative).</p> <p>10 MS. HEALY GALLAGHER: Yes.</p> <p>11 THE WITNESS: Yes. I apologize. I will</p> <p>12 do better. Steve already told me to do better at</p> <p>13 doing that.</p> <p>14 Q. (BY MR. MORAN) What do you recall</p> <p>15 learning about the economic substance doctrine in</p> <p>16 your Tax 1 and 2 classes?</p> <p>17 A. Essentially that transactions need to be</p> <p>18 made for -- have an economic purpose behind them as</p> <p>19 opposed to a solely tax-related purpose in order for</p> <p>20 them to be, I guess, considered or -- or dealt with</p> <p>21 properly in -- in the tax world.</p> <p>22 Q. Okay.</p> <p>23 A. Does that make sense?</p> <p>24 Q. I just want to know your understanding.</p> <p>25 A. Okay.</p>	<p style="text-align: right;">69</p> <p>1 A. Yes.</p> <p>2 Q. And you have three children?</p> <p>3 A. Three children.</p> <p>4 Q. Okay. And do you live in Salt Lake?</p> <p>5 A. Very -- it's south of Salt Lake. It's</p> <p>6 called Sandy, but just a suburb of Salt Lake, to the</p> <p>7 south.</p> <p>8 Q. Okay. Are your parents are still alive?</p> <p>9 A. My parents are, yes.</p> <p>10 Q. Do they live in the area too?</p> <p>11 A. They live here also, yes.</p> <p>12 Q. Okay. You've alluded to your fee. What</p> <p>13 is your hourly rate?</p> <p>14 A. \$300 an hour.</p> <p>15 Q. Okay. Do you always charge that in any</p> <p>16 engagement?</p> <p>17 A. No. I vary my rate depending on the</p> <p>18 issues and the client. Generally, for tax-related</p> <p>19 issues I charge \$300 an hour.</p> <p>20 Q. Okay. What about tax preparation?</p> <p>21 A. I usually do tax preparation on a flat fee</p> <p>22 basis.</p> <p>23 Q. What's your usual fee to prepare a tax</p> <p>24 return?</p> <p>25 A. Again, I'm -- I'm -- have been new at</p>

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19 (Pages 70 to 73)

<p style="text-align: right;">70</p> <p>1 this, but this last year I set it at \$170. \$170 for</p> <p>2 a basic tax return.</p> <p>3 Q. What's a basic tax return?</p> <p>4 A. Again, dealing with simple Schedule C</p> <p>5 income, W-2 income, principally.</p> <p>6 Q. Okay. And about how long would it -- does</p> <p>7 it typically -- how long does it typically take you</p> <p>8 to prepare a basic tax return?</p> <p>9 A. If you include the time meeting with the</p> <p>10 client and gathering all the information, it probably</p> <p>11 takes me a couple hours. A lot of that, at least as</p> <p>12 I've gotten into it, has been getting familiar with</p> <p>13 some new software to do that. So that has added to</p> <p>14 my time. But I'd say generally about an hour and a</p> <p>15 half to two hours.</p> <p>16 Q. Okay. What software do you use?</p> <p>17 A. Oh, that's -- now I've got to remember.</p> <p>18 It's -- it's Intuit, but I don't recall the specific</p> <p>19 product.</p> <p>20 Q. Okay. It's not Turbo Tax?</p> <p>21 A. It's not Turbo Tax.</p> <p>22 Q. You said you charge \$300 per hour for tax</p> <p>23 issues. What's your rate for other issues?</p> <p>24 A. I fluctuate between 250 to \$300 an hour.</p> <p>25 Q. Okay. You said it varies by client. Do</p>	<p style="text-align: right;">72</p> <p>1 Q. Okay. So the fee that you are planning to</p> <p>2 collect in this case, will that be based only on the</p> <p>3 number of hours you spend?</p> <p>4 A. That's how I have -- that's my</p> <p>5 anticipation, and that's how I have -- that's how I</p> <p>6 will -- I should say that's how I will bill it.</p> <p>7 Q. Okay. Is your compensation in any way</p> <p>8 dependent on whether or not you are recognized as an</p> <p>9 expert?</p> <p>10 A. No.</p> <p>11 Q. Okay. Is your compensation in any way</p> <p>12 based on the outcome of the case?</p> <p>13 A. No.</p> <p>14 Q. If you are called to testify in this case,</p> <p>15 what will your rate for testimony be?</p> <p>16 A. I anticipate it will be the same rate,</p> <p>17 \$300 per hour.</p> <p>18 Q. Do you have an engagement letter with</p> <p>19 either the defendants or Mr. Paul's law firm?</p> <p>20 A. Yes.</p> <p>21 Q. Is there a cap on the amount of fees that</p> <p>22 you can bill?</p> <p>23 A. No, not in the engagement letter.</p> <p>24 Q. Okay. Is there a cap somewhere else?</p> <p>25 A. No. Sorry.</p>
<p style="text-align: right;">71</p> <p>1 you give certain clients a discount?</p> <p>2 A. Yes.</p> <p>3 Q. What's that discount based on?</p> <p>4 A. Familiarity with the client. Whether I</p> <p>5 feel like they'll be a long-term client, or if they</p> <p>6 have been a long-term client.</p> <p>7 Q. So someone who is a long-term client, they</p> <p>8 get a lower rate?</p> <p>9 A. Yeah, if they -- yes. If they have -- if</p> <p>10 I anticipate that I'm going to be doing a lot of work</p> <p>11 for them.</p> <p>12 Q. So they get a volume discount?</p> <p>13 A. Yeah. Or if it's, you know, a -- somebody</p> <p>14 I know, somebody I'm trying to -- I don't know if you</p> <p>15 would call it help, but -- but I'm -- if I had a</p> <p>16 family member that needed tax -- or needed legal</p> <p>17 work, I would charge them a lower rate.</p> <p>18 Q. Okay. What rate are you charging in this</p> <p>19 matter?</p> <p>20 A. \$300 an hour.</p> <p>21 Q. Okay. What is your fee based on?</p> <p>22 A. I try and set my fee based on my own</p> <p>23 experience as well as what I understand others in the</p> <p>24 Utah market -- other tax attorneys in the Utah market</p> <p>25 are charging.</p>	<p style="text-align: right;">73</p> <p>1 Q. How many hours do you estimate you'll</p> <p>2 spend on this matter?</p> <p>3 A. I'm trying to remember what has happened</p> <p>4 so far. Probably somewhere between 75 and a hundred,</p> <p>5 I would think.</p> <p>6 Q. You already spent 75?</p> <p>7 A. No, I haven't -- I anticipate that is</p> <p>8 where it will end up.</p> <p>9 Q. Okay. How many hours have you spent thus</p> <p>10 far?</p> <p>11 A. That's a good question. Fifty to 60, I</p> <p>12 think.</p> <p>13 Q. I think you testified you expect the total</p> <p>14 amount will be 70 to 80?</p> <p>15 A. Seventy-five to a hundred.</p> <p>16 Q. Seventy-five to a hundred?</p> <p>17 A. Yeah. Some of that depends on whether I'm</p> <p>18 asked to testify in court and various things like</p> <p>19 that.</p> <p>20 Q. Okay. Have you been paid any amount thus</p> <p>21 far?</p> <p>22 A. No.</p> <p>23 Q. Have you sent a bill for what you've spent</p> <p>24 thus far?</p> <p>25 A. No.</p>

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20 (Pages 74 to 77)

<p style="text-align: right;">74</p> <p>1 Q. When do you plan to send that bill?</p> <p>2 A. Probably in the next -- within the next</p> <p>3 two weeks.</p> <p>4 Q. Okay. All right. What expertise do you</p> <p>5 have that makes you believe you're qualified to</p> <p>6 testify as an expert witness in this case?</p> <p>7 A. I've been working in the tax arena for 12</p> <p>8 years, I think. Twelve or 13 years. I've -- in most</p> <p>9 of my practice -- or most of my career I've been</p> <p>10 dealing with tax cases on all sorts of levels. And</p> <p>11 so I think my experience in doing that is what's</p> <p>12 qualified me as an expert.</p> <p>13 Q. Is there anything that makes you unique?</p> <p>14 A. Unique from?</p> <p>15 Q. From anyone else. I mean, if I went out</p> <p>16 on the street and I found someone else who has been</p> <p>17 doing primarily tax cases for 12 years, is there any</p> <p>18 reason that you would be more qualified than them?</p> <p>19 A. Goll, that's a good question. I can't</p> <p>20 think of anything. I think there are a lot of tax</p> <p>21 attorneys who have similar experience that I -- that</p> <p>22 I have.</p> <p>23 And at least for the engagement that is</p> <p>24 here, in a -- kind of a narrow issue in the tax code,</p> <p>25 I think there's lots of tax attorneys that could be</p>	<p style="text-align: right;">76</p> <p>1 Q. Okay. Do you know what Mr. Jones's</p> <p>2 involvement in this case is?</p> <p>3 A. My understanding is he represents the</p> <p>4 taxpayers that have purchased the solar lenses from</p> <p>5 R-a Power3 or RaPower3. There are several of those</p> <p>6 taxpayers who are under audit, and he is representing</p> <p>7 those taxpayers.</p> <p>8 Q. Okay. What did Mr. Jones tell you that</p> <p>9 would be involved?</p> <p>10 A. That I would need to do a lot of research</p> <p>11 and prepare an expert report. And then likely have a</p> <p>12 deposition taken. And possibly be called to testify</p> <p>13 at trial.</p> <p>14 Q. Okay. What happened after -- what</p> <p>15 happened next?</p> <p>16 A. After Mr. Jones called me?</p> <p>17 Q. Yes.</p> <p>18 A. We arranged to meet, talk about the case.</p> <p>19 We had a lunch where we chatted about the case and a</p> <p>20 lot of the issues in the case.</p> <p>21 And then we arranged to meet with Mr. Paul</p> <p>22 and his law firm and get more details from that.</p> <p>23 Q. Okay. Did Mr. Jones tell you who had</p> <p>24 asked him to reach out to you?</p> <p>25 A. No. I didn't get the impression that</p>
<p style="text-align: right;">75</p> <p>1 qualified to be an expert on -- on that section of</p> <p>2 the tax code. Or those issues related to the tax</p> <p>3 code.</p> <p>4 Q. When is the first time you heard of this</p> <p>5 case?</p> <p>6 A. Probably the middle of August this year.</p> <p>7 Q. So August 2017?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And how did you learn of it?</p> <p>10 A. A friend of mine is a tax attorney, who</p> <p>11 has some association with the case in another</p> <p>12 capacity, called me and asked me if I would be</p> <p>13 willing to consider being an expert witness in the</p> <p>14 case.</p> <p>15 Q. What's your friend's name?</p> <p>16 A. Paul Jones.</p> <p>17 Q. How do you know Mr. Jones?</p> <p>18 A. We have been -- I've known him since we</p> <p>19 were both associates at different law firms. We see</p> <p>20 each other at tax functions. And then we were</p> <p>21 both -- we were both in the -- on the executive</p> <p>22 committee of the tax section of the bar together.</p> <p>23 Q. Okay. So it sounds like you've known</p> <p>24 Mr. Jones for most of your career.</p> <p>25 A. Yes.</p>	<p style="text-align: right;">77</p> <p>1 anyone had, but he didn't -- he didn't mention -- he</p> <p>2 didn't mention anybody.</p> <p>3 Q. Okay.</p> <p>4 A. I'm assuming if somebody did reach out, it</p> <p>5 would have been Mr. Paul.</p> <p>6 Q. Okay. So Mr. Jones told you your role</p> <p>7 would be researching, sitting for a deposition,</p> <p>8 possibly testifying?</p> <p>9 A. And preparing an expert report.</p> <p>10 Q. Okay. What did he tell you the research</p> <p>11 would involve?</p> <p>12 A. Researching whether or not if a -- he kind</p> <p>13 of framed it to me as if a client came and asked you</p> <p>14 about this opportunity or investment arrangement,</p> <p>15 whether I would recommend them to take -- to</p> <p>16 participate.</p> <p>17 Q. So is this a hypothetical client?</p> <p>18 A. Yes. Yes.</p> <p>19 Q. So Mr. Jones -- well, let me rephrase.</p> <p>20 The question that Mr. Jones told you he</p> <p>21 wanted you to research was whether or not you would</p> <p>22 recommend to a hypothetical client what?</p> <p>23 A. Whether or not -- if that hypothetical</p> <p>24 client wanted to purchase solar lenses from RaPower3,</p> <p>25 whether they would be entitled to claim a solar</p>

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21 (Pages 78 to 81)

<p style="text-align: right;">78</p> <p>1 energy credit and -- as well as whether or not they</p> <p>2 would be entitled to claim deduction -- or</p> <p>3 depreciation -- the depreciation deduction for -- for</p> <p>4 their lenses.</p> <p>5 Q. And what did Mr. Jones tell you about this</p> <p>6 hypothetical client? Anything?</p> <p>7 A. No. He -- he mentioned that there are</p> <p>8 some standard documents that -- that people would</p> <p>9 have to sign in order to be involved in this. And so</p> <p>10 he said, You'll have to read the contracts and -- and</p> <p>11 if one of your clients wanted to do it under those</p> <p>12 contracts, what would you recommend.</p> <p>13 Q. Okay.</p> <p>14 (EXHIBIT 651 WAS MARKED.)</p> <p>15 Q. Mr. Hawes, you've been given a copy of</p> <p>16 what's been marked for identification as Plaintiff's</p> <p>17 Exhibit 651.</p> <p>18 Do you recognize it?</p> <p>19 A. Yes.</p> <p>20 Q. What is it?</p> <p>21 A. This is the copy of the expert witness</p> <p>22 report that I prepared in this case.</p> <p>23 Q. And you just testified about some -- I</p> <p>24 think you called them standard documents that a</p> <p>25 RaPower3 customer signs.</p>	<p style="text-align: right;">80</p> <p>1 credit and depreciation associated with RaPower3</p> <p>2 lenses, Exhibits A, B and C to your report,</p> <p>3 Exhibit 651, those are the only documents you looked</p> <p>4 at?</p> <p>5 A. Those are the only RaPower -- well, those</p> <p>6 are the only contracts I looked at.</p> <p>7 Q. Okay.</p> <p>8 A. Related to a potential transaction.</p> <p>9 Q. What else did you look at?</p> <p>10 A. Well, the -- there are several exhibits</p> <p>11 that are attached here that I looked at. There were</p> <p>12 a couple of tax opinion letters and memorandum that</p> <p>13 RaPower3 had received. There are some -- there is a</p> <p>14 tax practice series publication about the energy</p> <p>15 credit. There's a couple -- I don't know if you</p> <p>16 would call them memos or treatises or whatever</p> <p>17 from -- one from Mr. Neldon Johnson that have to do</p> <p>18 with these -- kind of the technology behind the solar</p> <p>19 lenses. And then lots of statutes, rules, cases, IRS</p> <p>20 publications.</p> <p>21 Q. All right. I understand you got Exhibits</p> <p>22 A, B and C from Mr. Jones. Where did you get</p> <p>23 Exhibits D, E, F, G and H?</p> <p>24 A. So -- and I should clarify. In Exhibit A</p> <p>25 there are two versions of the Equipment Purchase</p>
<p style="text-align: right;">79</p> <p>1 A. Yes.</p> <p>2 Q. Are those documents attached to your</p> <p>3 expert report?</p> <p>4 A. Yes, Exhibit A and Exhibit B and</p> <p>5 Exhibit C.</p> <p>6 Exhibit A is a couple of contracts --</p> <p>7 equipment purchase agreements from RaPower3.</p> <p>8 Exhibit B is operation and maintenance</p> <p>9 agreements.</p> <p>10 And Exhibit C is a placed in service</p> <p>11 letter.</p> <p>12 Q. So when you say that Mr. Jones told you</p> <p>13 there was a set of documents that a RaPower3 customer</p> <p>14 signs, that's what you're talking about?</p> <p>15 A. That's what I'm talking about, yes.</p> <p>16 Q. Exhibit A, B and C?</p> <p>17 A. Yes.</p> <p>18 Q. Okay. Did Mr. Jones give you any other</p> <p>19 documents?</p> <p>20 A. No.</p> <p>21 Q. Okay.</p> <p>22 A. No, he did not.</p> <p>23 Q. So getting back to the question you were</p> <p>24 given, whether or not you would recommend to a</p> <p>25 hypothetical client that they could claim a tax</p>	<p style="text-align: right;">81</p> <p>1 Agreement, as well as two versions in Exhibit B of</p> <p>2 the Operation and Maintenance Agreement.</p> <p>3 I got Exhibit -- I got the -- the -- I'll</p> <p>4 call it the 2010 version from Mr. Jones of both the</p> <p>5 Equipment Purchase Agreement and the operation and</p> <p>6 the maintenance agreement.</p> <p>7 There's also a 2015 or '16 version of</p> <p>8 those same agreements that I got off of RaPower3's</p> <p>9 website.</p> <p>10 Q. Okay. How about Exhibits D, E, F -- go</p> <p>11 ahead if you're not done.</p> <p>12 A. And Exhibit C, same thing. The placed in</p> <p>13 service letter I got off their website.</p> <p>14 Exhibits D, E and F, I believe I got those</p> <p>15 from -- from Mr. Paul and his law firm.</p> <p>16 Q. How about G and H?</p> <p>17 A. G and H I got off of the website, the --</p> <p>18 there is a rapower3.com and an iaus.com.</p> <p>19 Q. All right. I just want to be clear on one</p> <p>20 thing. So the only question that you were given is</p> <p>21 whether or not you would recommend to a hypothetical</p> <p>22 client that they claim depreciation and tax credits</p> <p>23 associated with RaPower3's solar lenses?</p> <p>24 A. Associated with this transaction, yes.</p> <p>25 Q. Okay. Were you given any other questions</p>

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22 (Pages 82 to 85)

<p style="text-align: right;">82</p> <p>1 to answer?</p> <p>2 A. That's the general question and that's --</p> <p>3 I believe that's how I've phrased this report.</p> <p>4 That's my memory --</p> <p>5 Q. Okay.</p> <p>6 A. -- that that was the question I had.</p> <p>7 Q. Why did Mr. Jones tell you he wanted you</p> <p>8 to answer this question?</p> <p>9 A. They needed a tax expert to testify in the</p> <p>10 case.</p> <p>11 Q. In what case?</p> <p>12 A. In this case. Sorry.</p> <p>13 Q. Okay.</p> <p>14 A. And he thought of me, and asked me if I</p> <p>15 wanted to do it.</p> <p>16 Q. Okay.</p> <p>17 A. I don't -- if you are asking me why he</p> <p>18 thought of me, I -- I don't know.</p> <p>19 Q. Okay. You're aware that Mr. Jones has not</p> <p>20 entered an appearance in this case, right?</p> <p>21 A. Yes, I'm aware.</p> <p>22 Q. And you also testified that it's your</p> <p>23 understanding Mr. Jones represents taxpayers in</p> <p>24 several associated tax court cases, right?</p> <p>25 A. Right.</p>	<p style="text-align: right;">84</p> <p>1 know if I should say trying to accomplish, but what</p> <p>2 their purpose was and the -- and a little bit about</p> <p>3 the transactions that his clients had entered into.</p> <p>4 And that was about it.</p> <p>5 Q. What did he tell you that the lenses were?</p> <p>6 A. He said they were -- and I'm spacing on</p> <p>7 the type of lens they are. That name will come to</p> <p>8 me. But that they're a specific type of lens that</p> <p>9 focuses solar energy principally to create heat, as</p> <p>10 well as to create electricity.</p> <p>11 Q. What did he tell you was going to be done</p> <p>12 with the heat these lenses were purportedly</p> <p>13 producing?</p> <p>14 A. Ultimately that the goal was to turn them</p> <p>15 into electricity. I think that's their -- that was</p> <p>16 his understanding. That's still my understanding,</p> <p>17 although I have heard that there may be other uses</p> <p>18 for the heat, but the principal goal in that was to</p> <p>19 generate electricity.</p> <p>20 Q. Were you -- did Mr. Jones tell you about</p> <p>21 any -- anything other than electricity that these --</p> <p>22 that the heat was supposed to produce?</p> <p>23 A. No, he did not.</p> <p>24 Q. Okay. Did Mr. Jones say that the lenses</p> <p>25 were currently producing electricity?</p>
<p style="text-align: right;">83</p> <p>1 Q. Okay. Did Mr. Jones discuss whether or</p> <p>2 not you would be an expert witness in the tax court</p> <p>3 as well?</p> <p>4 A. He did not.</p> <p>5 Q. Okay. Did Mr. Jones say why he wouldn't</p> <p>6 be the expert in this case?</p> <p>7 A. He felt that because of his representation</p> <p>8 in the tax court cases there would be some sort of</p> <p>9 conflict that would prevent him from acting as an</p> <p>10 expert in this case. I don't know if there -- if</p> <p>11 that's official or if he just felt uncomfortable</p> <p>12 doing that, but that's -- that's how he explained it</p> <p>13 to me.</p> <p>14 Q. Okay. What else did Mr. Jones tell you</p> <p>15 when he approached you about being an expert witness</p> <p>16 in this case?</p> <p>17 A. He told me a little bit about the</p> <p>18 technology, and then just a little bit about the --</p> <p>19 the procedural posture of -- a little bit about the</p> <p>20 procedural posture of this case but -- and also a</p> <p>21 little bit about the procedural posture of his tax</p> <p>22 court cases.</p> <p>23 Q. What did he tell you about the technology?</p> <p>24 A. He just explained what the -- what the</p> <p>25 lenses were and what their -- what their -- I don't</p>	<p style="text-align: right;">85</p> <p>1 A. He didn't say yes or no. He said they</p> <p>2 were -- and I think some of that was he -- he didn't</p> <p>3 have current information. But I don't remember him</p> <p>4 saying one way or the other.</p> <p>5 Q. Did you ask him?</p> <p>6 A. I don't recall asking him.</p> <p>7 Q. Is that something you weren't concerned</p> <p>8 about in giving an expert opinion?</p> <p>9 A. Well, at that first meeting I figured I'd</p> <p>10 learn that later on.</p> <p>11 Q. Okay.</p> <p>12 A. So I didn't -- I didn't think about it at</p> <p>13 that point.</p> <p>14 Q. Did there come a point where you did think</p> <p>15 about whether or not these lenses were generating</p> <p>16 electricity?</p> <p>17 A. Yes.</p> <p>18 Q. When was that?</p> <p>19 A. I ultimately made a visit to the site</p> <p>20 where these lenses are installed and got a chance to</p> <p>21 look at how they -- how they worked, what their</p> <p>22 design is and ultimately what their purpose is and</p> <p>23 what they are going -- what they were going to</p> <p>24 produce.</p> <p>25 Q. All right. When did you visit the site,</p>

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<p style="text-align: right;">86</p> <p>1 and where did you visit?</p> <p>2 A. Oh, the date we went -- I don't remember</p> <p>3 the exact date, but it was --</p> <p>4 Q. Approximately is fine.</p> <p>5 A. Yeah, it was mid to late September 2017.</p> <p>6 And you asked where did we visit?</p> <p>7 Q. Yes.</p> <p>8 A. Where did I visit?</p> <p>9 It's in Delta, Utah. I think it might be</p> <p>10 just a little outside Delta, but the closest city or</p> <p>11 town is Delta, Utah.</p> <p>12 Q. Okay. And who did you see when you went</p> <p>13 to Delta, Utah?</p> <p>14 A. Spoke with Neldon Johnson. Spoke with</p> <p>15 Greg Shepard. And that -- I think those were the</p> <p>16 only two. There were some other employees that were</p> <p>17 there working that we talked a little bit with, but</p> <p>18 I -- I don't remember their names, and we didn't chat</p> <p>19 with them about anything in detail.</p> <p>20 Q. Okay. Who else went on the site visit</p> <p>21 with you?</p> <p>22 A. It was myself, Steven Paul and Dan</p> <p>23 Garriott, both of whom are attorneys for -- counsel</p> <p>24 for the defendants.</p> <p>25 Q. All right. And in your report you refer</p>	<p style="text-align: right;">88</p> <p>1 being built and ready to be -- "hoisted" might be the</p> <p>2 right word -- lifted up on towers to be put to use.</p> <p>3 Q. Okay. You have just described a bunch of</p> <p>4 things, for lack of a better word, right?</p> <p>5 A. Yeah.</p> <p>6 Q. What were those things doing, if anything?</p> <p>7 MR. PAUL: Objection. Foundation.</p> <p>8 THE WITNESS: I'm -- what do you mean by</p> <p>9 "doing"?</p> <p>10 Q. (BY MR. MORAN) You just described you</p> <p>11 went out to the middle of the desert, you saw -- you</p> <p>12 went to Mr. Johnson's house?</p> <p>13 A. Right.</p> <p>14 Q. You went to a manufacturing facility. You</p> <p>15 said you saw some lenses that were hoisted on towers</p> <p>16 and a few hundred arrays that were being ready to be</p> <p>17 hoisted onto towers.</p> <p>18 A. Okay.</p> <p>19 Q. What, if anything, were those lenses or</p> <p>20 anything else doing?</p> <p>21 A. Well, okay. I'll start with the lenses</p> <p>22 that were on the towers. They were -- I mean, they</p> <p>23 were sitting there collecting the solar energy. They</p> <p>24 moved it around so we could --</p> <p>25 Q. They moved what around?</p>
<p style="text-align: right;">87</p> <p>1 to the management. When you say "management," are</p> <p>2 you referring to Greg Shepard and Neldon Johnson?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. When you went to the site in</p> <p>5 Delta --</p> <p>6 A. Uh-huh (affirmative).</p> <p>7 Q. -- what did you see?</p> <p>8 A. First we went to Mr. Johnson's home, and</p> <p>9 he was showing us some of the -- what's the right</p> <p>10 word for it? Some of the technology, the circuit</p> <p>11 board that he has been -- he was working on that is</p> <p>12 to help in the generation of electricity.</p> <p>13 Then we went to a -- I guess a</p> <p>14 warehouse-type facility, and maybe even more of a</p> <p>15 laboratory-type thing where they were testing various</p> <p>16 different projects and how they interact with this</p> <p>17 whole process of generating electricity.</p> <p>18 And then we went out to one site where</p> <p>19 there were several towers with an array of lenses up</p> <p>20 on them. And he gave us -- he moved the lenses</p> <p>21 around to show us what they could do a little bit,</p> <p>22 the heat that they could generate.</p> <p>23 And then we went to another site which is</p> <p>24 kind of -- I guess you would say under construction,</p> <p>25 where there are a couple hundred arrays that are</p>	<p style="text-align: right;">89</p> <p>1 A. Excuse me. The lens, they adjusted them</p> <p>2 so we could feel the heat that they were creating.</p> <p>3 Q. They weren't moving automatically,</p> <p>4 following the sun?</p> <p>5 A. They did -- they had some that -- my</p> <p>6 understanding was that they were -- they tried to</p> <p>7 move it so we wouldn't have to walk to a very</p> <p>8 difficult spot to feel it. They tried to adjust it</p> <p>9 so they could move the focus to where we were.</p> <p>10 Q. Okay.</p> <p>11 A. We did go into a little shed there and saw</p> <p>12 the computer system that was set up, that I was told</p> <p>13 was what was the automatically adjusting process.</p> <p>14 But I think the automatic adjustment takes a long</p> <p>15 time to really notice any movement. We weren't there</p> <p>16 for that -- for that long to -- to see if that was</p> <p>17 actually working.</p> <p>18 Q. All right.</p> <p>19 A. At the -- at the manufacturing facility</p> <p>20 they were -- there were some individuals that I could</p> <p>21 see that were out working on building some items, but</p> <p>22 mostly we just walked through and saw -- saw various,</p> <p>23 for lack of a better word, inventions or -- or</p> <p>24 products that -- and Mr. Johnson explained how they</p> <p>25 would be used in the ultimate process.</p>

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24 (Pages 90 to 93)

<p style="text-align: right;">90</p> <p>1 Q. When you say "they would be used," is that 2 future tense? 3 A. Yes. At least the ones that we saw. 4 Q. Okay. 5 A. At his home he showed us a circuit board 6 and had it set up with a -- I don't recall the name 7 of the meter, but some meter that measures the 8 electricity output. And he was -- he was showing us 9 the -- he was taking it from a lamp -- or a light 10 bulb -- a light bulb shining on the circuit breaker 11 and was showing the -- the light energy coming in and 12 the electricity that was -- that was coming out. At 13 least that's what the meter was showing us. 14 And then at the -- at the final place, 15 that's -- all of those lenses -- those arrays of 16 lenses were on the ground. There were some workers 17 out there that were, you know, milling about, but 18 what I was told was those are -- they are installing 19 lenses on the array and then they are getting ready 20 to lift them up onto the stands -- the poles that 21 they will be on. 22 Q. So let's go back to the lenses you talked 23 about that were -- I think were at the research and 24 development site? 25 A. Yes.</p>	<p style="text-align: right;">92</p> <p>1 two employees? 2 A. I don't. I didn't get the names. 3 Q. Was Mr. Shepard there? 4 A. Mr. Shepard was not there at that point. 5 He had left. 6 Q. So what was Mr. Shepard's role in your 7 tour? 8 A. So he -- he met us. He went to 9 Mr. Johnson's house with us. And he went to the 10 manufacturing facility with us. He, for the most 11 part, just sat and listened. And he had to leave 12 early. I think it was a family matter that he had to 13 attend to. But he left early, and Mr. Johnson took 14 us to the other two sites. 15 Q. Okay. Was Matt Shepard there? 16 A. I know we met someone that was 17 Mr. Shepard's son. 18 Q. Okay. 19 A. I did not get if his name was Matt. But 20 we just met him for a couple of minutes. 21 Q. Okay. 22 A. And then didn't see him again. 23 Q. All right. Getting back to the lenses, 24 you said Mr. Johnson manipulated the array to 25 generate heat that you saw, and they burned -- and</p>
<p style="text-align: right;">91</p> <p>1 Q. Okay. And you said that they moved the 2 array to concentrate heat at a certain point? 3 A. Yes. 4 Q. That was to show you? 5 A. Uh-huh (affirmative). 6 MS. HEALY GALLAGHER: Yes. 7 THE WITNESS: Yes. I apologize. Thank 8 you. 9 Q. (BY MR. MORAN) What happened af -- what 10 were they doing with this heat? 11 A. When we were there they -- they burned 12 something. They burned a cardboard box, I think it 13 was. 14 Q. When you say "they," who are you talking 15 about? 16 A. Mr. Johnson and there were one, maybe two 17 other employees that were there working in the 18 trailer that I -- I took it to be they were work -- 19 they had been working there -- or that was their 20 assigned position or whatever their employment 21 entailed. 22 Q. When you say "Mr. Johnson," you're talking 23 about Neldon Johnson? 24 A. Neldon Johnson. 25 Q. Do you know the identities of these other</p>	<p style="text-align: right;">93</p> <p>1 Mr. Johnson burned a cardboard box? 2 A. Yes. 3 Q. Okay. What else? Anything that this lens 4 was doing? 5 A. I put my hand under it and could only keep 6 it there for a few seconds. Other than that, that -- 7 that's -- that's all we saw -- 8 Q. Okay. 9 A. -- at that site. 10 Q. Did you ever see electricity being 11 generated? 12 A. No. I think, practically, I don't know -- 13 I didn't see anything running off of electricity 14 that -- I don't know how you would see electricity 15 being generated, but I didn't see anything plugged 16 into something that was running off of electricity 17 created by these lenses. 18 Q. Okay. You probably saw some item, for 19 example, a computer or something that was plugged in, 20 but did you also see wires coming in from the street? 21 A. Coming in from the street? 22 Q. Yeah. In other words, was the house and 23 the facilities -- were they connected to a power line 24 that was from an external source? 25 MR. PAUL: Objection to the extent it</p>

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25 (Pages 94 to 97)

<p style="text-align: right;">94</p> <p>1 lacks foundation.</p> <p>2 THE WITNESS: Mr. Johnson's house I do not</p> <p>3 believe was connected to the lenses or -- or</p> <p>4 electricity from the lenses. Neither was the</p> <p>5 facility. They were quite some distance away.</p> <p>6 The computer in the -- in the trailer,</p> <p>7 there were -- there were electrical lines running on</p> <p>8 the ground. I didn't see if they ran into the</p> <p>9 trailer and I didn't see if -- what the computer was</p> <p>10 plugged into, but -- that's the extent that I saw.</p> <p>11 Q. (BY MR. MORAN) But do you have any</p> <p>12 knowledge that the lenses were generating</p> <p>13 electricity?</p> <p>14 A. I don't.</p> <p>15 Q. Okay. Did anyone tell you that they were</p> <p>16 generating electricity?</p> <p>17 A. Currently, at that moment, nobody did tell</p> <p>18 me.</p> <p>19 Q. Did anyone tell you that they had</p> <p>20 generated electricity at any time?</p> <p>21 A. I believe Mr. Johnson said they had -- in</p> <p>22 the same type of experiment that he was working in</p> <p>23 his home, they had tested it and generated</p> <p>24 electricity. I don't know if it's a constant source</p> <p>25 of electricity or if it's just in experiments that</p>	<p style="text-align: right;">96</p> <p>1 currently generated --</p> <p>2 Q. Okay.</p> <p>3 A. -- to qualify for the credit.</p> <p>4 Q. We'll get back to that.</p> <p>5 A. Okay.</p> <p>6 Q. Did you ask Mr. Johnson for any proof that</p> <p>7 he had generated electricity, or did you just take</p> <p>8 his word for it?</p> <p>9 A. I think what I -- what I saw in his home</p> <p>10 was some proof, but I didn't ask him for anything</p> <p>11 further about the electricity generation abilities of</p> <p>12 the lenses.</p> <p>13 Q. So you took what he told you as true and</p> <p>14 based your conclusion on his statement to you?</p> <p>15 A. Yes.</p> <p>16 Q. Okay. When you were at the facility, did</p> <p>17 you see any references or products or things</p> <p>18 involving water distillation?</p> <p>19 A. I don't recall that specifically. I know</p> <p>20 there was some discussion of it, but I don't</p> <p>21 remember -- I don't remember any products or things</p> <p>22 that had to do with water distillation.</p> <p>23 Q. Okay. Did you base your opinion on</p> <p>24 anything involving water distillation?</p> <p>25 A. No.</p>
<p style="text-align: right;">95</p> <p>1 they've -- that they've seen it tested. But that's</p> <p>2 what I was told.</p> <p>3 Q. When you say "Mr. Johnson," you mean</p> <p>4 Neldon Johnson?</p> <p>5 A. Neldon Johnson, yes.</p> <p>6 Q. Okay. Is that something that matters to</p> <p>7 you when you form your expert opinion?</p> <p>8 A. With respect to whether the credit is</p> <p>9 properly taken?</p> <p>10 Q. Let me rephrase the question.</p> <p>11 Is any defendant's, in this case, ability</p> <p>12 to generate electricity something that you</p> <p>13 consider -- considered in forming your expert</p> <p>14 opinion?</p> <p>15 A. Yes, it's something I considered.</p> <p>16 Q. How did you consider it?</p> <p>17 A. I considered it -- whether it -- whether</p> <p>18 the -- number one, whether it was a viable</p> <p>19 technology. Number two, whether that made a</p> <p>20 difference under the tax code or not.</p> <p>21 Q. In your view, did electricity generation</p> <p>22 have anything to do with whether or not a credit was</p> <p>23 allowable under the tax code?</p> <p>24 A. It had something to do with it, although I</p> <p>25 don't think the credit requires that electricity be</p>	<p style="text-align: right;">97</p> <p>1 Q. How about a biomass burner, did you see</p> <p>2 that?</p> <p>3 A. I did not see a biomass burn.</p> <p>4 Q. Was it discussed?</p> <p>5 A. If it was, it was very brief, and I don't</p> <p>6 recall the discussion.</p> <p>7 Q. The heat that you saw generated and you</p> <p>8 said they lit a cardboard box on fire...</p> <p>9 A. Uh-huh (affirmative).</p> <p>10 Q. Do you recall that testimony?</p> <p>11 A. Yes.</p> <p>12 Q. Did the heat go anywhere, do anything?</p> <p>13 A. Other than light the box on fire? No.</p> <p>14 Q. Okay. That heat you saw from the lens</p> <p>15 array -- the heat that you are talking about, that</p> <p>16 was coming from the lens array?</p> <p>17 A. Yes.</p> <p>18 Q. Was it going anywhere besides the box?</p> <p>19 A. When I was there, no.</p> <p>20 Q. Were you told that the heat had gone</p> <p>21 someplace when you weren't there?</p> <p>22 A. No. From -- from this site I wasn't given</p> <p>23 any information about what they were -- what they</p> <p>24 were using the heat for currently.</p> <p>25 Q. All right. And was the heat being</p>

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<p style="text-align: right;">98</p> <p>1 captured or contained in any way?</p> <p>2 A. Not that I can recall. I will say that</p> <p>3 there were wires running along the ground from each</p> <p>4 of these -- each of the poles the solar array was</p> <p>5 sitting on, but I don't know how they were connected</p> <p>6 to the solar array or any -- or any capturing</p> <p>7 facility.</p> <p>8 Q. So you saw some wires. Did these wires</p> <p>9 have anything to do with the conclusions you reached</p> <p>10 in this case?</p> <p>11 A. Other than that they were there, but</p> <p>12 nothing beyond that.</p> <p>13 Q. Okay. Have you ever seen one of these</p> <p>14 solar lens arrays used to heat a receiver?</p> <p>15 A. No.</p> <p>16 Q. Have you ever heard the term "receiver" as</p> <p>17 part of this case?</p> <p>18 A. Vaguely. I don't know if I heard it in</p> <p>19 terms of a receiver, but we -- Mr. John --</p> <p>20 Mr. Neldon Johnson talked about that the effort would</p> <p>21 be -- or the technology would work by focusing the</p> <p>22 heat on either some sort of -- what is it? Kind of a</p> <p>23 coil that you would run water through. Heat up the</p> <p>24 water to create steam that ultimately you could turn</p> <p>25 into electricity.</p>	<p style="text-align: right;">100</p> <p>1 A. Yes.</p> <p>2 Q. Okay. When did you start drafting your</p> <p>3 report?</p> <p>4 A. I had already started drafting it at that</p> <p>5 point a little bit. I -- my first meeting with</p> <p>6 Paul Jones was kind of late August. I started</p> <p>7 drafting my report probably -- or at least started</p> <p>8 doing the research for my report probably early</p> <p>9 September.</p> <p>10 Q. And what did you do to research for your</p> <p>11 report?</p> <p>12 A. Looked up the statutes, the regulations</p> <p>13 related to the credit. And if there were any cases</p> <p>14 or guides from the IRS that were associated with</p> <p>15 that.</p> <p>16 Q. What statutes?</p> <p>17 A. It started with USC Section 48. That's</p> <p>18 also connected to Section 46 and Section 38. Those</p> <p>19 are the statutes that deal with the solar energy</p> <p>20 credit and -- and as part of the general business</p> <p>21 investment credit.</p> <p>22 Looked at statute -- and, again, I spaced</p> <p>23 the number. Is it okay if I --</p> <p>24 Q. You can look at your report.</p> <p>25 A. -- look at my report to --</p>
<p style="text-align: right;">99</p> <p>1 The other option would be it would -- it</p> <p>2 would be shone onto -- or focused onto one of these</p> <p>3 circuit board -- circuit boards that he had that was</p> <p>4 equipped with photovoltaic receivers, I guess you</p> <p>5 would call it, or panels.</p> <p>6 Q. That's what he showed you in the house and</p> <p>7 focused a light bulb on?</p> <p>8 A. Right. Right.</p> <p>9 Q. Okay. Did you ever see a solar lens array</p> <p>10 focused on a coil that Mr. Neldon Johnson was talking</p> <p>11 about?</p> <p>12 A. No.</p> <p>13 Q. Did you ever see one of these solar lens</p> <p>14 arrays focused on the circuit board that Mr. Johnson</p> <p>15 showed you?</p> <p>16 A. No.</p> <p>17 Q. Is that something you would have liked to</p> <p>18 have seen? Would it have anything to do with the</p> <p>19 conclusion you drew in this case?</p> <p>20 A. Again, no, because I think the -- the</p> <p>21 credit doesn't depend on whether electricity is</p> <p>22 currently being made.</p> <p>23 Q. Okay. We'll get back to that.</p> <p>24 So you said you visited the site in mid</p> <p>25 to -- mid to late September?</p>	<p style="text-align: right;">101</p> <p>1 Q. Just tell me what exhibit number you are</p> <p>2 looking at.</p> <p>3 A. Sure. Well, this is just -- this is</p> <p>4 Exhibit 651.</p> <p>5 Q. Okay.</p> <p>6 A. Also related to the energy credit and the</p> <p>7 property that qualifies is Section 50 of the Internal</p> <p>8 Revenue Code.</p> <p>9 And then I've got to get -- when we start</p> <p>10 talking about depreciation, there's Sections 162,</p> <p>11 167, Section 183 and 212.</p> <p>12 And we also looked at -- or I also looked</p> <p>13 at Section -- I just never -- 469 that have to do</p> <p>14 with material operation.</p> <p>15 Q. Okay.</p> <p>16 A. I am sure there are others as well but</p> <p>17 those are the main ones that I looked at.</p> <p>18 Q. Did you look up these statutes yourself,</p> <p>19 or did someone give them to you?</p> <p>20 A. A little of both.</p> <p>21 Q. Okay.</p> <p>22 A. I mean, in terms of actually finding</p> <p>23 the -- the content, I found the content, but I was --</p> <p>24 it wasn't that hard, but I was given the cite</p> <p>25 sometimes to know where to go.</p>

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<p style="text-align: right;">102</p> <p>1 Q. Who gave you that cite?</p> <p>2 A. Paul Jones, when we initially talked,</p> <p>3 mentioned the cite of the credit. In my other</p> <p>4 discussions with Mr. Paul we've talked about those</p> <p>5 cites as well.</p> <p>6 Q. All right. And you said you looked at</p> <p>7 case law?</p> <p>8 A. Uh-huh (affirmative).</p> <p>9 MS. HEALY GALLAGHER: Yes.</p> <p>10 THE WITNESS: Yeah. Darn it. Yes.</p> <p>11 Q. (BY MR. MORAN) What -- do you recall what</p> <p>12 cases you looked at, other than what's referenced in</p> <p>13 the report?</p> <p>14 A. I think most all the cases that I looked</p> <p>15 at are -- are referenced in the report.</p> <p>16 Q. Okay. How many hours did -- withdrawn.</p> <p>17 Did anyone give you those case citations</p> <p>18 for cases you looked at?</p> <p>19 A. A couple of them. I -- I -- Mr. Jones</p> <p>20 pointed me to one of those cases.</p> <p>21 Q. Which one?</p> <p>22 A. I think it's -- initially it was -- find</p> <p>23 the right -- Cooper versus Commissioner.</p> <p>24 Q. Okay.</p> <p>25 A. Most of the others I -- I found on my own.</p>	<p style="text-align: right;">104</p> <p>1 Ms. Davenport's background? Is she a practicing</p> <p>2 lawyer? Is she admitted to the bar? What's her</p> <p>3 practice area?</p> <p>4 A. My understanding is she does tax. She is</p> <p>5 a practicing lawyer. She -- I don't know much more</p> <p>6 than that.</p> <p>7 Q. Have you ever worked with her before?</p> <p>8 A. No.</p> <p>9 Q. Okay. Did you meet with her? Did she</p> <p>10 come to your office?</p> <p>11 A. Yes, she came to mine and we talked about</p> <p>12 the case -- or the report. Sorry.</p> <p>13 Q. Do you know if she has any background in</p> <p>14 tax -- or do you have any -- what do you know about</p> <p>15 her background in tax?</p> <p>16 A. I know hardly anything about her</p> <p>17 background in tax. I know she is -- again, I -- I</p> <p>18 know she's worked with Paul Jones, and he's the one</p> <p>19 that suggested that I could use her to help me do</p> <p>20 some research.</p> <p>21 Q. Okay. Do you know if she has any</p> <p>22 experience with Section 6700?</p> <p>23 A. I don't -- specifically, I don't.</p> <p>24 Q. Do you know if she has any experience</p> <p>25 assisting taxpayers in determining whether or not</p>
<p style="text-align: right;">103</p> <p>1 Q. Okay. Who found the Misko case?</p> <p>2 A. Who found the Misko case? I had -- I did</p> <p>3 have -- I did have some help from another attorney</p> <p>4 that I worked with, and she found a couple of these</p> <p>5 cases as well.</p> <p>6 Q. Who is that?</p> <p>7 A. Her name is Jenni Davenport.</p> <p>8 Q. Where is she a lawyer?</p> <p>9 A. She is a lawyer -- I think she -- my</p> <p>10 understanding is she kind of works part-time for</p> <p>11 different people. I got connected with her because</p> <p>12 Paul Jones has worked with her before as well.</p> <p>13 Q. Okay. What did Ms. Davenport do to help</p> <p>14 you prepare this report?</p> <p>15 A. She mostly helped do some research. And</p> <p>16 then helped me review the report and, you know, make</p> <p>17 sure it was -- kind of check it for -- what's the</p> <p>18 right word -- spelling errors, grammatical issues,</p> <p>19 formatting, that kind of stuff.</p> <p>20 Q. Okay. So you said she found some of the</p> <p>21 cases that you cite to, including the Misko case?</p> <p>22 A. Uh-huh (affirmative).</p> <p>23 MR. PAUL: Yes.</p> <p>24 THE WITNESS: Yes.</p> <p>25 Q. (BY MR. MORAN) What do you know about</p>	<p style="text-align: right;">105</p> <p>1 they have a trade or business?</p> <p>2 A. I don't.</p> <p>3 Q. Do you know if she has any experience</p> <p>4 regarding Section 469 of the Internal Revenue Code?</p> <p>5 A. In -- in her practice I don't. I mean, I</p> <p>6 know -- I know we talked about it as we were looking</p> <p>7 at this, but I don't know anything about her -- her</p> <p>8 specific practice or her clients.</p> <p>9 Q. So why did you think she was qualified to</p> <p>10 help you with your expert report?</p> <p>11 A. Mostly the referral from Mr. Jones.</p> <p>12 He's -- he's used her before to help do some</p> <p>13 research, and I needed some help doing some research.</p> <p>14 Q. Why did you need help?</p> <p>15 A. Well, I'm a single practitioner. I've got</p> <p>16 other cases, and it was my effort to try and -- it</p> <p>17 was a short time frame to turn around a full expert</p> <p>18 report, so I -- I looked for some help to get some</p> <p>19 research done.</p> <p>20 Q. Is that because you didn't know off the</p> <p>21 top of your head what statutes and regs and case law</p> <p>22 might apply?</p> <p>23 A. Off the top of my head, right, I did not</p> <p>24 know. As with any case that I deal with, you've got</p> <p>25 to go do research.</p>

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<p style="text-align: right;">106</p> <p>1 Q. But you're an expert?</p> <p>2 A. That's right.</p> <p>3 Q. Who else did you talk to about the facts,</p> <p>4 as you understand them, in this case besides</p> <p>5 Neldon Johnson, Greg Shepard, Paul Jones and</p> <p>6 Mr. Paul? Anyone else?</p> <p>7 A. Mr. Garriott, who is another attorney at</p> <p>8 Mr. Paul's office. Miss Davenport. Other than that,</p> <p>9 that's it.</p> <p>10 Q. Did you ever talk to Richard Jamison?</p> <p>11 A. No.</p> <p>12 Q. Okay. How about John Howell?</p> <p>13 A. John -- say the last name.</p> <p>14 Q. John Howell.</p> <p>15 A. John Howell, no.</p> <p>16 Q. How about Roger Freeborn?</p> <p>17 A. No.</p> <p>18 Q. Do you know who Mr. Freeborn is?</p> <p>19 A. I have heard of him. When we were in</p> <p>20 Delta Mr. Shepard mentioned his name, said that he</p> <p>21 was ill, and that's all I know about him.</p> <p>22 Q. Okay. Did you ever -- did you talk to any</p> <p>23 other RaPower3 customers or people who bought lenses?</p> <p>24 A. No.</p> <p>25 Q. Okay. You didn't think that was</p>	<p style="text-align: right;">108</p> <p>1 brought some documents with me, if necessary.</p> <p>2 Q. Mr. Hawes, I'm going to represent to you</p> <p>3 that the subpoena we issued you required those to be</p> <p>4 produced on September 27th. That was last week.</p> <p>5 A. Okay.</p> <p>6 Q. Why weren't those documents produced?</p> <p>7 A. Most of the documents are referenced in my</p> <p>8 report. They're cited in there. And -- plus, I have</p> <p>9 produced several of them -- or a few of them along</p> <p>10 with my report.</p> <p>11 MR. MORAN: All right. Let's mark this as</p> <p>12 an exhibit. Two exhibits.</p> <p>13 (EXHIBIT 652 AND EXHIBIT 653 WERE MARKED.)</p> <p>14 MR. PAUL: And, Chris, just for the</p> <p>15 record, I had understood the subpoena to be that he</p> <p>16 needed to bring them with him today. So if there is</p> <p>17 a miscommunication, it's my fault.</p> <p>18 MR. MORAN: All right. We'll deal with</p> <p>19 this later. I'm going to ask him some questions on</p> <p>20 this document and --</p> <p>21 MR. PAUL: You bet.</p> <p>22 MR. MORAN: -- we'll see what we need to</p> <p>23 do.</p> <p>24 MR. PAUL: Now, which is which?</p> <p>25 MR. MORAN: 653 is the notice -- United</p>
<p style="text-align: right;">107</p> <p>1 important?</p> <p>2 A. My opinion was going to be based on what</p> <p>3 the tax code said, not what their experience was,</p> <p>4 necessarily.</p> <p>5 Q. But you're also opining on a hypothetical</p> <p>6 client.</p> <p>7 A. Right.</p> <p>8 Q. Who was a RaPower3 customer; is that</p> <p>9 correct?</p> <p>10 A. That's correct.</p> <p>11 Q. All right. And you didn't think you</p> <p>12 needed to talk to a RaPower3 customer?</p> <p>13 A. No, not to give the opinion that I was</p> <p>14 going to give.</p> <p>15 Q. Okay. Are you aware that the United</p> <p>16 States issued you a subpoena for documents in this</p> <p>17 case?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. What did you -- when did you learn</p> <p>20 that?</p> <p>21 A. Mr. Paul sent it to me when he sent the</p> <p>22 notice of deposition.</p> <p>23 Q. Did you produce any documents in response</p> <p>24 to that subpoena?</p> <p>25 A. I didn't produce any separately. I have</p>	<p style="text-align: right;">109</p> <p>1 States' Notice of Intent to Subpoena Documents.</p> <p>2 652 is the Acknowledgment and Waiver of</p> <p>3 Service.</p> <p>4 MR. PAUL: Thank you.</p> <p>5 Q. (BY MR. MORAN) Mr. Hawes, directing your</p> <p>6 attention to Exhibit 653, I direct your attention to</p> <p>7 the fourth page. This appears to be a subpoena to</p> <p>8 produce documents, information or objects or to</p> <p>9 permit inspection of premises in a civil action.</p> <p>10 Do you recognize this document?</p> <p>11 A. Yes.</p> <p>12 Q. What is it?</p> <p>13 A. It is a copy of the subpoena to produce</p> <p>14 documents, information or objects that I received</p> <p>15 from Mr. Paul.</p> <p>16 Q. Okay. And you received this subpoena from</p> <p>17 the United States via Mr. Paul?</p> <p>18 A. Yes.</p> <p>19 Q. Okay. Was that shortly after Mr. Paul</p> <p>20 submitted his expert -- submitted your expert report</p> <p>21 to the United States?</p> <p>22 A. I believe so.</p> <p>23 Q. Okay. And Exhibit 653 appears to require</p> <p>24 production of documents on September 27th; is that</p> <p>25 correct?</p>

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<p style="text-align: right;">110</p> <p>1 A. That's what it looks like, yes.</p> <p>2 Q. Okay. And those documents could have been</p> <p>3 dropped off at the United States Attorney's Office or</p> <p>4 provided to my office via e-mail or any other</p> <p>5 appropriate service by September 27th, 2017. Did you</p> <p>6 produce documents to the United States by</p> <p>7 September 27th?</p> <p>8 A. No.</p> <p>9 Q. Okay. And Mr. Paul has indicated -- and I</p> <p>10 think you have as well -- that you have those</p> <p>11 documents with you here?</p> <p>12 A. Yes.</p> <p>13 Q. Okay. I'll direct your attention to</p> <p>14 the -- to Attachment A to the document subpoena.</p> <p>15 A. Okay.</p> <p>16 Q. Attachment A references a series of</p> <p>17 documents that you were required to produce. Is it</p> <p>18 your testimony that you have all those documents with</p> <p>19 you today?</p> <p>20 A. Yes, I believe so.</p> <p>21 Q. Okay. What documents did you attach to</p> <p>22 your report that are responsive to this subpoena?</p> <p>23 A. The RaPower contracts, as well as the</p> <p>24 placed in service letter I believe fall under</p> <p>25 document request number four. "Copies of documents</p>	<p style="text-align: right;">112</p> <p>1 also have copies of these same documents that were</p> <p>2 attached as well.</p> <p>3 MR. MORAN: Go off the record.</p> <p>4 (A break was taken from 11:37 a.m. to</p> <p>5 11:39 a.m.)</p> <p>6 MR. MORAN: Go back on.</p> <p>7 THE WITNESS: Could I clarify one thing as</p> <p>8 well?</p> <p>9 MR. MORAN: Sure.</p> <p>10 THE WITNESS: On Exhibit A of the subpoena</p> <p>11 there are categories 5, 6 and 7 that relate to any</p> <p>12 ownership interest or anything along those lines that</p> <p>13 I have in RaPower3. There are no documents that fill</p> <p>14 those documents. I don't have ownership interest.</p> <p>15 Q. (BY MR. MORAN) So your testimony is that</p> <p>16 with respect to categories 5, 6 and 7 of the United</p> <p>17 States' document subpoena, you have no such</p> <p>18 documents?</p> <p>19 A. That's correct.</p> <p>20 Q. Same subject, your production of</p> <p>21 documents. Did you -- are you withholding any</p> <p>22 documents --</p> <p>23 A. No.</p> <p>24 Q. -- that are responsive to the subpoena?</p> <p>25 A. No.</p>
<p style="text-align: right;">111</p> <p>1 cited in your report that contain facts or</p> <p>2 assumptions related to any transaction involving a</p> <p>3 lens."</p> <p>4 The Exhibit F -- let me get to this</p> <p>5 exhibit. Exhibits D and E, the other tax opinion</p> <p>6 letters that were received, would fall under</p> <p>7 Category 2, "Copies of all documents that you</p> <p>8 reviewed to form any opinion in this case."</p> <p>9 Q. Which exhibits?</p> <p>10 A. D and E.</p> <p>11 Q. Okay.</p> <p>12 A. Exhibits F, the Bloomberg Law Tax Practice</p> <p>13 series would fall under Category 3, documents relied</p> <p>14 upon.</p> <p>15 Exhibits G and H would be under document</p> <p>16 request number four related to facts and assumptions.</p> <p>17 And then there were several documents</p> <p>18 referenced but not attached in terms of statutes,</p> <p>19 rules, cases, IRS publications that are cited in the</p> <p>20 opinion.</p> <p>21 Q. Okay. What documents do you have with you</p> <p>22 that you didn't produce?</p> <p>23 A. I have copies of the statutes, copies of</p> <p>24 the regs, copies of the cases. I have a copy of my</p> <p>25 engagement letter that goes to category number 1. I</p>	<p style="text-align: right;">113</p> <p>1 MR. MORAN: Okay. All right. During the</p> <p>2 break we had a discussion with Mr. Paul and the</p> <p>3 witness. During our lunch break we've agreed that</p> <p>4 Mr. Hawes will leave all the documents he brought</p> <p>5 with him with counsel for the United States; we'll</p> <p>6 review them during the lunch break, and if we need to</p> <p>7 make copies of anything, we will, and take it from</p> <p>8 there.</p> <p>9 Is that your understanding, Mr. Paul?</p> <p>10 MR. PAUL: Yes, that's fine.</p> <p>11 Q. (BY MR. MORAN) Mr. Hawes?</p> <p>12 A. Yes.</p> <p>13 Q. Mr. Hawes, you testified that Exhibit G</p> <p>14 and H that are attached to your report,</p> <p>15 Exhibit 651 -- Exhibits G and H are documents that</p> <p>16 contain facts or assumptions related to any</p> <p>17 transaction involving a lens?</p> <p>18 A. Yes, that's how I would characterize them.</p> <p>19 Q. Okay. So you got Exhibits G and H from</p> <p>20 rapower3.com?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. And --</p> <p>23 MR. PAUL: Or IAS.</p> <p>24 THE WITNESS: Or iaus.com.</p> <p>25 Q. (BY MR. MORAN) You got those documents</p>

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<p style="text-align: right;">114</p> <p>1 from a defendant in this case?</p> <p>2 A. I guess, technically, yes, because I got</p> <p>3 them off their website.</p> <p>4 Q. Okay. And the document request pertains</p> <p>5 to facts or assumptions that you base your opinion</p> <p>6 on, right?</p> <p>7 A. Correct.</p> <p>8 Q. Okay. And so do you have personal</p> <p>9 knowledge of the facts contained in Exhibits G or H,</p> <p>10 or did you take what's represented to be a fact and</p> <p>11 assume it's true and base your opinion thereon?</p> <p>12 A. That's correct, it's my assumption that</p> <p>13 those are true.</p> <p>14 Q. Okay. If those turned -- if they turned</p> <p>15 out to be incorrect statements in Exhibits G or H,</p> <p>16 would that change your opinion?</p> <p>17 A. It might. I'd have to see what those</p> <p>18 statements are.</p> <p>19 Q. Okay. All right. Getting back to what</p> <p>20 you looked at in preparing your report. In the</p> <p>21 Schedule A attached to your expert report you refer</p> <p>22 to "Pleadings, motions, deposition transcripts and</p> <p>23 other documents filed in or relating to the</p> <p>24 applicable case."</p> <p>25 Do you see that?</p>	<p style="text-align: right;">116</p> <p>1 THE WITNESS: Rick Jamison.</p> <p>2 Q. (BY MR. MORAN) Okay.</p> <p>3 A. I looked at his deposition testimony.</p> <p>4 Q. When did you look at that?</p> <p>5 A. Probably over the last two or three days.</p> <p>6 Q. So that was after you wrote your report?</p> <p>7 A. Yes.</p> <p>8 Q. Mr. Jamison's deposition was just two</p> <p>9 weeks ago, I think.</p> <p>10 A. Right. Right.</p> <p>11 Q. Do you recall anything noteworthy from</p> <p>12 Mr. Jamison's deposition?</p> <p>13 A. I was reading it more to get a sense of</p> <p>14 what the deposition might be like. As I've said,</p> <p>15 I've never had my deposition taken. I've been --</p> <p>16 I've been in the room when depositions are taken. So</p> <p>17 it was just to try and give me some little</p> <p>18 information about this process.</p> <p>19 Q. Who gave you Mr. Jamison's deposition</p> <p>20 transcript?</p> <p>21 A. Mr. Paul did.</p> <p>22 Q. Okay. Did anything that Mr. Jamison said</p> <p>23 in his deposition cause you to modify an opinion you</p> <p>24 had?</p> <p>25 A. No.</p>
<p style="text-align: right;">115</p> <p>1 A. Yes.</p> <p>2 Q. What pleadings do you recall looking at?</p> <p>3 A. I read through the Complaint.</p> <p>4 Q. Okay.</p> <p>5 A. That's where I've spent most of my time.</p> <p>6 I haven't -- I don't recall any other pleadings that</p> <p>7 I've reviewed.</p> <p>8 Q. Okay. How about motions?</p> <p>9 A. Motions I've -- I've just looked at the</p> <p>10 captions on the documents.</p> <p>11 Q. You didn't read any of the documents?</p> <p>12 A. I don't recall reading any motions that</p> <p>13 have been made.</p> <p>14 Q. Okay. What deposition transcripts?</p> <p>15 A. I have -- and I am going to space the</p> <p>16 names here. I've read through pieces of a deposition</p> <p>17 transcript of one of the taxpayers -- or a couple of</p> <p>18 the taxpayers but for the life of me cannot remember</p> <p>19 their names.</p> <p>20 I've read through a little bit of the</p> <p>21 transcript of a gentleman that you mentioned.</p> <p>22 MR. PAUL: Rich Jamison.</p> <p>23 THE WITNESS: Rich Jamison, yes. Is it</p> <p>24 Rich?</p> <p>25 MR. PAUL: Rick.</p>	<p style="text-align: right;">117</p> <p>1 Q. All right. So you looked at Jamison's</p> <p>2 transcript, some taxpayers' whose names you don't</p> <p>3 remember?</p> <p>4 A. Right.</p> <p>5 Q. Anything else? Any other transcripts?</p> <p>6 A. No, I don't believe so.</p> <p>7 Q. Did you look at any deposition transcript</p> <p>8 of Neldon Johnson?</p> <p>9 A. No.</p> <p>10 Q. Okay. How about Greg Shepard?</p> <p>11 A. No.</p> <p>12 Q. How about the depositions of IAS, RaPower3</p> <p>13 or LTB1, LLC?</p> <p>14 A. No.</p> <p>15 Q. You also -- in Schedule A you reference</p> <p>16 the Kirton -- withdrawn.</p> <p>17 In Schedule A you reference the Anderson</p> <p>18 Law Center Tax Opinion Letter at Exhibit D.</p> <p>19 A. Uh-huh. Yes.</p> <p>20 Q. Are you aware that a Todd Anderson was</p> <p>21 deposited in this case?</p> <p>22 A. I was not.</p> <p>23 Q. So you didn't look at his transcript?</p> <p>24 A. I did not look at his transcript.</p> <p>25 Q. How about Jessica Anderson, have you ever</p>

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<p style="text-align: right;">118</p> <p>1 heard the name Jessica Anderson?</p> <p>2 MR. PAUL: Are you aware that Jessica</p> <p>3 Anderson was deposed in this case?</p> <p>4 THE WITNESS: I was not.</p> <p>5 Q. (BY MR. MORAN) Directing your attention</p> <p>6 to Exhibit E, the Kirton & McConkie Tax Opinion</p> <p>7 Memorandum. Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. Do you know who authored that memorandum?</p> <p>10 A. I do not recall the name, but a lawyer or</p> <p>11 lawyers at Kirton & McConkie. I can look and find</p> <p>12 the name.</p> <p>13 Q. You can look. I'll represent to you that</p> <p>14 it's a gentleman by the name of Ken Birrell.</p> <p>15 A. Yes, that sounds familiar.</p> <p>16 Q. Are you aware that Ken Birrell was deposed</p> <p>17 in this case?</p> <p>18 A. I was not.</p> <p>19 Q. Would you be interested in seeing the</p> <p>20 deposition transcripts of Todd Anderson or</p> <p>21 Jessica Anderson or Ken Birrell?</p> <p>22 A. Yes. I don't think -- I mean, I'd have to</p> <p>23 see what they say, but I don't think they would</p> <p>24 change my opinion that I've rendered in this case.</p> <p>25 But I'm always interested in what's going on in the</p>	<p style="text-align: right;">120</p> <p>1 A. The name sounds familiar, but I've heard</p> <p>2 it not related to this case.</p> <p>3 Q. Okay. Have you heard it in relation to an</p> <p>4 accounting firm formerly known as Mantyla McReynolds?</p> <p>5 A. No, although I do know that accounting</p> <p>6 firm.</p> <p>7 Q. Okay.</p> <p>8 A. I believe my interaction -- or at least my</p> <p>9 memory of the name was that Mr. Oveson -- I can't</p> <p>10 remember if he was at the tax commission -- the Utah</p> <p>11 State Tax Commission or if -- we did some work with</p> <p>12 him at another law firm that I was at. But I do</p> <p>13 know -- recall him being at Mantyla McReynolds.</p> <p>14 Q. Okay. I'll represent to you that</p> <p>15 Ken Oveson was a CPA at Mantyla McReynolds, and</p> <p>16 Mr. Oveson gave a deposition in this case. And, in</p> <p>17 substance, Mr. Oveson testified that many years ago,</p> <p>18 approximately 2010, he refused to give Greg Shepard</p> <p>19 an opinion that Mr. Shepard wanted on these lenses</p> <p>20 and that Mr. Shepard subsequently fired him as a CPA.</p> <p>21 Is that a fact that you would like to</p> <p>22 explore further?</p> <p>23 MR. PAUL: I would also raise an objection</p> <p>24 as to the extent it misrepresents the deposition</p> <p>25 testimony from Mr. Oveson. If you're proposing that</p>
<p style="text-align: right;">119</p> <p>1 case.</p> <p>2 Q. What if I told you Jessica Anderson, who</p> <p>3 is an attorney in Delta, Utah, testified that she</p> <p>4 told Neldon Johnson that tax credits and depreciation</p> <p>5 were not permissible for his solar lenses?</p> <p>6 MR. PAUL: I'll object to the extent it</p> <p>7 misrepresents her deposition testimony. If you're</p> <p>8 asking as a hypothetical, I'll withdraw my objection.</p> <p>9 Q. (BY MR. MORAN) You can answer.</p> <p>10 A. I would be interested. I don't know if</p> <p>11 Miss Anderson is a tax attorney, if she deals with</p> <p>12 the tax code all that often or not. So I'd be</p> <p>13 interested to see that and her reasoning.</p> <p>14 Q. What if I told you Ken Birrell, in the law</p> <p>15 firm Kirton McConkie, sent a cease and desist letter</p> <p>16 to Mr. Johnson telling him to -- telling Mr. Johnson</p> <p>17 to cease using what you refer to as Exhibit E, the</p> <p>18 Kirton McConkie Tax Opinion Memorandum; is that</p> <p>19 something you would be interested in seeing?</p> <p>20 A. Sure, I would be interested in seeing it.</p> <p>21 Q. Would you be interested in seeing</p> <p>22 Mr. Birrell's deposition transcript?</p> <p>23 A. Sure.</p> <p>24 Q. Okay. Are you familiar with a gentleman</p> <p>25 by the name of Ken Oveson?</p>	<p style="text-align: right;">121</p> <p>1 as a hypothetical, I will withdraw my objection.</p> <p>2 Q. (BY MR. MORAN) You can answer.</p> <p>3 A. Sure, I would be interested in seeing</p> <p>4 that.</p> <p>5 Q. Okay. I'm going to throw two more names</p> <p>6 at you. Do you know Cody Buck?</p> <p>7 A. No.</p> <p>8 Q. Okay. How about Dave Mantyla?</p> <p>9 A. Dave Mantyla?</p> <p>10 Q. Yes.</p> <p>11 A. I know a Mantyla, but now I'm trying to</p> <p>12 remember his first name. But I don't think it's</p> <p>13 Dave.</p> <p>14 Q. It might be Don?</p> <p>15 A. Don. I know Don.</p> <p>16 Q. Don Mantyla is Dave Mantyla's father.</p> <p>17 A. Okay. I don't know Dave.</p> <p>18 Q. Okay. I'll represent to you that</p> <p>19 Mr. Buck and Mr. Dave Mantyla were also formerly</p> <p>20 employed at Mantyla McReynolds and they gave</p> <p>21 depositions in this case. And that deposition</p> <p>22 testimony is also relevant to Mr. Oveson's testimony.</p> <p>23 Is it -- are the deposition transcripts of</p> <p>24 Mr. Buck and Mr. Mantyla something you would be</p> <p>25 interested in reading?</p>

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<p style="text-align: right;">122</p> <p>1 A. Sure.</p> <p>2 Q. Okay. Any other depositions you reviewed</p> <p>3 beyond what you've already testified to?</p> <p>4 A. No.</p> <p>5 Q. Okay. Why did you only review pieces of</p> <p>6 depositions?</p> <p>7 A. Time, mostly.</p> <p>8 Q. Okay.</p> <p>9 A. I tried to -- once I kind of went through</p> <p>10 the preliminary aspects of the depositions that we've</p> <p>11 gone through here in terms of how a deposition runs</p> <p>12 and various things like that, I didn't go through</p> <p>13 each of those with -- with each individual. I tried</p> <p>14 to skim through as best I could their backgrounds</p> <p>15 and -- but I was -- like I said, I was engaged the</p> <p>16 latter part of August, first part of September for a</p> <p>17 report that was due at the end of September -- or,</p> <p>18 excuse me, was due in the middle of September, and so</p> <p>19 I had to pick and choose what I was able to review.</p> <p>20 Q. Which transcripts were made available to</p> <p>21 you?</p> <p>22 A. So Mr. -- I'm losing his name again.</p> <p>23 Mr....</p> <p>24 Q. The gentleman sitting to your right?</p> <p>25 A. No, no, no. Mr....</p>	<p style="text-align: right;">124</p> <p>1 Q. No, L-u-n-n.</p> <p>2 A. L-u-n-n. No.</p> <p>3 Q. How about Robert Aulds?</p> <p>4 A. That one, yes. That's one of the</p> <p>5 taxpayers that I --</p> <p>6 Q. So you recognize Preston Olsen and</p> <p>7 Robert Aulds?</p> <p>8 A. Yes. I don't think I read a deposition</p> <p>9 from Preston Olsen.</p> <p>10 Q. Okay.</p> <p>11 A. But I do remember reading the deposition</p> <p>12 of Mr. Auld.</p> <p>13 Q. How about Roger Halvorsen?</p> <p>14 A. No.</p> <p>15 Q. Okay. How about John -- I already asked</p> <p>16 you about John Howell.</p> <p>17 Preston Olsen, did you read that</p> <p>18 deposition?</p> <p>19 A. I didn't read his deposition.</p> <p>20 Q. But you recognize the name?</p> <p>21 A. But I recognize the name.</p> <p>22 Q. How do you recognize the name?</p> <p>23 A. His is the contract which I received from</p> <p>24 Mr. Jones.</p> <p>25 Q. Okay.</p>
<p style="text-align: right;">123</p> <p>1 Q. Mr. Jones?</p> <p>2 A. Jamison.</p> <p>3 Q. Jamison --</p> <p>4 A. Mr. Jamison and two taxpayer depositions.</p> <p>5 Again, I can't recall the names.</p> <p>6 Q. But my question is who gave you those</p> <p>7 deposition transcripts.</p> <p>8 A. So Mr. Paul gave me Mr. Jamison's</p> <p>9 transcript. Mr. Jones, Paul Jones, gave me the</p> <p>10 deposition transcripts of his clients.</p> <p>11 Q. Okay. Does the name Peter Gregg ring a</p> <p>12 bell?</p> <p>13 A. Peter --</p> <p>14 Q. Peter Gregg?</p> <p>15 A. Gregg?</p> <p>16 Q. If it doesn't, that's fine.</p> <p>17 A. No, it does not.</p> <p>18 Q. Preston Olsen?</p> <p>19 A. Preston Olsen does ring a bell.</p> <p>20 Q. How about Bryan Zeleznik?</p> <p>21 A. No, that doesn't.</p> <p>22 Q. How about Frank Lunn?</p> <p>23 A. Frank Lund?</p> <p>24 Q. Lunn.</p> <p>25 A. With a D?</p>	<p style="text-align: right;">125</p> <p>1 A. In --</p> <p>2 Q. The Equipment Purchase Agreement?</p> <p>3 A. The Equipment Purchase Agreement. And I</p> <p>4 believe the Operation and Maintenance Agreement as</p> <p>5 well.</p> <p>6 Q. Did you read the deposition of PacifiCorp?</p> <p>7 A. No.</p> <p>8 Q. How about Mike Penn?</p> <p>9 A. No.</p> <p>10 Q. How about Robert Rowbotham?</p> <p>11 A. No.</p> <p>12 Q. How about Matthew Shepard?</p> <p>13 A. No.</p> <p>14 Q. How about Lynette Williams?</p> <p>15 A. No.</p> <p>16 Q. After I just ran through that list, do you</p> <p>17 recall whose deposition transcripts you reviewed?</p> <p>18 A. I do recall reviewing Mr. Auld's. A-u-l-d</p> <p>19 I believe is how you spell it.</p> <p>20 Q. Okay.</p> <p>21 A. I don't recall the other one.</p> <p>22 Q. Okay. Do you remember any characteristics</p> <p>23 of that other deposition, for example, where the</p> <p>24 taxpayer lived, what case they were deposed in?</p> <p>25 A. No.</p>

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<p style="text-align: right;">126</p> <p>1 Q. When the deposition was taken?</p> <p>2 A. No, I don't.</p> <p>3 Q. But you said there was -- you received</p> <p>4 those two transcripts from Mr. Paul?</p> <p>5 A. Yes.</p> <p>6 MR. PAUL: No.</p> <p>7 THE WITNESS: I mean -- sorry. Paul</p> <p>8 Jones.</p> <p>9 Q. (BY MR. MORAN) You received them from</p> <p>10 Paul Jones?</p> <p>11 A. Right.</p> <p>12 Q. All right. So wouldn't those deposition</p> <p>13 transcripts be responsive to the United States'</p> <p>14 subpoena?</p> <p>15 A. I guess potentially they could. I did not</p> <p>16 reference them here.</p> <p>17 Q. I think we asked for --</p> <p>18 A. Right, anything I reviewed.</p> <p>19 Q. Yes.</p> <p>20 A. Right.</p> <p>21 Q. Can you produce those transcripts to the</p> <p>22 United States?</p> <p>23 A. Absolutely. Absolutely.</p> <p>24 Q. All right. Mr. Hawes, would you agree</p> <p>25 with me that your expert report is couched in terms</p>	<p style="text-align: right;">128</p> <p>1 which judge is assigned to this case?</p> <p>2 A. I believe it's David Nuffer.</p> <p>3 Q. Okay. Are you familiar in any way with</p> <p>4 Judge Nuffer?</p> <p>5 A. Yes, I know him.</p> <p>6 Q. How do you know him?</p> <p>7 A. When I clerked at the federal district</p> <p>8 court here in Utah, he was a magistrate judge. He</p> <p>9 has also been a past president of the Utah State Bar.</p> <p>10 I don't have, really, any personal interaction with</p> <p>11 him. I know him more from him being a judge and him</p> <p>12 being a -- the president of the bar.</p> <p>13 Q. Have you ever spoken to him?</p> <p>14 A. I'm sure I did back when we were at</p> <p>15 court -- or when I was at the court. I don't recall</p> <p>16 ever speaking to him since then.</p> <p>17 Q. Okay. So you've never appeared before</p> <p>18 him?</p> <p>19 A. No.</p> <p>20 Q. Do you have an opinion of Judge Nuffer?</p> <p>21 A. I like Judge Nuffer.</p> <p>22 Q. How come?</p> <p>23 A. I -- it's been a while, but I -- I had no</p> <p>24 complaints about Judge Nuffer.</p> <p>25 Q. All right.</p>
<p style="text-align: right;">127</p> <p>1 of whether or not you would recommend clients take a</p> <p>2 particular position on their tax return?</p> <p>3 A. Yes.</p> <p>4 Q. Okay. And that's the question you were</p> <p>5 given by Paul Jones?</p> <p>6 A. Yes.</p> <p>7 Q. Okay. You've also read the Complaint in</p> <p>8 this case?</p> <p>9 A. Yes.</p> <p>10 Q. And you've also testified that you made</p> <p>11 yourself familiar with 6700 for the first time</p> <p>12 pursuant to this case?</p> <p>13 A. Refamiliarized myself with 6700.</p> <p>14 Q. You were familiar with it before?</p> <p>15 A. Through law school primarily.</p> <p>16 Q. All right. I have to ask you, why does</p> <p>17 your hypothetical (indistinguishable) and a</p> <p>18 hypothetical client matter to this case?</p> <p>19 A. I think it -- it goes to whether or not</p> <p>20 tax credits were properly taken in this case, which</p> <p>21 as my understanding is a -- is at issue in this case.</p> <p>22 Q. Who is going to decide whether or not the</p> <p>23 tax credits at issue were appropriately taken?</p> <p>24 A. Ultimately I assume a judge will.</p> <p>25 Q. Okay. Do you know who the judge is --</p>	<p style="text-align: right;">129</p> <p>1 A. Not that my complaints mean anything.</p> <p>2 Q. So are you aware of some reason that Judge</p> <p>3 Nuffer lacks the legal expertise to decide whether or</p> <p>4 not the tax credits at issue in this case were</p> <p>5 appropriately taken?</p> <p>6 MR. PAUL: Objection. Relevance.</p> <p>7 THE WITNESS: I am not aware.</p> <p>8 Q. (BY MR. MORAN) So, as far as you know,</p> <p>9 Judge Nuffer is completely equipped to decide this</p> <p>10 case and apply the law to the facts of this case?</p> <p>11 A. As far as I know, yes.</p> <p>12 Q. Okay. So why does he need you?</p> <p>13 MR. PAUL: Objection. Argumentative.</p> <p>14 You don't have to answer that if you don't</p> <p>15 want to.</p> <p>16 MR. MORAN: You do have to.</p> <p>17 MR. PAUL: No, he doesn't. You're arguing</p> <p>18 with him about why he's necessary in the case.</p> <p>19 MR. MORAN: I want to know why he thinks</p> <p>20 he's necessary to this case.</p> <p>21 Q. What help are you going to offer the trier</p> <p>22 of fact?</p> <p>23 MR. PAUL: He's already mentioned that.</p> <p>24 Your question was why does Nuffer need you.</p> <p>25 Q. (BY MR. MORAN) I'll withdraw the question</p>

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<p style="text-align: right;">130</p> <p>1 as to why does Judge Nuffer need you, but I will ask, 2 how will you -- your expertise be helpful to the 3 trier of facts in this case?</p> <p>4 A. Well, I think it's -- triers of fact are 5 always looking for help in understanding -- I mean, 6 judges do -- judges have to -- well often are dealing 7 with situations, laws that they don't have every 8 other day with them, so any sort of input that can 9 help in that regard would -- would help a judge make 10 his decision.</p> <p>11 Q. Do you think Judge Nuffer doesn't have a 12 law clerk?</p> <p>13 A. I'm sure he does.</p> <p>14 Q. Are both sides of this case not 15 represented by competent counsel?</p> <p>16 A. I -- you all appear to be very competent, 17 in my opinion.</p> <p>18 Q. So I ask you again, why is your legal 19 expertise helpful to the trier of fact in this case?</p> <p>20 A. Just helps him understand the tax codes 21 that he may not have experience with or have dealt 22 with.</p> <p>23 Q. So you don't think Judge Nuffer's able to 24 comprehend the tax code at issue in this case?</p> <p>25 MR. PAUL: Objection. That's</p>	<p style="text-align: right;">132</p> <p>1 A. Yes.</p> <p>2 Q. In the district of Utah?</p> <p>3 A. Right.</p> <p>4 Q. Are you a judge in the district of Utah?</p> <p>5 A. Not last time I checked, no.</p> <p>6 Q. Okay. Any reason that you're aware of 7 that Judge Nuffer couldn't consult with one of his 8 fellow judges appointed to the district court for the 9 district of Utah?</p> <p>10 A. Nope.</p> <p>11 Q. Okay. You've testified that you consulted 12 statutes, cases, regulations, other evidence that may 13 or may not be admissible. Is there any reason that 14 you are aware of that Judge Nuffer couldn't do 15 exactly what you did?</p> <p>16 A. No, nothing that I'm aware of.</p> <p>17 Q. Okay. So he's equally equipped as you to 18 apply the law to the facts of this case?</p> <p>19 A. Other than he -- he hasn't practiced as a 20 tax attorney, to my knowledge. I'm -- I'm saying 21 that without knowing his prior practice.</p> <p>22 Q. What do you know about Judge Nuffer's 23 prior practice?</p> <p>24 A. The only interaction I have with him is 25 where he's been a magistrate judge. That's -- that's</p>
<p style="text-align: right;">131</p> <p>1 argumentative. I'm going to object.</p> <p>2 You don't have to answer that question if 3 you don't want to.</p> <p>4 THE WITNESS: I have full confidence in -- 5 there is nothing I know about Judge Nuffer that would 6 tell me that he's not a capable jurist. I know when 7 I clerked for a judge we always appreciated if we 8 could find information from others who had maybe more 9 experience in the field that was helpful.</p> <p>10 Q. (BY MR. MORAN) Okay. When you clerked 11 for Judge Benson, do you ever recall an attorney 12 offering legal expertise to be recognized as an 13 expert?</p> <p>14 A. No, I do not.</p> <p>15 Q. Okay. In your capacity clerking for 16 Judge Benson did you ever feel like Judge Benson 17 needed outside legal expertise from a lawyer expert?</p> <p>18 A. I know there were several times where he 19 would ask -- and maybe it's not outside attorneys, 20 but other judges who may have had issues dealing with 21 certain aspects of the law that -- that it was a 22 first impression for him, so...</p> <p>23 Q. Other judges on the court?</p> <p>24 A. Yes.</p> <p>25 Q. Okay.</p>	<p style="text-align: right;">133</p> <p>1 the earliest I have dealt with Judge Nuffer. I don't 2 know what he did before then.</p> <p>3 Q. Do you have any familiarity with his 4 dockets when he was a magistrate judge?</p> <p>5 A. Only on occasion when cases that I had -- 6 or that my court was dealing with were down at the 7 magistrate level.</p> <p>8 Q. Do you know if Judge Nuffer has ever had a 9 tax case before?</p> <p>10 A. I don't know.</p> <p>11 Q. You might want to take a look at United 12 States v. McBride.</p> <p>13 Do you have any engineering expertise?</p> <p>14 A. No.</p> <p>15 Q. Okay. Do you have any expertise in solar 16 energy?</p> <p>17 A. No.</p> <p>18 Q. Do you have any expertise in solar process 19 heat?</p> <p>20 A. No.</p> <p>21 Q. Have you ever provided legal advice to any 22 defendant in this case?</p> <p>23 A. No.</p> <p>24 Q. How about to anyone who has purchased 25 lenses from the defendant in this case?</p>

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<p style="text-align: right;">134</p> <p>1 A. Not that I know of. My understanding is 2 there are potentially hundred -- hundreds of 3 taxpayers. I don't know who they are, all of them, 4 so I don't know if I've ever provided tax advice or 5 any legal advice to -- to anyone. 6 Q. Okay. 7 A. I haven't looked at all of them. 8 Q. Have you ever heard of RaPower3 before 9 August of this year? 10 A. I recall a newspaper article just flashing 11 through my -- or seeing it briefly, a headline that 12 was a couple of years ago. But other than that, no. 13 Q. Okay. Had you ever heard of 14 Neldon Johnson before August of 2017? 15 A. No. 16 Q. How about Greg Shepard? 17 A. No. 18 Q. Okay. You may have testified to this 19 earlier when we were talking about the subpoena, but 20 I just want to make it clear. Do you have any 21 ownership interest in a defendant in this case? 22 A. No. 23 Q. Okay. How about SOLCO? 24 A. No. 25 Q. Are you an officer or director of any</p>	<p style="text-align: right;">136</p> <p>1 electricity or any other useable product, is that 2 something you would be interested in? 3 A. Did you say "if"? 4 Q. If such a report existed. 5 A. Certainly I would be interested in reading 6 it. 7 Q. Okay. Would that possibly change your 8 opinions in this case? 9 A. Possibly, but, as we mentioned before, I'm 10 not sure that -- I don't think the credit requires 11 that electricity be currently made. 12 Q. Okay. Did you ask either Mr. Jones or 13 Mr. Paul for any additional materials that you would 14 have found helpful in preparing your report? 15 A. Beyond what I've already talked about? 16 Q. Yes. 17 A. Beyond what I've already talked about them 18 giving me, no. 19 Q. And what they've given you is listed in 20 Schedule A of your expert report? 21 A. Some of it is in there, yes. Or -- well, 22 I should say schedule A includes things they did not 23 give me. 24 Q. Okay. There were other things that you 25 obtained from a website?</p>
<p style="text-align: right;">135</p> <p>1 defendant in this case? 2 A. No. 3 Q. Okay. Have you ever heard of an entity 4 called Cobblestone? 5 A. Cobblestone? No, I have not. 6 Q. Okay. Do you own any lenses that were 7 purchased from a defendant in this case? 8 A. No. 9 Q. How about members of your family? 10 A. No, as far as I know. I have -- I have 11 lots of cousins, brothers and sisters. I have no 12 idea if they've bought, but as far as I know, no. 13 Q. Okay. Are you aware of a gentleman by the 14 name of Dr. Thomas Mancini? 15 A. No. 16 Q. Never heard that name before? 17 A. Never heard that name. 18 Q. Okay. Have you ever read an expert report 19 in this case that was provided by the United States? 20 A. No. 21 Q. Now, if there was an expert report 22 provided by an expert for the United States that 23 says, in substance, Mr. Johnson's technologies, in 24 particular, his solar lenses, have never worked, does 25 not work now and never will work to produce</p>	<p style="text-align: right;">137</p> <p>1 A. Right. 2 Q. Or statutes you may have looked up by 3 yourself? 4 A. Right. Correct. 5 Q. Okay. But was there anything else that 6 you would have liked to have seen that you didn't 7 see? For example, our report from the United States 8 expert, would you be interested in reading that? 9 A. I would be interested in reading it. 10 Again, I don't know if it would change my opinion -- 11 Q. Okay. 12 A. -- but I'd be interested in reading it. 13 Q. Okay. Have you or will you ask 14 defendants' attorney for a copy of that? 15 A. I have not done so, but I certainly will. 16 Q. Okay. 17 A. Is that the only expert report submitted 18 by the United States? 19 Q. I will represent to you that the United 20 States has only submitted one expert report in this 21 case. 22 A. Okay. 23 Q. All right. Whenever an expert writes a 24 report, they usually make some assumptions, and 25 you've already testified to some of them. You -- we</p>

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<p style="text-align: right;">138</p> <p>1 talked about -- I think it was Exhibits G and H</p> <p>2 referenced in Schedule A to your report. Exhibits G</p> <p>3 and H, which are the Holy Grail of Solar Energy by</p> <p>4 Neldon Johnson, and Exhibit H is the New Solar Energy</p> <p>5 Breakthrough May Compete with Gas, from iaus.com.</p> <p>6 Are there any other assumptions that you</p> <p>7 made in this case?</p> <p>8 A. I -- I assumed any taxpayer -- or any</p> <p>9 purchaser would purpose under these agreements</p> <p>10 that --</p> <p>11 Q. Okay.</p> <p>12 A. -- have been listed.</p> <p>13 Q. When you say "these agreements," you are</p> <p>14 referring to Exhibits A and B?</p> <p>15 A. A and B, yes.</p> <p>16 Q. Okay. Did you assume any of the exhibits</p> <p>17 in Exhibit C are true? Let me withdraw the question.</p> <p>18 Did you prefer that -- did you assume that</p> <p>19 any statements appearing in Exhibit C to your report</p> <p>20 are true?</p> <p>21 A. Let me just look at that real quick. Yes,</p> <p>22 I did assume that those were true.</p> <p>23 Q. All the statements in Exhibit C?</p> <p>24 A. There is nothing here that I can -- that I</p> <p>25 find that I didn't -- that I had an issue with, so,</p>	<p style="text-align: right;">140</p> <p>1 client had a trade or business?</p> <p>2 A. That's correct.</p> <p>3 Q. Okay. And you referred to what's commonly</p> <p>4 known as the Section 183 factors?</p> <p>5 A. Yes.</p> <p>6 Q. Okay. Have you ever heard of a case</p> <p>7 called Nickeson v. Commissioner?</p> <p>8 A. That does not ring a bell.</p> <p>9 MR. MORAN: Okay. I'm going to mark this</p> <p>10 as an exhibit and represent to you that this is a</p> <p>11 copy of the case Nickeson v. Commissioner, 962 F.2d</p> <p>12 973 from the Tenth Circuit.</p> <p>13 Madam Court Reporter, can we mark that as</p> <p>14 an exhibit?</p> <p>15 (EXHIBIT 654 WAS MARKED.)</p> <p>16 I think now is a good time for a lunch</p> <p>17 break.</p> <p>18 Mr. Hawes, I would ask you during the</p> <p>19 break to take some time, review this case -- it's</p> <p>20 relatively short -- and when we come back, we'll</p> <p>21 start out with some questions on Nickeson.</p> <p>22 THE WITNESS: All right.</p> <p>23 MR. MORAN: Be back here at 1:15.</p> <p>24 (A break was taken from 12:16 p.m. to</p> <p>25 1:11 p.m.)</p>
<p style="text-align: right;">139</p> <p>1 yes.</p> <p>2 Q. Okay. All right. Mr. Hawes, overall, I</p> <p>3 take from your report that you assume -- and you</p> <p>4 explained why, but you assume that your hypothetical</p> <p>5 client has a trade or business. Is that a fair</p> <p>6 characterization of your report?</p> <p>7 A. At least has or would create one in -- in</p> <p>8 entering into this transaction.</p> <p>9 Q. Okay. If it turns out -- and I'm not</p> <p>10 going to ask you to agree with me now -- but if it</p> <p>11 turns out that they don't have a trade or business,</p> <p>12 is it fair to say that everything else falls apart,</p> <p>13 that the rest of your conclusions are -- are wrong?</p> <p>14 A. I don't know if I could go that far. It</p> <p>15 would -- it would -- I would go back and look at the</p> <p>16 report and adjust some things, but I don't know if it</p> <p>17 all hinges on whether it's a trade or business.</p> <p>18 Q. Okay. Well, if there is no trade or</p> <p>19 business, can they take depreciation?</p> <p>20 A. Generally not, no.</p> <p>21 Q. Okay. And in order to claim an energy</p> <p>22 credit, you have to have depreciable property, right?</p> <p>23 A. That's correct.</p> <p>24 Q. Okay. And in reviewing your report, when</p> <p>25 you -- you analyzed whether or not this hypothetical</p>	<p style="text-align: right;">141</p> <p>1 MR. MORAN: We're back on.</p> <p>2 Q. Mr. Hawes, did you -- we're back after a</p> <p>3 brief lunch break -- or a less-than-an-hour lunch</p> <p>4 break.</p> <p>5 Did you have occasion to talk to anyone</p> <p>6 about the facts of the case during the break?</p> <p>7 A. Yes, I spoke with Mr. Paul here.</p> <p>8 Q. What did you talk about?</p> <p>9 A. We talked about primarily the case that</p> <p>10 you had given us to -- to review and how it might</p> <p>11 impact -- or how it is related to this case, if at</p> <p>12 all.</p> <p>13 Q. Okay. What did Mr. Paul say?</p> <p>14 A. He just pointed out some of the things</p> <p>15 with the issues of the facts of that case and -- and</p> <p>16 I read through it, and we talked a little bit about</p> <p>17 how they -- if they are related at all and if there</p> <p>18 is any differences between the facts of that case and</p> <p>19 this case.</p> <p>20 Q. Okay. We'll talk more about that case in</p> <p>21 a minute.</p> <p>22 A. All right.</p> <p>23 Q. Did you talk about anything else?</p> <p>24 A. Other than just general deposition</p> <p>25 demeanor, whether I'm being responsive or not -- that</p>

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<p style="text-align: right;">142</p> <p>1 kind of stuff.</p> <p>2 Q. All right. This morning you testified</p> <p>3 about Jenni Davenport. Do you recall that?</p> <p>4 A. Yes.</p> <p>5 Q. And you said that Paul Jones referred you</p> <p>6 to Jenni Davenport?</p> <p>7 A. Right.</p> <p>8 Q. Okay. And I believe you testified you</p> <p>9 didn't -- Mr. Jones told you she does some work for</p> <p>10 him?</p> <p>11 A. I think she does quite a bit of work for</p> <p>12 him.</p> <p>13 Q. Okay.</p> <p>14 A. I don't -- I don't know the extent. I --</p> <p>15 I got the impression from talking to her that -- I</p> <p>16 don't know if she's full-time in practicing as a</p> <p>17 lawyer. I believe she's a mother --</p> <p>18 Q. Okay.</p> <p>19 A. -- and has children, so I don't know how</p> <p>20 that plays into it, but...</p> <p>21 Q. Do you know where Jenni Davenport works?</p> <p>22 A. I know she does a little work out of her</p> <p>23 home. I know she does have -- she -- when I've gone</p> <p>24 to visit her, she had some office space at</p> <p>25 Paul Jones's law firm.</p>	<p style="text-align: right;">144</p> <p>1 Q. So then Mr. Jones didn't share that with</p> <p>2 you?</p> <p>3 A. He -- no. He just said she does some work</p> <p>4 for him and she's -- and apparently does a lot of</p> <p>5 work for him, and maybe they brought her in as an</p> <p>6 associate.</p> <p>7 Q. Okay. So she didn't tell you she was an</p> <p>8 associate at Hale & Wood law firm?</p> <p>9 A. Not that I -- no, not that I recall.</p> <p>10 Q. Okay. And you testified that Paul Jones</p> <p>11 isn't an expert in this case because he was</p> <p>12 conflicted out?</p> <p>13 A. That's -- well, he felt like that would</p> <p>14 compromise his position as representing the taxpayers</p> <p>15 in the tax court cases.</p> <p>16 Q. Okay. Does Jenni Davenport, who is also</p> <p>17 employed by the same law firm -- does that enter into</p> <p>18 the conflict analysis at all?</p> <p>19 MR. PAUL: Objection. Foundation.</p> <p>20 THE WITNESS: I suppose it could. I don't</p> <p>21 know if she does anything with those tax -- with</p> <p>22 those taxpayer cases.</p> <p>23 Q. (BY MR. MORAN) Did you ask?</p> <p>24 A. I did not.</p> <p>25 Q. And she didn't share?</p>
<p style="text-align: right;">143</p> <p>1 Q. What firm is that?</p> <p>2 A. Hale & Wood.</p> <p>3 Q. Okay. So you know --</p> <p>4 A. Although -- although Paul -- I don't know</p> <p>5 his situation. He has been -- he's been on his own</p> <p>6 firm before his e-mail address -- at least the one</p> <p>7 that I use is pauljonesattorney.net or .com or</p> <p>8 something like that. So I don't know if he's fully a</p> <p>9 partner with that firm or if he is just leasing space</p> <p>10 from them. But -- and I don't know how that's</p> <p>11 changed over the last little while since I looked</p> <p>12 into it.</p> <p>13 Q. Would it surprise you to know that</p> <p>14 Paul Jones' bio appears on Hale & Wood's website?</p> <p>15 A. No, not at all.</p> <p>16 Q. So is it your understanding that Mr. Jones</p> <p>17 is a partner at Hale & Wood law firm?</p> <p>18 A. That was not my understanding, but it</p> <p>19 wouldn't surprise me if he had become a partner.</p> <p>20 Q. Okay. And would it surprise you to know</p> <p>21 that Jenni Davenport is an associate at that same law</p> <p>22 firm?</p> <p>23 A. I guess that wouldn't surprise me, but I</p> <p>24 didn't know the details of that when we talked --</p> <p>25 when I talked to Jenni.</p>	<p style="text-align: right;">145</p> <p>1 A. She didn't share.</p> <p>2 Q. Okay. I want to make sure I understand</p> <p>3 Ms. Davenport's role in the report. She's employed</p> <p>4 by the same firm as Paul Jones who is representing</p> <p>5 the taxpayers in the taxpayer case?</p> <p>6 A. Apparently that is the case, yes.</p> <p>7 Q. Okay. And she did, it sounds like, a</p> <p>8 fairly significant portion of the research that's</p> <p>9 contained in your expert report.</p> <p>10 A. Well, I don't know if it's significant,</p> <p>11 but she -- she did -- she helped me with the</p> <p>12 research. She did a fair amount.</p> <p>13 Q. A fair amount?</p> <p>14 A. Yeah.</p> <p>15 Q. Okay. About how many hours did -- do you</p> <p>16 know how many hours she spent working on your expert</p> <p>17 report?</p> <p>18 A. That I don't know yet. I anticipate</p> <p>19 getting a -- a statement from her that I can include</p> <p>20 in my bill when I -- when I present it to Mr. Paul</p> <p>21 and his firm.</p> <p>22 Q. Okay. So what's the financial arrangement</p> <p>23 with Ms. Davenport?</p> <p>24 A. I'm going to pay her for her time.</p> <p>25 Q. You're going to pay her directly or you're</p>

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<p style="text-align: right;">146</p> <p>1 going to pay Hale & Wood?</p> <p>2 A. We have not discussed that. I anticipated</p> <p>3 that I would just pay her directly.</p> <p>4 Q. But she hasn't sent you an invoice yet?</p> <p>5 A. No.</p> <p>6 Q. Okay. Do you think she's going to?</p> <p>7 A. Yes. If she doesn't, I will insist on it.</p> <p>8 Q. Okay. And then you're going to pass that</p> <p>9 cost on to Mr. Paul?</p> <p>10 A. Yes.</p> <p>11 Q. Do you believe that when an expert -- or a</p> <p>12 purported expert provides an opinion in a case that</p> <p>13 their opinion should be objective?</p> <p>14 A. Sure. Absolutely.</p> <p>15 Q. Okay. Does it concern you at all that</p> <p>16 Ms. Davenport helped you with the report and she is</p> <p>17 employed by the same firm that represents the</p> <p>18 taxpayers who are associated with RaPower3?</p> <p>19 A. Well, no, not necessarily.</p> <p>20 Q. No?</p> <p>21 A. Just because -- the report is my report</p> <p>22 and the analysis is my analysis. She helped me to do</p> <p>23 some research. We had a very short window to turn it</p> <p>24 around, and so that was an effort to try and help me</p> <p>25 to be able to get it done.</p>	<p style="text-align: right;">148</p> <p>1 about whether or not they're engaged in a trade or</p> <p>2 business. I -- perhaps if a taxpayer had told me</p> <p>3 that they wanted to do what the Nickesons were doing,</p> <p>4 I may have came to the same result as -- as the court</p> <p>5 here.</p> <p>6 Q. You may have came to the same result as</p> <p>7 the court here?</p> <p>8 A. Well --</p> <p>9 Q. I mean, this is the Tenth Circuit.</p> <p>10 A. Sure.</p> <p>11 Q. Which circuit are we in?</p> <p>12 A. We're in the Tenth Circuit. Then I would</p> <p>13 have relied on this case and told them that the way</p> <p>14 they were doing it was -- would not be operating a</p> <p>15 trade or business.</p> <p>16 Q. So you reviewed the Nickeson case. And do</p> <p>17 you agree with me that the Tenth Circuit affirmed the</p> <p>18 tax court's analysis of what constitutes trade or</p> <p>19 business?</p> <p>20 A. Yes.</p> <p>21 Q. Okay. Let's look at some of the factors</p> <p>22 the tax court used in the Nickeson case.</p> <p>23 A. Sure.</p> <p>24 Q. The taxpayers in the Nickeson case had no</p> <p>25 independent appraisal of the components that were at</p>
<p style="text-align: right;">147</p> <p>1 Q. Do you think that Ms. Davenport provided</p> <p>2 you with perhaps authority, statutes, cases,</p> <p>3 regulations that were contrary to the opinion that</p> <p>4 you offered in your report?</p> <p>5 A. She didn't provide me with any of those.</p> <p>6 Q. Did she give you the Nickeson case?</p> <p>7 A. She did not.</p> <p>8 Q. Okay. So she just gave you some</p> <p>9 authorities that she found, gave them to you and you</p> <p>10 used them in your report?</p> <p>11 A. Yep.</p> <p>12 Q. Okay.</p> <p>13 MS. HEALY GALLAGHER: Yes.</p> <p>14 THE WITNESS: Yes.</p> <p>15 Q. (BY MR. MORAN) All right. So you had a</p> <p>16 chance to take a look at the Nickeson case?</p> <p>17 A. Yes, I did.</p> <p>18 Q. Okay. How, if at all, does the Nickeson</p> <p>19 case change your conclusions that you reached in your</p> <p>20 report?</p> <p>21 A. I don't think it alters them.</p> <p>22 Q. At all?</p> <p>23 A. No. I think this is a very specific fact</p> <p>24 scenario. And as I'm thinking about counseling the</p> <p>25 hypothetical taxpayers, I'm asking them questions</p>	<p style="text-align: right;">149</p> <p>1 issue.</p> <p>2 Do you agree with that?</p> <p>3 A. Yes, that's listed here.</p> <p>4 Q. Okay. Are you aware of any independent</p> <p>5 appraisal of the lenses that are at issue in this</p> <p>6 case?</p> <p>7 A. No, I'm not.</p> <p>8 Q. Okay. What's your understanding of the</p> <p>9 value of the lenses at issue in this case?</p> <p>10 A. My understanding is the value is -- is the</p> <p>11 price that the parties negotiated in their contract.</p> <p>12 My understanding is also that that price does not</p> <p>13 solely reflect the lenses but reflects other things</p> <p>14 as well.</p> <p>15 Q. What are those other things?</p> <p>16 A. There's guarantee rights, maintenance</p> <p>17 rights, things like that that the taxpayer would also</p> <p>18 be paying for.</p> <p>19 Q. Maintenance rights and guarantee rights?</p> <p>20 A. Right.</p> <p>21 Q. Who does the maintenance?</p> <p>22 A. The -- my understanding is it is the --</p> <p>23 the lessee, LTB1, whoever is the -- the operator --</p> <p>24 under the O and M agreement, the operations and</p> <p>25 management agreement.</p>

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<p style="text-align: right;">150</p> <p>1 Q. What does that have to do with the value</p> <p>2 of the lens that was purchased, because the lessor</p> <p>3 pays the taxpayer, right? So how do the maintenance</p> <p>4 agreements -- how does that increase the value of the</p> <p>5 lens?</p> <p>6 A. Well, I -- I assumed that that's part of</p> <p>7 the value that comes along with it. As you enter in</p> <p>8 this transaction you are -- you're buying those other</p> <p>9 services that go along with it.</p> <p>10 Q. You assume that. Why do you assume that?</p> <p>11 A. Because those are listed in the contract.</p> <p>12 Q. Which contract?</p> <p>13 A. Both contracts.</p> <p>14 Q. The right to lease to LTB?</p> <p>15 A. Well, there's -- there's -- there's a --</p> <p>16 my memory of it is there's a guarantee that if --</p> <p>17 Q. You could look.</p> <p>18 A. Sure. There's a guarantee that if</p> <p>19 something happens to these lenses they'll be</p> <p>20 replaced.</p> <p>21 Q. By who?</p> <p>22 A. For -- I believe by RaPower3 under the</p> <p>23 purchase --</p> <p>24 Q. RaPower3 is going to replace the lenses?</p> <p>25 A. That's my memory, but I will check.</p>	<p style="text-align: right;">152</p> <p>1 price other than \$3,500?</p> <p>2 A. No.</p> <p>3 Q. So are you aware of any facts that suggest</p> <p>4 that a person buying lenses could actually negotiate</p> <p>5 the price?</p> <p>6 A. No. My experience is that anybody can</p> <p>7 always try and negotiate anything. I don't think --</p> <p>8 I'm not aware of any instance where any negotiations</p> <p>9 were -- there was an effort made to make</p> <p>10 negotiations, and if so, if those were successful.</p> <p>11 Q. So how would you use the term "negotiate"?</p> <p>12 It sounds like they offered the lenses for sale at</p> <p>13 \$3,500 and people either bought them or they didn't.</p> <p>14 A. Well, it's the same thing with, like,</p> <p>15 buying a car. There is a sticker price on it, but I</p> <p>16 can walk in and say, "I'll give you this much," and</p> <p>17 we can try and negotiate. And one party can -- they</p> <p>18 can negotiate and come to a different price or either</p> <p>19 I or the -- or the car dealer can say, "I won't</p> <p>20 change," and so they don't buy.</p> <p>21 Q. Okay. Are you aware of -- I'll ask the</p> <p>22 question again. Are you aware of any RaPower3</p> <p>23 customer purchasing a lens for a price other than</p> <p>24 \$3,500?</p> <p>25 A. No, I am not.</p>
<p style="text-align: right;">151</p> <p>1 Q. Please do. Mr. Hawes, I'll give you</p> <p>2 another minute, but we've got a lot to talk about.</p> <p>3 A. I apologize. I do know in Exhibit A --</p> <p>4 this I guess would be the 2010 agreement -- there</p> <p>5 is -- paragraph eight is a warranty. Seller -- in</p> <p>6 this case -- seller is RaPower3 -- warrants to -- for</p> <p>7 35 years that the alternative energy system shall</p> <p>8 remain in good and operating condition.</p> <p>9 Q. Okay. So it's your understanding that the</p> <p>10 value of the lens is \$3,500?</p> <p>11 A. The value of the lens and the other</p> <p>12 aspects that they are buying.</p> <p>13 Q. And the other aspects are the maintenance</p> <p>14 and the warranty of the lens?</p> <p>15 A. Those are -- there might be others in</p> <p>16 here, but those are the two big ones that I -- that</p> <p>17 jumped out at me.</p> <p>18 Q. And I think previously you testified that</p> <p>19 that price was negotiated between the purchasers and</p> <p>20 the sellers?</p> <p>21 A. I -- that's my understanding. I</p> <p>22 understand that the -- that the arrangement was --</p> <p>23 that RaPower3 was advertising these as selling them</p> <p>24 for \$3,500.</p> <p>25 Q. Are you aware of them selling them for any</p>	<p style="text-align: right;">153</p> <p>1 Q. Are you aware of any attempt to negotiate</p> <p>2 a price other than \$3,500?</p> <p>3 A. No, I am not.</p> <p>4 Q. Did you ask anyone who you talked to in</p> <p>5 preparing your expert report?</p> <p>6 A. No, I didn't.</p> <p>7 Q. Mr. Hawes, I'm handing you what's been</p> <p>8 marked in a previous deposition as Exhibit 518. I</p> <p>9 don't know if you've ever seen this document before.</p> <p>10 Have you?</p> <p>11 A. I have not.</p> <p>12 Q. Okay. Exhibit 518 is a document that was</p> <p>13 produced by RaPower3. It appears to me, at least,</p> <p>14 that the price of each lens was \$52.18 and was</p> <p>15 obtained from Plaskolite.</p> <p>16 A. Okay.</p> <p>17 Q. Does Exhibit 518 affect your opinion on</p> <p>18 the value -- the value of the lenses we're talking</p> <p>19 about today?</p> <p>20 A. Absolutely not.</p> <p>21 Q. No. Why is that?</p> <p>22 A. Because the price is whatever anybody will</p> <p>23 pay for it.</p> <p>24 Q. Okay.</p> <p>25 A. If I could sell this piece of paper for a</p>

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<p style="text-align: right;">154</p> <p>1 million dollars and somebody would pay for that, I</p> <p>2 would do it. It -- but it's -- price is just a</p> <p>3 function of what somebody is willing to pay for it.</p> <p>4 Q. Okay. So, again, in Nickeson there was --</p> <p>5 the tax court analyzed an independent appraisal of</p> <p>6 the property at issue. Are you aware of any</p> <p>7 independent appraisals of the value of these lenses?</p> <p>8 A. I'm not.</p> <p>9 Q. Okay. So how do you explain the</p> <p>10 difference between the purchase price of \$52 from</p> <p>11 Plaskolite and when RaPower3 offers them to members</p> <p>12 of the public for \$52 with a bunch of tax benefits?</p> <p>13 A. Well, again, I'm -- I'm looking at that</p> <p>14 warranty. They've got -- they are on the hook for 35</p> <p>15 years of replacing these if they get broken, for</p> <p>16 nothing. So that's -- that's a substantial cost that</p> <p>17 RaPower3 is -- is promised to do, and my guess is</p> <p>18 they are trying to recoup some of that cost up front.</p> <p>19 Q. It's a substantial cost? It cost them \$52</p> <p>20 for a lens. They would have to replace this thing, I</p> <p>21 don't know, 30 times.</p> <p>22 MR. PAUL: Objection. Argumentative.</p> <p>23 THE WITNESS: Thirty times over 35 years,</p> <p>24 that may not have been all that unreasonable.</p> <p>25 Q. (BY MR. MORAN) What do you know about the</p>	<p style="text-align: right;">156</p> <p>1 took the facts they gave you and assumed that \$3,500</p> <p>2 was the actual value?</p> <p>3 A. Well, it was the price.</p> <p>4 Q. It was the price, but what about the</p> <p>5 actual value? Because, as you know, value matters in</p> <p>6 transactions when we're considering tax implications,</p> <p>7 right?</p> <p>8 A. Okay. So I -- well, I guess I'm assuming</p> <p>9 that the taxpayers who purchased that and paid that</p> <p>10 price valued those at \$3,500 apiece.</p> <p>11 Q. Are the taxpayers who are a party to that</p> <p>12 transaction, are they independent?</p> <p>13 A. Not -- not in the sense that they are a</p> <p>14 party to the transaction.</p> <p>15 Q. Okay. So does that affect your analysis</p> <p>16 under -- I mean, the Tenth Circuit has -- has said,</p> <p>17 We consider whether or not there is an independent</p> <p>18 appraisal of the property at issue. Does that affect</p> <p>19 your conclusion in this case?</p> <p>20 A. It could have some impact on it, but I</p> <p>21 don't think the Tenth Circuit says that that is the</p> <p>22 only consideration.</p> <p>23 Q. Okay. We're going to talk about it some</p> <p>24 more.</p> <p>25 A. Okay.</p>
<p style="text-align: right;">155</p> <p>1 cost of providing the warranty services and the</p> <p>2 maintenance services that you say make up the</p> <p>3 difference between \$52 and 3,500?</p> <p>4 A. I -- I don't have any details about what</p> <p>5 efforts they've had to make to -- to warranty or to</p> <p>6 replace lenses.</p> <p>7 I do know that when I was there I did see</p> <p>8 some lenses that were broken on the -- what I'm</p> <p>9 terming the research and development side. So I</p> <p>10 imagine that -- that those would have to be replaced.</p> <p>11 Q. I want to -- I'm looking for some</p> <p>12 dollars -- dollar figures here.</p> <p>13 A. Sure.</p> <p>14 Q. You know if they get a lens for \$3,500,</p> <p>15 you say there's costs associated with maintaining and</p> <p>16 providing the warranty. I want to understand how you</p> <p>17 jump from \$52 to 3,500.</p> <p>18 A. Well, I'm -- I'm not putting a value on</p> <p>19 the warranty or on the -- on the unit itself.</p> <p>20 Q. Who is?</p> <p>21 A. The -- the parties to the transaction.</p> <p>22 Q. Including the defendants in this case,</p> <p>23 right?</p> <p>24 A. Absolutely.</p> <p>25 Q. Okay. So is it fair to say you assume --</p>	<p style="text-align: right;">157</p> <p>1 Q. Are you aware of any secondary market for</p> <p>2 these lenses?</p> <p>3 A. I am not.</p> <p>4 Q. When I say "secondary market," I mean,</p> <p>5 someone who buys a lens for \$3,500, can they sell it</p> <p>6 to anyone else?</p> <p>7 A. Can they or have they?</p> <p>8 Q. We'll make it a two-part question.</p> <p>9 A. Can they? Yes, I believe they can.</p> <p>10 Q. What makes you say that?</p> <p>11 A. I -- I think under the arrangements they</p> <p>12 could certainly purchase a -- they don't have to -- I</p> <p>13 don't think they're obligated -- well, there may be</p> <p>14 some requirement and I'm -- I'm just doing this being</p> <p>15 fuzzy on the contract, but they have -- they get</p> <p>16 the -- the lens when the lease term is up. So</p> <p>17 they -- the taxpayer buys the lens, makes the</p> <p>18 decision to lease it.</p> <p>19 Now, if they make a decision to lease it</p> <p>20 for a certain amount of time, then -- then certainly</p> <p>21 they wouldn't sell it during that time, unless they</p> <p>22 worked out some arrangement with the lessee.</p> <p>23 Q. You said the taxpayer decides to lease it?</p> <p>24 A. Yes.</p> <p>25 Q. So you are saying they don't have -- they</p>

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<p style="text-align: right;">158</p> <p>1 can buy a lens but not lease it?</p> <p>2 A. I'm sure they could. I'm not aware of any</p> <p>3 taxpayer who's done that, but I'm sure they could.</p> <p>4 Q. I'm going to direct your attention to</p> <p>5 paragraph four of the equipment and operations -- I'm</p> <p>6 sorry. Paragraph four of the Equipment Purchase</p> <p>7 Agreement that is attached to your report.</p> <p>8 Are you with me?</p> <p>9 A. Yep.</p> <p>10 Q. "The alternative energy system shall be</p> <p>11 placed in operation only at and operated only at the</p> <p>12 installation site and shall be operated and managed</p> <p>13 for the installment period by an independent</p> <p>14 operations management company."</p> <p>15 Did I read that correctly?</p> <p>16 A. Yes.</p> <p>17 Q. So it sounds to me like if I buy a lens</p> <p>18 that's what I shall do, I shall have it installed at</p> <p>19 this installation site.</p> <p>20 Is that -- is that your understanding as</p> <p>21 well?</p> <p>22 A. That appears to be what this contract</p> <p>23 says.</p> <p>24 Q. Okay. So if I buy a lens, can I bring it</p> <p>25 home and put it in my backyard and look at it, maybe</p>	<p style="text-align: right;">160</p> <p>1 right?</p> <p>2 A. Under this -- under this document, yes.</p> <p>3 Q. Okay. So why would there be a secondary</p> <p>4 market for this?</p> <p>5 A. Maybe after the lease agreement is up.</p> <p>6 Q. In 35 years?</p> <p>7 A. Sure.</p> <p>8 Q. Okay. Any reason you believe that? I</p> <p>9 mean, did you talk to anyone about what the secondary</p> <p>10 market might be like in 35 years?</p> <p>11 A. No.</p> <p>12 Q. Okay.</p> <p>13 A. No. It's new technology, is my</p> <p>14 understanding, so who knows what the market will be</p> <p>15 like in 30, 35 years.</p> <p>16 Q. So you have no facts to support your</p> <p>17 conclusion that there is a secondary market for these</p> <p>18 lenses?</p> <p>19 A. That's correct.</p> <p>20 Q. Okay. Back to the Nickeson case. Would</p> <p>21 you agree with me that the Tenth Circuit affirmed the</p> <p>22 tax court's decision that when a purchase agreement</p> <p>23 emphasizes tax benefits associated with a</p> <p>24 transaction, that is a -- that there is a negative</p> <p>25 inference as to whether or not there is an actual</p>
<p style="text-align: right;">159</p> <p>1 burn some cardboard boxes?</p> <p>2 A. I -- my understanding was that there</p> <p>3 was -- if you could give me one second to just look</p> <p>4 through this.</p> <p>5 Okay. Sorry. Would you ask your question</p> <p>6 again?</p> <p>7 MR. MORAN: Can you read the last question</p> <p>8 back?</p> <p>9 (Record was read as follows: "So if I buy</p> <p>10 a lens, can I bring it home and put it in my</p> <p>11 backyard and look at it, maybe burn some</p> <p>12 cardboard boxes?")</p> <p>13 THE WITNESS: If you go through with the</p> <p>14 full -- I mean, there is a right of revocation,</p> <p>15 paragraph 29. So they can revoke the -- the purchase</p> <p>16 price, but if -- it appears that if you agree to this</p> <p>17 Equipment Purchase Agreement, then part of that is</p> <p>18 you're also agreeing to -- to lease the -- lease the</p> <p>19 lenses.</p> <p>20 Q. (BY MR. MORAN) Okay. And then paragraph</p> <p>21 29 that you just referred to has a revocation period</p> <p>22 of 14 days; is that right?</p> <p>23 A. That's correct.</p> <p>24 Q. So if I buy a lens and 14 days go by, I</p> <p>25 have got to lease it to this operations company,</p>	<p style="text-align: right;">161</p> <p>1 trade or business?</p> <p>2 A. I am looking at the case --</p> <p>3 Q. I direct your attention to paragraph four</p> <p>4 on page 4 of the Nickeson case.</p> <p>5 A. Yes, I'm seeing that here.</p> <p>6 Q. Okay. So you agree with me that that's --</p> <p>7 that the Tenth Circuit affirmed that when a</p> <p>8 transaction is promoted with tax benefits, there's</p> <p>9 a -- that's a factor that suggests there is no trade</p> <p>10 or business?</p> <p>11 A. That's a factor that they considered, yes.</p> <p>12 Q. Mr. Hawes, I'm handing you what's been</p> <p>13 marked for identification in a previous deposition as</p> <p>14 Plaintiff's Exhibit 20.</p> <p>15 Mr. Hawes, do you recognize Plaintiff's</p> <p>16 Exhibit 20?</p> <p>17 A. I have seen this, yes.</p> <p>18 Q. Where did you see it?</p> <p>19 A. On RaPower3's website.</p> <p>20 Q. All right. What is Exhibit 20?</p> <p>21 A. It's got a title that says -- it's a</p> <p>22 calculator, basically. "Turn Your Tax Liabilities</p> <p>23 Into Assets," it's called. And it's the -- the --</p> <p>24 it's used to calculate tax benefits.</p> <p>25 Q. Okay. So would you agree with me that</p>

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<p style="text-align: right;">162</p> <p>1 this is a calculator provided by the defendants in</p> <p>2 this case to determine how many lenses you need to</p> <p>3 buy to zero out your tax liability?</p> <p>4 A. Yes, I believe it is.</p> <p>5 Q. Okay. You said you recognized Exhibit 20.</p> <p>6 How do you recognize it?</p> <p>7 A. Just from looking on the website.</p> <p>8 Q. Okay. So you saw this before you drafted</p> <p>9 your expert report?</p> <p>10 A. Yes.</p> <p>11 Q. Did it factor into your decision at all</p> <p>12 or did -- let me rephrase.</p> <p>13 Did the tax calculator on the RaPower3</p> <p>14 website affect the conclusions you drew?</p> <p>15 A. I knew it was there, but I -- I think -- I</p> <p>16 mean, I drew those conclusions knowing it was there.</p> <p>17 So it had an impact on them, but it didn't -- it</p> <p>18 didn't drive the overall conclusions that I made.</p> <p>19 Q. Did it have any effect?</p> <p>20 A. Sure.</p> <p>21 Q. What was that effect?</p> <p>22 A. Well, you'd have -- if -- if a taxpayer</p> <p>23 was -- I mean, each taxpayer is different. But if</p> <p>24 the only issue that they are dealing with is tax</p> <p>25 benefits, then I might look at that taxpayer a little</p>	<p style="text-align: right;">164</p> <p>1 I'd have some discussions with them and say, "That</p> <p>2 might not be the best way to do this."</p> <p>3 Q. Okay. Now, tell me this. Do you have any</p> <p>4 knowledge of what RaPower3 -- or whoever created this</p> <p>5 calculator on RaPower3's behalf -- what did they know</p> <p>6 about people looking at this website and their --</p> <p>7 their own personal tax situations?</p> <p>8 MR. PAUL: Objection. Foundation. Calls</p> <p>9 for speculation.</p> <p>10 Q. (BY MR. MORAN) Do you know?</p> <p>11 A. I don't know.</p> <p>12 Q. Do you think that's an issue in this case?</p> <p>13 A. I suppose it could be an issue.</p> <p>14 Q. Okay.</p> <p>15 A. Again, I was looking at this from trying</p> <p>16 to advise a client, not the mindset of what RaPower3</p> <p>17 was in.</p> <p>18 Q. Oh. Tell me, in this district court case,</p> <p>19 whose actions are at issue, taxpayers who were</p> <p>20 customers of RaPower3 or the defendants?</p> <p>21 A. RaPower -- or the defendants' actions are</p> <p>22 at issue.</p> <p>23 Q. Okay. So, again, I hate to beat this dead</p> <p>24 horse, but what does it matter what RaPower3's</p> <p>25 customers thought or what you would advise some</p>
<p style="text-align: right;">163</p> <p>1 bit differently than somebody else who's looking to</p> <p>2 engage in the solar industry and engage in a trade or</p> <p>3 business.</p> <p>4 Q. You said every taxpayer is different.</p> <p>5 A. (Witness nods head.)</p> <p>6 Q. Is that your testimony?</p> <p>7 A. Absolutely. Yes.</p> <p>8 Q. Okay. So how do you -- how does your</p> <p>9 statement, every taxpayer is different, affect the</p> <p>10 question you were posed to answer in this -- you were</p> <p>11 asked to answer in this case about a hypothetical</p> <p>12 client? Every taxpayer is different --</p> <p>13 A. Sure.</p> <p>14 Q. -- so what value is your opinion?</p> <p>15 A. It -- it -- I'm making some assumptions</p> <p>16 that if taxpayers meet these certain criteria, I</p> <p>17 would advise them to participate in this -- and I've</p> <p>18 tried to list those out in the opinion, that if they</p> <p>19 meet these steps and -- and meet these</p> <p>20 qualifications, then I would advise them to do that.</p> <p>21 Q. Okay. What if they used RaPower3's tax</p> <p>22 calculator to figure out how many lenses to buy and</p> <p>23 zero out their tax liability? Is that something you</p> <p>24 would recommend?</p> <p>25 A. If that was their only consideration, then</p>	<p style="text-align: right;">165</p> <p>1 hypothetical customer? Why does that matter to this</p> <p>2 case?</p> <p>3 A. I think it has some impact on what the</p> <p>4 ultimate issue is in the case, is whether there's an</p> <p>5 abusive tax shelter that they were promoting, which</p> <p>6 is what Judge Nuffer will ultimately be tasked to</p> <p>7 determine.</p> <p>8 Q. He will, won't he?</p> <p>9 A. He's not been asked to determine whether</p> <p>10 or not the credits were valid, whether or not each</p> <p>11 individual taxpayer -- this is my understanding from</p> <p>12 reading the Complaint -- whether each individual</p> <p>13 taxpayer was engaged in a trade or business. He's</p> <p>14 been asked to look at the 6700 issues.</p> <p>15 Q. Okay.</p> <p>16 A. So I guess my opinion would be to help him</p> <p>17 understand the issues that surround -- or at least a</p> <p>18 couple of the issues that surround this ultimate</p> <p>19 issue.</p> <p>20 Q. All right. And you just hit on something</p> <p>21 important. Section 6700 is what this case boils down</p> <p>22 to, right? And you're an expert on that?</p> <p>23 A. That's right.</p> <p>24 Q. Okay.</p> <p>25 A. But I'm not offering an opinion on that.</p>

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<p style="text-align: right;">166</p> <p>1 Q. You're not offering an opinion on 2 Section 6700?</p> <p>3 A. No.</p> <p>4 Q. Okay. And Section 6700, would you agree 5 with me, focuses on what the defendants in this case 6 knew or had reason to know?</p> <p>7 A. I think that's right.</p> <p>8 Q. Okay. What do you know about what the 9 defendants in this case had reason -- knew or had 10 reason to know about their customers' individual tax 11 situations?</p> <p>12 A. I didn't get any of that information.</p> <p>13 Q. Did you ask for it?</p> <p>14 A. No.</p> <p>15 Q. Okay.</p> <p>16 A. I didn't -- that's correct, I did not.</p> <p>17 Q. Would you like to have some information on 18 that?</p> <p>19 A. I -- again, I -- if -- if I was advising 20 an individual taxpayer, I would get that information 21 from that individual taxpayer.</p> <p>22 Q. Okay. I'm handing you what's been marked 23 for identification as Plaintiff's Exhibit 112. This 24 was marked during the deposition of Lynette Williams. 25 I direct your attention to the second</p>	<p style="text-align: right;">168</p> <p>1 Q. Okay. And now we've got an e-mail from 2 Greg Shepard, a defendant in this case, saying, "The 3 first way to make money at RaPower3 is with the tax 4 benefits."</p> <p>5 A. (Witness nods head.)</p> <p>6 Q. Does this -- do you find Exhibit 112 at 7 all concerning in the conclusions you've drawn?</p> <p>8 A. Not necessarily. Number one, it says "the 9 first way," which means there are other ways.</p> <p>10 Q. All right?</p> <p>11 A. Number two, any business transaction takes 12 into account the tax considerations of that 13 transaction.</p> <p>14 Q. Okay.</p> <p>15 A. Any -- any business transaction I've been 16 involved with, any personal transaction, has some tax 17 implications that you try and take care of -- that 18 you try and think through.</p> <p>19 Q. Okay. Tell me, in this document -- and 20 I'll give you a few seconds to look at it, but are 21 any other ways to make money promoted?</p> <p>22 A. Not that I can see specifically.</p> <p>23 Q. Okay. Mr. Hawes, I'm handing you what's 24 been marked for identification as Plaintiff's 25 Exhibit 244. This was marked at the deposition of</p>
<p style="text-align: right;">167</p> <p>1 paragraph. It says, "Thus, it would be in your best 2 interest to help your downline with their taxes. 3 Make sure everything is okay. The first way to make 4 money at RaPower3 is with the tax benefits." 5 Did I read that correctly?</p> <p>6 A. You did.</p> <p>7 Q. Okay. And this appears to be a letter 8 from -- or an e-mail from Greg Shepard?</p> <p>9 A. Correct.</p> <p>10 Q. To Ra3 leaders?</p> <p>11 A. Yes.</p> <p>12 Q. Okay.</p> <p>13 A. Well, to undisclosed recipients, but the 14 subject is Ra3 leaders.</p> <p>15 Q. Thanks for that clarification.</p> <p>16 Does the sentence -- "The first way to 17 make money at RaPower3 is with the tax benefits." 18 Does that mean anything to you?</p> <p>19 A. I'm not sure I understand what you're 20 asking. Well, does it --</p> <p>21 Q. Well, the Tenth Circuit thinks it's 22 interesting and relevant when, as part of a 23 transaction, tax benefits are emphasized. We already 24 agreed on that, I think. 25 A. Yes.</p>	<p style="text-align: right;">169</p> <p>1 Peter Gregg. I don't suppose this document was 2 provided to you, was it?</p> <p>3 A. No, I have not seen this.</p> <p>4 Q. Okay. I'm going to direct your 5 attention -- well, rephrase.</p> <p>6 Exhibit 244 appears to be an e-mail from 7 Greg Shepard to undisclosed recipients. I'll 8 represent to you that this document was produced by 9 Peter Gregg, who also testified that he purchased 10 RaPower3's lenses.</p> <p>11 Directing your attention to the last 12 paragraph. "And so it is with RaPower3: Whether you 13 make tons of money or just a little, everyone makes 14 money with RaPower3 as long as they are a taxpayer." 15 Did I read that correctly?</p> <p>16 A. You did.</p> <p>17 Q. Same questions I asked you with regards to 18 the last two exhibits. Does that document affect 19 your conclusion?</p> <p>20 A. No, I don't think so.</p> <p>21 Q. It doesn't affect your conclusion that the 22 taxpayers in this case -- the RaPower3 customers are 23 engaged in a trade or business, even after you've 24 read the Nickeson case? 25 A. No, I don't think so.</p>

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<p style="text-align: right;">170</p> <p>1 Q. All right.</p> <p>2 A. I think it's -- well, yeah.</p> <p>3 Q. It doesn't?</p> <p>4 A. It doesn't.</p> <p>5 Q. Okay.</p> <p>6 A. No.</p> <p>7 Q. Directing your attention back to the</p> <p>8 Nickeson case. The fifth factor that the Tenth</p> <p>9 Circuit affirmed was that the agreement was vague to</p> <p>10 the point of being illusory.</p> <p>11 A. I see that.</p> <p>12 Q. Okay. Let me direct your attention to</p> <p>13 the -- back to the Equipment Purchase Agreement we've</p> <p>14 been referencing that's attached to your report. At</p> <p>15 Exhibit 651.</p> <p>16 A. Okay.</p> <p>17 Q. This is for -- this Equipment Purchase</p> <p>18 Agreement refers to alternative energy systems; is</p> <p>19 that correct?</p> <p>20 A. That's correct.</p> <p>21 Q. What's your understanding of what an</p> <p>22 alternative energy system is?</p> <p>23 A. My understanding is that it's -- that it's</p> <p>24 principally related to the lenses, although I think</p> <p>25 there's some language in here that would suggest that</p>	<p style="text-align: right;">172</p> <p>1 specifically to the lenses.</p> <p>2 Q. Does that make sense to you?</p> <p>3 A. It doesn't cause me heartburn.</p> <p>4 Q. It doesn't cause you heartburn, but if you</p> <p>5 had a client who said, "I signed this contract; what</p> <p>6 did I buy," what would you tell them?</p> <p>7 A. I'd tell them that you bought the lenses.</p> <p>8 Q. "You bought the lenses"?</p> <p>9 A. Right.</p> <p>10 Q. Okay. Then why does it say "alternative</p> <p>11 energy systems"?</p> <p>12 A. They just defined it as alternative energy</p> <p>13 system. I don't know -- I guess whoever wrote this</p> <p>14 contract decided to divine it that way.</p> <p>15 Q. Okay. Would you say -- withdrawn.</p> <p>16 What in the contract says that lens --</p> <p>17 just -- let's look in this one. It looks like 20</p> <p>18 lenses. Where in the contract does it say that</p> <p>19 there's 20 lenses being purchased? Because I see</p> <p>20 alternative energy systems all over this document.</p> <p>21 A. Right. Again, I don't know if it</p> <p>22 specifically says "lenses." I'm not recalling it --</p> <p>23 that it did, but it uses the terminology that it said</p> <p>24 up front of alternative energy systems. So I don't</p> <p>25 know if that answers your question, but...</p>
<p style="text-align: right;">171</p> <p>1 there are other components to the system that may be</p> <p>2 included in that.</p> <p>3 Q. Okay. So on one hand you say it's related</p> <p>4 to a lens, and then you say there is also some</p> <p>5 language that suggests it's part of the other</p> <p>6 components?</p> <p>7 A. That's true.</p> <p>8 Q. Okay. Which is it?</p> <p>9 A. In the background, paragraph one, it</p> <p>10 says -- this is paragraph one of the Exhibit A to...</p> <p>11 Q. Exhibit 651?</p> <p>12 A. To Exhibit 651.</p> <p>13 Q. Okay.</p> <p>14 A. It says, "The technology relates to solar</p> <p>15 energy collection, and which technology is utilized</p> <p>16 for the design and fabrication of certain components</p> <p>17 which are identified below and which are hereinafter</p> <p>18 collectively referred to as the alternative energy</p> <p>19 system."</p> <p>20 The fact that it says "components" may</p> <p>21 suggest there is other components other than the</p> <p>22 lenses, but it -- it also does say that they are</p> <p>23 selling -- "hereby sells to purchaser, and purchaser</p> <p>24 hereby purchases from seller the alternative energy</p> <p>25 systems." So that suggests that it just refers</p>	<p style="text-align: right;">173</p> <p>1 Q. It doesn't. I'm just trying to understand</p> <p>2 what tangible property is being purchased, and it</p> <p>3 sounds like your understanding is that it's a lens,</p> <p>4 but you really can't point to anything in the</p> <p>5 contract that -- that states why that's your</p> <p>6 understanding.</p> <p>7 A. Well -- and there may -- let me check --</p> <p>8 let me look at one other thing here. And my guess</p> <p>9 is -- or not my guess, but my assumption is that is</p> <p>10 coming from other -- these other documents.</p> <p>11 Q. What other documents?</p> <p>12 A. The Operation and Maintenance Agreement.</p> <p>13 Q. All right. We're going to get to that.</p> <p>14 Can you tell me -- I'm just going to ask</p> <p>15 this. There seems to be some -- I'm going to use the</p> <p>16 adjective of the Tenth Circuit -- illusory components</p> <p>17 of this agreement.</p> <p>18 Do you agree with that?</p> <p>19 A. No, I wouldn't agree that they're</p> <p>20 illusory.</p> <p>21 Q. Okay.</p> <p>22 A. But there is a lot of legal connotations</p> <p>23 that go with illusory, and I wouldn't -- I wouldn't</p> <p>24 attach those to this contract.</p> <p>25 Q. Okay. Are you familiar with the Internal</p>

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<p style="text-align: right;">174</p> <p>1 Revenue Code Section 26 USC 7701-0?</p> <p>2 A. I know it's a -- I believe 7701 is a</p> <p>3 penalty provision, but I'm not sure the specifics of</p> <p>4 it.</p> <p>5 Q. You think 7701 is a penalty provision?</p> <p>6 A. That's my memory. I may be off.</p> <p>7 Q. I'll represent to you that 7701 is the</p> <p>8 definition section of the tax code.</p> <p>9 A. Okay.</p> <p>10 Q. I'm not an expert in tax law, I don't</p> <p>11 pretend to be, but I do know that.</p> <p>12 Also, I'll also represent to you that</p> <p>13 7701-0 is the -- referred to as the codified economic</p> <p>14 substance doctrine.</p> <p>15 A. Okay.</p> <p>16 Q. Are you familiar with the economic</p> <p>17 substance doctrine?</p> <p>18 A. Yes, I'm familiar with what it is, mostly</p> <p>19 from learning it in law school.</p> <p>20 Q. Okay.</p> <p>21 A. I haven't had any cases that -- where</p> <p>22 we've had to deal with that -- where I've had to deal</p> <p>23 with that.</p> <p>24 Q. Okay. So you have no experience with the</p> <p>25 economic substance doctrine in your professional</p>	<p style="text-align: right;">176</p> <p>1 Q. Oh, okay.</p> <p>2 I'll represent to you that, in substance,</p> <p>3 7701 defines the economic substance doctrine as</p> <p>4 that a transaction needs to change in a meaningful</p> <p>5 way, apart from the tax consequences, a taxpayer's</p> <p>6 economic position. And the taxpayer has to have a</p> <p>7 substantial purpose besides the tax affects for</p> <p>8 entering into a transaction.</p> <p>9 Is that your understanding of the economic</p> <p>10 substance doctrine?</p> <p>11 A. I think that's...</p> <p>12 Q. Okay.</p> <p>13 A. -- that's accurate.</p> <p>14 Q. Let's keep that in mind as we go forward</p> <p>15 today.</p> <p>16 A. Okay.</p> <p>17 Q. I'm handing you what's been marked for</p> <p>18 identification in a previous deposition as</p> <p>19 Exhibit 282. I don't suppose Mr. Paul provided you</p> <p>20 with this document, did he?</p> <p>21 A. No, I have not seen this document.</p> <p>22 Q. Okay. Exhibit 228 appears to be an e-mail</p> <p>23 from Greg Shepard. And it was produced by, again,</p> <p>24 Peter Gregg, who also testified that he had purchased</p> <p>25 lenses from RaPower3.</p>
<p style="text-align: right;">175</p> <p>1 career?</p> <p>2 A. Not in -- not that I can recall, in my</p> <p>3 career.</p> <p>4 Q. Okay. Did you consider the economic</p> <p>5 substance doctrine when you wrote your expert report?</p> <p>6 A. Yes, as a general matter, but I don't</p> <p>7 recall going to 7701-0 and looking at -- at the</p> <p>8 definition.</p> <p>9 Q. Okay. You just testified that you did</p> <p>10 consider it. I want to know, what did you consider</p> <p>11 about the economic substance doctrine in relation to</p> <p>12 this -- the report that you wrote about this case?</p> <p>13 A. Well, just in general that I know that the</p> <p>14 economic substance doctrine exists.</p> <p>15 Q. Okay.</p> <p>16 A. I know that transactions need to have</p> <p>17 economic substance.</p> <p>18 My assumption in a lot of this respect is</p> <p>19 that the economic substance doctrine is written</p> <p>20 within the other tax code sections, and so when we're</p> <p>21 talking about some of these other sections, that</p> <p>22 those sections take into account that doctrine. So</p> <p>23 if you're following those sections and those</p> <p>24 regulations, you should be safe on the economic</p> <p>25 substance doctrine.</p>	<p style="text-align: right;">177</p> <p>1 I'm going to direct your attention to the</p> <p>2 second paragraph. It says, "If you would like to</p> <p>3 part company, we will refund your money and you can</p> <p>4 pay the IRS and move in a different direction."</p> <p>5 Did I read that first sentence correctly?</p> <p>6 A. You did.</p> <p>7 Q. Okay. Well, you already testified about</p> <p>8 the Equipment Purchase Agreement, right?</p> <p>9 A. Testified --</p> <p>10 Q. The Equipment Purchase Agreement that's</p> <p>11 Exhibit A attached to your --</p> <p>12 A. Yes, yes.</p> <p>13 Q. -- report at Exhibit 651?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Would you characterize the</p> <p>16 Equipment Purchase Agreement as a contract?</p> <p>17 A. That -- yes, that's how I viewed it in</p> <p>18 making my --</p> <p>19 Q. Contracts are typically binding on the</p> <p>20 parties, right?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. So if one party says to the other</p> <p>23 party, "If you would like out, we'll give you your</p> <p>24 money back," does that sound like a contract to you?</p> <p>25 A. I think parties can agree to step out of a</p>

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<p style="text-align: right;">178</p> <p>1 contract any time they want.</p> <p>2 Q. Okay. This -- Exhibit 282 was written</p> <p>3 when the IRS was auditing several RaPower3 customers.</p> <p>4 A. (Witness nods head.)</p> <p>5 Q. So my understanding what's happening in</p> <p>6 Exhibit 282 is that once these transactions came</p> <p>7 under scrutiny from the IRS, Greg Shepard, on behalf</p> <p>8 of RaPower3, offered customers a way out.</p> <p>9 MR. PAUL: Is that a question or just a</p> <p>10 statement you want us to be aware of?</p> <p>11 Q. (BY MR. MORAN) Is that your</p> <p>12 understanding? You can take a --</p> <p>13 MR. PAUL: Objection. Lacks foundation.</p> <p>14 MR. MORAN: You can take a look at</p> <p>15 Exhibit 282 if you want.</p> <p>16 THE WITNESS: Okay. So -- sorry. Would</p> <p>17 you repeat the question?</p> <p>18 MR. MORAN: Would you repeat the question?</p> <p>19 MR. PAUL: That's a statement. What's the</p> <p>20 question?</p> <p>21 (Record was read as follows: "So my</p> <p>22 understanding what's happening in Exhibit 282 is</p> <p>23 that once these transactions came under scrutiny</p> <p>24 from the IRS, Greg Shepard, on behalf of</p> <p>25 RaPower3, offered customers a way out.</p>	<p style="text-align: right;">180</p> <p>1 environmental benefits out of it, some piece of mind</p> <p>2 benefits out of it, some desire to start investing</p> <p>3 some funds that they just had sitting around. There</p> <p>4 is all kinds of benefits that people could be looking</p> <p>5 for out of these transactions.</p> <p>6 Q. (BY MR. MORAN) Did they get any financial</p> <p>7 benefits?</p> <p>8 A. Again, no, not that I know of.</p> <p>9 Q. Okay. So what, other than the tax</p> <p>10 benefits, have RaPower3 customers gotten?</p> <p>11 A. I'll say it again. There's -- there's a</p> <p>12 litany of things that they could get. And I</p> <p>13 haven't -- like I said earlier, I haven't talked to</p> <p>14 any of these taxpayers, so I don't know what other</p> <p>15 benefits they are hoping to get, let alone maybe</p> <p>16 they've got the potential -- they feel like the</p> <p>17 potential for the financial benefits is sufficient</p> <p>18 for them.</p> <p>19 Q. But you believe this transaction has</p> <p>20 economic substance?</p> <p>21 A. Yes.</p> <p>22 Q. Okay. Directing your attention to</p> <p>23 paragraph seven of the Equipment Purchase Agreement</p> <p>24 in Exhibit A that's attached to your expert report in</p> <p>25 Exhibit 651.</p>
<p style="text-align: right;">179</p> <p>1 Is that your understanding?")</p> <p>2 THE WITNESS: That appears to be the case,</p> <p>3 in general. I mean, there's lots going on in this</p> <p>4 e-mail, but I -- that appears to be the general</p> <p>5 notion behind it.</p> <p>6 Q. (BY MR. MORAN) Okay. Does Exhibit 282</p> <p>7 affect your view on whether or not the transactions</p> <p>8 we're talking about today have economic substance?</p> <p>9 A. No. Again, I think any party can opt out</p> <p>10 of contracts. If both parties agree to opt out of</p> <p>11 the contract, they can do that.</p> <p>12 Q. Okay. Do you know if RaPower3 customers</p> <p>13 have ever gotten any benefit other than tax benefits?</p> <p>14 A. That I don't know.</p> <p>15 Q. Okay.</p> <p>16 A. I don't know. Any monetary benefit?</p> <p>17 Q. Yes.</p> <p>18 A. That I don't know.</p> <p>19 Q. You don't know?</p> <p>20 A. I don't know.</p> <p>21 Q. Okay. So what other than tax benefits</p> <p>22 have they gotten?</p> <p>23 MR. PAUL: Objection. Asked and answered.</p> <p>24 THE WITNESS: Maybe they're looking to</p> <p>25 provide for the environment. Maybe they got some</p>	<p style="text-align: right;">181</p> <p>1 A. Uh-huh. Yes.</p> <p>2 Q. My understanding of paragraph seven is</p> <p>3 that a RaPower3 customer can reduce the number of</p> <p>4 alternative energy systems, whatever that is, if</p> <p>5 there are changes to the Internal Revenue Code.</p> <p>6 Is that your understanding of paragraph</p> <p>7 seven too?</p> <p>8 A. Yes, that's true, although they're limited</p> <p>9 to the amount that they can -- they can reduce.</p> <p>10 Q. Where do you see a limitation?</p> <p>11 A. It says, "Seller agrees to accept the</p> <p>12 reduced amount, provided that the reduced amount is</p> <p>13 not less than the total amount already paid as a down</p> <p>14 payment or a one-time payment."</p> <p>15 Q. Oh, okay. So, in other words, RaPower3</p> <p>16 gets to keep the money that these people have already</p> <p>17 given them?</p> <p>18 A. I guess if you want to look at it that</p> <p>19 way, that's true.</p> <p>20 Q. Your answer is yes?</p> <p>21 A. Yeah.</p> <p>22 Q. Okay. So even after looking at paragraph</p> <p>23 seven, you still believe this transaction has</p> <p>24 economic substance?</p> <p>25 A. Yes, I do.</p>

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<p style="text-align: right;">182</p> <p>1 Q. And it's got -- it has some sort of</p> <p>2 benefit to a customer beyond the tax benefits?</p> <p>3 A. Absolutely, but, again, I'm -- I want to</p> <p>4 emphasize that I was -- I was writing this opinion as</p> <p>5 opposed -- or in anticipation of discussions with --</p> <p>6 we'll call it a hypothetical taxpayer. And I would</p> <p>7 go through a lot of those questions with them. If</p> <p>8 they -- if they met those steps, then I would say</p> <p>9 this has economic benefit for them.</p> <p>10 Q. What steps?</p> <p>11 A. A lot of the steps in my -- whether or not</p> <p>12 they are engaged in a trade or business, whether</p> <p>13 they're materially participating, those thing lines</p> <p>14 along lines.</p> <p>15 Q. All right. We'll get to that.</p> <p>16 So, Mr. Hawes, are you telling me that if</p> <p>17 this hypothetical client came to you, showed you the</p> <p>18 RaPower3 Equipment Purchase Agreement, you looked at</p> <p>19 paragraph seven, this wouldn't raise a red flag as to</p> <p>20 whether or not maybe the economic substance doctrine</p> <p>21 needs to be considered and whether or not your</p> <p>22 hypothetical client was engaged in RaPower3 for</p> <p>23 sole -- solely the tax benefits?</p> <p>24 A. Well, certainly I would, but I'd have</p> <p>25 those discussions. It would raise the issue,</p>	<p style="text-align: right;">184</p> <p>1 office and said, "I got this equipment purchase</p> <p>2 agreement; can I claim these deductions," you would</p> <p>3 consider the economic substance doctrine.</p> <p>4 A. Within the confines of the operating a</p> <p>5 trade or business and materially participating.</p> <p>6 Q. Okay. Well, why doesn't an explanation of</p> <p>7 the economic substance doctrine appear in your expert</p> <p>8 report?</p> <p>9 A. I -- I think I've answered that I operate</p> <p>10 it -- or I think about it in terms of if you're</p> <p>11 following the statute on these separate issues, then</p> <p>12 you're going to be -- your transaction is going to</p> <p>13 have economic substance.</p> <p>14 Q. Okay. All right. Going back to the</p> <p>15 Equipment Purchase Agreement. Looking at the last</p> <p>16 paragraph on the second page. It's two paragraphs</p> <p>17 down from where the type says Option 3.</p> <p>18 Are you with me?</p> <p>19 A. Yes. Okay.</p> <p>20 Q. Starting with, "The installation date</p> <p>21 shall be defined as the date the Alternative Energy</p> <p>22 Equipment has been installed and begins to produce</p> <p>23 revenue."</p> <p>24 Did I read that correctly?</p> <p>25 A. You did.</p>
<p style="text-align: right;">183</p> <p>1 absolutely.</p> <p>2 Q. Okay. So why -- I mean, you had the</p> <p>3 Equipment Purchase Agreement. Why, in your expert</p> <p>4 report, do you not consider the economic substance</p> <p>5 doctrine?</p> <p>6 A. I think, like I said, it was -- we were</p> <p>7 looking at material participation and -- and</p> <p>8 what's -- operating a trade or business. And my</p> <p>9 understanding and my view is that if you're within</p> <p>10 the confines of the statutes in operating a trade or</p> <p>11 business and materially participating and following</p> <p>12 the regulations and the counsel that the IRS has</p> <p>13 given, then your -- your transaction has some</p> <p>14 economic substance to it.</p> <p>15 Q. Okay. I understand that's your answer</p> <p>16 now. Could it also be because Jenni Davenport didn't</p> <p>17 give you a copy of 7701-0?</p> <p>18 MR. PAUL: Objection. Argumentative.</p> <p>19 THE WITNESS: No.</p> <p>20 Q. (BY MR. MORAN) Why not?</p> <p>21 A. It just isn't.</p> <p>22 Q. I mean, you already testified that you</p> <p>23 knew about the economic substance doctrine. You --</p> <p>24 you had paragraph seven, and you also just testified</p> <p>25 that if -- if some hypothetical client came into your</p>	<p style="text-align: right;">185</p> <p>1 Q. All right. We've deposed many customers,</p> <p>2 and we've also got testimony from several of the</p> <p>3 defendants in this case that no lens has ever</p> <p>4 produced revenue. Are you aware of that fact?</p> <p>5 A. I was not aware of that fact, but it</p> <p>6 wouldn't surprise me.</p> <p>7 Q. Why doesn't it surprise you?</p> <p>8 A. My understanding was they were still</p> <p>9 working through the issues that are related to</p> <p>10 getting these things set up so they can set up the</p> <p>11 whole system.</p> <p>12 Q. So it doesn't surprise you that no lenses</p> <p>13 produced revenue?</p> <p>14 A. It -- no, it doesn't surprise me that --</p> <p>15 that no lenses produced revenue.</p> <p>16 Q. Okay. And so, therefore, this</p> <p>17 installation date has not occurred?</p> <p>18 A. I think according to this, that's</p> <p>19 accurate.</p> <p>20 Q. Okay. Do you know when the defendants</p> <p>21 started selling the lenses that we're talking about</p> <p>22 today?</p> <p>23 A. I don't know precisely. I have heard that</p> <p>24 the date is around 2010 -- sometime in 2010.</p> <p>25 Q. Okay. Would it surprise you to know that</p>

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<p style="text-align: right;">186</p> <p>1 lenses similar to these have been sold by various</p> <p>2 defendants in this case since 2005?</p> <p>3 A. No, it wouldn't surprise me.</p> <p>4 Q. Okay. So they started in 2005. It's now</p> <p>5 2017, 12 years later. We've tried to learn from the</p> <p>6 defendants when these things are going to begin</p> <p>7 producing revenue, and we haven't gotten an answer.</p> <p>8 Do you know?</p> <p>9 A. I don't know.</p> <p>10 Q. They didn't tell you?</p> <p>11 A. They did not tell me.</p> <p>12 Q. Did you ask?</p> <p>13 A. I asked how the -- how the efforts were</p> <p>14 going to -- to get this online, and they -- and the</p> <p>15 close -- the -- the date that they talked about was</p> <p>16 getting their production facility up and running,</p> <p>17 the -- where all the arrays are now on the ground</p> <p>18 waiting to be put onto poles.</p> <p>19 Q. That's the hundreds you were talking</p> <p>20 about?</p> <p>21 A. Yes.</p> <p>22 Q. Okay.</p> <p>23 A. And my memory is that -- that they are at</p> <p>24 least looking to get those all installed within the</p> <p>25 next six months to a year. I know there is other</p>	<p style="text-align: right;">188</p> <p>1 Q. They told you that?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. What else did they have to do?</p> <p>4 Anything?</p> <p>5 A. Well, I'm sure there's lots of steps in</p> <p>6 there that I'm -- I don't know if lots of steps, but</p> <p>7 there's lots of things that I don't know about how to</p> <p>8 get this -- their system up and running. But I</p> <p>9 have -- you know, I've taken what I've seen and what</p> <p>10 they've told me, that -- that they are working</p> <p>11 towards producing electricity and, therefore,</p> <p>12 revenue.</p> <p>13 Q. Okay. So I'm trying to -- still trying to</p> <p>14 understand this contract. You say it's not illusory.</p> <p>15 When is the installation date?</p> <p>16 MR. PAUL: Objection. Argumentative.</p> <p>17 Asked and answered.</p> <p>18 THE WITNESS: Under the contract, the</p> <p>19 installation date is the date they're installed and</p> <p>20 begin to produce revenue.</p> <p>21 Q. (BY MR. MORAN) I'm looking for a calendar</p> <p>22 date. Maybe a year.</p> <p>23 A. I don't have a calendar date.</p> <p>24 Q. Do you know if the defendants have a</p> <p>25 calendar date --</p>
<p style="text-align: right;">187</p> <p>1 things -- or at least my understanding is there is</p> <p>2 other things standing in their way in terms of</p> <p>3 producing revenue.</p> <p>4 Q. What are those things?</p> <p>5 A. I think they have to enter into some</p> <p>6 contractual agreements to be able to access the grid.</p> <p>7 Q. Do you know if they have those?</p> <p>8 A. I don't know if they have those.</p> <p>9 Q. Did you ask?</p> <p>10 A. I did not ask.</p> <p>11 Q. Okay. What else did they have to do?</p> <p>12 A. In order to get on the grid?</p> <p>13 Q. Well, you said there were several things</p> <p>14 they had to do before they -- I think it was -- you</p> <p>15 testified start producing revenue. What else?</p> <p>16 A. So then they -- I believe they have to get</p> <p>17 the whole -- their whole set up with -- whether it's</p> <p>18 photovoltaic -- I keep forgetting the word -- circuit</p> <p>19 board or whether it's producing steam --</p> <p>20 Q. Either one?</p> <p>21 A. -- through their process.</p> <p>22 Q. Which one is it going to be?</p> <p>23 A. I think they have the option to do both.</p> <p>24 Q. Okay.</p> <p>25 A. That's my understanding.</p>	<p style="text-align: right;">189</p> <p>1 A. I do not.</p> <p>2 Q. -- that they expect this is going to</p> <p>3 happen?</p> <p>4 A. I know -- my -- my memory of what they</p> <p>5 said was that they expect this to -- that</p> <p>6 something -- they should be in a position to move</p> <p>7 forward hopefully within the next six months to a</p> <p>8 year.</p> <p>9 Q. Okay. Are you aware of any facts to</p> <p>10 suggest that it's true that the installation date</p> <p>11 will happen in the next six months to a year?</p> <p>12 A. Other than their statements?</p> <p>13 Q. Yes.</p> <p>14 A. No.</p> <p>15 Q. Okay.</p> <p>16 A. Well, I should say, other than their</p> <p>17 statements and my view of the yard where the array --</p> <p>18 where the solar arrays were ready to be put up on --</p> <p>19 on poles. Those are the -- those are my two facts.</p> <p>20 Q. Do you have any expertise in what you saw</p> <p>21 at their site? What about what you saw makes you</p> <p>22 believe that this installation date is going to occur</p> <p>23 within the next six months to a year?</p> <p>24 A. I saw literally hundreds of welded -- I</p> <p>25 don't know what you -- frames, I guess. The majority</p>

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<p style="text-align: right;">190</p> <p>1 of them with lenses installed on the ground and --</p> <p>2 and poles or -- or whatever we call them that they</p> <p>3 going to be on top of, that those were there ready to</p> <p>4 be installed as well.</p> <p>5 Q. Okay. I represent to you I was there in</p> <p>6 April -- that's six months ago -- I saw something</p> <p>7 very similar.</p> <p>8 A. Okay.</p> <p>9 Q. Here we are six months later, they are</p> <p>10 still saying six months to a year.</p> <p>11 A. Okay.</p> <p>12 Q. Does that fact concern you at all?</p> <p>13 A. No. If it's not -- if it's not within six</p> <p>14 months to a year, I'm assuming that they're working</p> <p>15 towards it.</p> <p>16 Q. What, if any -- if anything, does do it to</p> <p>17 your opinion about whether or not this has -- this</p> <p>18 transaction has economic substance, that the</p> <p>19 defendants have been selling these lenses for 12</p> <p>20 years and there's been no revenue or this</p> <p>21 installation date triggered?</p> <p>22 A. I think all it tells me is this technology</p> <p>23 is tricky and they're -- they're working towards it.</p> <p>24 Q. They've been working for 12 years. Do you</p> <p>25 know anything to suggest that we're not going to be</p>	<p style="text-align: right;">192</p> <p>1 agreement negotiation with the power company goes</p> <p>2 quickly?</p> <p>3 MR. PAUL: Objection. Foundation.</p> <p>4 THE WITNESS: I have nothing to base that</p> <p>5 on. If by "quickly" you mean a months --</p> <p>6 Q. (BY MR. MORAN) Six months to a year.</p> <p>7 A. I -- I don't see why it couldn't take that</p> <p>8 much time, but there's -- I'm sure there's lots of</p> <p>9 things that I'm not considering.</p> <p>10 Q. I'll represent to you that we deposed</p> <p>11 PacifiCorp in this case and PacifiCorp told us that</p> <p>12 they've never heard of these defendants. There has</p> <p>13 been no power purchase agreement negotiated with</p> <p>14 them. And this was as of November of last year.</p> <p>15 A. Okay.</p> <p>16 Q. Does that affect your conclusion that this</p> <p>17 transaction has -- does have economic substance --</p> <p>18 A. I don't think so.</p> <p>19 Q. No?</p> <p>20 A. They were, you know -- they're working</p> <p>21 towards it.</p> <p>22 Q. Who do you think would pay for the</p> <p>23 electricity that's generated by the heat that you</p> <p>24 felt on your hand?</p> <p>25 MR. PAUL: Objection. Exceeds the scope</p>
<p style="text-align: right;">191</p> <p>1 waiting another 12 years?</p> <p>2 A. Not necessarily, but I know a lot of</p> <p>3 inventions that -- or I assume a lot of inventions</p> <p>4 and technologies -- new technologies take longer than</p> <p>5 12 years to get right.</p> <p>6 Q. Do you think that putting lenses in towers</p> <p>7 in arrays is enough to generate electricity?</p> <p>8 A. Based on what I was shown and -- and the</p> <p>9 statements that were made, I think there -- I think</p> <p>10 there is.</p> <p>11 Q. What makes you say that?</p> <p>12 A. I almost burned my hand.</p> <p>13 Q. Okay.</p> <p>14 A. I saw the electricity output that was</p> <p>15 being created from the -- the circuit board.</p> <p>16 Q. It was being powered by a light bulb?</p> <p>17 A. Right.</p> <p>18 Q. Okay. Anything else?</p> <p>19 A. I think that's it.</p> <p>20 Q. Okay. You also mentioned that there needs</p> <p>21 to be a power purchase agreement to get in the grid.</p> <p>22 A. I assume there does. I did not do any</p> <p>23 research with that, but I assume there does.</p> <p>24 Q. You're a lawyer; you've been involved in</p> <p>25 transactions. Do you think that that power purchase</p>	<p style="text-align: right;">193</p> <p>1 of his expert opinion. Try to stay on track,</p> <p>2 counsel.</p> <p>3 THE WITNESS: I don't think that, itself,</p> <p>4 is producing the electricity. I think the -- the</p> <p>5 effort is to use the heat that it's creating to</p> <p>6 produce electricity.</p> <p>7 Q. (BY MR. MORAN) Okay. How does the heat</p> <p>8 produce electricity?</p> <p>9 A. It can heat up water --</p> <p>10 Q. Okay.</p> <p>11 A. -- into steam and turn a turbine that</p> <p>12 generates electricity.</p> <p>13 Q. Okay. Do you have any knowledge of that</p> <p>14 process?</p> <p>15 A. Other than the -- the items that I saw and</p> <p>16 how they are planning to do it, no.</p> <p>17 Q. Did you see any evidence of hundreds of</p> <p>18 turbines?</p> <p>19 A. No.</p> <p>20 Q. Okay. Did you see -- did you see</p> <p>21 receivers that were going to be on these lenses?</p> <p>22 A. Receivers?</p> <p>23 Q. Yes. I mean something has got to absorb</p> <p>24 the sunlight, right?</p> <p>25 A. Right. I -- I didn't see them on the</p>

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<p style="text-align: right;">194</p> <p>1 lenses. I saw a -- a -- what's the right word? A...</p> <p>2 Q. Was it a glass tube?</p> <p>3 A. No. I saw a -- what's the right word? A</p> <p>4 sample, for lack of a better word, a machine that</p> <p>5 is -- was proposed to have the water run in it and</p> <p>6 then out it pops -- or the idea is that it would</p> <p>7 create steam, run through the process and turn a</p> <p>8 turbine.</p> <p>9 I did see a video of their proposed</p> <p>10 turbine process that -- that showed what they were</p> <p>11 working on.</p> <p>12 Q. Okay. All right. There's been a lot of</p> <p>13 testimony about the operations and management</p> <p>14 company. You've alluded to it a couple times. It's</p> <p>15 referenced in the Equipment Purchase Agreement. Do</p> <p>16 you know what I'm talking about?</p> <p>17 A. Yes, I believe so.</p> <p>18 Q. Okay. Do you know the name of that</p> <p>19 equipment -- of -- withdrawn.</p> <p>20 Do you know the name of that operations</p> <p>21 and maintenance company?</p> <p>22 A. My understanding is it's LTB, LLC.</p> <p>23 Q. Okay. And is it your understanding that</p> <p>24 they are also a defendant in this case?</p> <p>25 A. I don't recall. Yes. Although it is</p>	<p style="text-align: right;">196</p> <p>1 had as I put together this report.</p> <p>2 Q. Okay. What led you to believe that</p> <p>3 RaPower3 and LTB were not related through common</p> <p>4 ownership?</p> <p>5 A. Statements from -- or I guess assumptions</p> <p>6 from what management has said, as well as I didn't</p> <p>7 have any documentation related to their ownership.</p> <p>8 Q. When you are saying "management," who are</p> <p>9 you referring to?</p> <p>10 A. The only two I've talked with are -- are</p> <p>11 Neldon Johnson and Gregory Shepard.</p> <p>12 Q. Okay. And what did they tell you about</p> <p>13 the ownership of LTB and RaPower3?</p> <p>14 A. My memory is that they said that -- just</p> <p>15 as I've said there, that they weren't related.</p> <p>16 Q. Okay. Did you ask who owned LTB?</p> <p>17 A. I did not.</p> <p>18 Q. Okay. And they just -- they didn't</p> <p>19 volunteer that information?</p> <p>20 A. No.</p> <p>21 Q. Okay. So if Neldon Johnson testified that</p> <p>22 RaPower3 and LTB are both owned by DCL16A, is that</p> <p>23 information you would have liked to have known?</p> <p>24 A. Yeah, I think so. I mean, it may have</p> <p>25 changed that statement there.</p>
<p style="text-align: right;">195</p> <p>1 listed in this case as LTB1, LLC.</p> <p>2 Q. Okay. There is a few LTBs that we've</p> <p>3 heard about. We're going to talk about a few of</p> <p>4 them.</p> <p>5 A. Okay.</p> <p>6 Q. Directing your attention back to the O and</p> <p>7 M agreement that you provided as Exhibit B, it's</p> <p>8 referred to LTB, LLC.</p> <p>9 A. Correct.</p> <p>10 Q. Directing your attention to page 4 of your</p> <p>11 report, you talk about this Operation and Maintenance</p> <p>12 Agreement. You refer to LTB1, LLC. I share your</p> <p>13 confusion about these various LTBs. But you refer to</p> <p>14 LTB1 and you say, "The operator is a for-profit</p> <p>15 commercial enterprise that is not related to either</p> <p>16 RaPower3 or purchaser through common ownership."</p> <p>17 Did I read that correctly?</p> <p>18 A. You did.</p> <p>19 Q. Would it surprise you to know that</p> <p>20 RaPower3 and LTB are both owned by an entity known as</p> <p>21 DCL16A?</p> <p>22 A. That I did not know.</p> <p>23 Q. I'll represent to you that Neldon Johnson</p> <p>24 testified exactly that.</p> <p>25 A. Okay. That was not the information that I</p>	<p style="text-align: right;">197</p> <p>1 Q. How would it change that statement?</p> <p>2 A. That they had some common ownership.</p> <p>3 Q. Yeah, and how does that affect your</p> <p>4 conclusions?</p> <p>5 A. I don't think that makes any change in my</p> <p>6 conclusions.</p> <p>7 Q. No?</p> <p>8 A. No. I mean, I'd have to go back and look.</p> <p>9 I looked at this thinking that there was no common</p> <p>10 ownership. So I'd have to go back and look and see</p> <p>11 if common ownership makes any difference in the</p> <p>12 assumptions and the -- and the analysis that I've</p> <p>13 given you.</p> <p>14 Q. All right. Will you agree to go back and</p> <p>15 look at Neldon Johnson's various deposition</p> <p>16 transcripts and decide whether or not common</p> <p>17 ownership of any LTB entity and RaPower3 affects your</p> <p>18 conclusion?</p> <p>19 A. Sure.</p> <p>20 Q. Okay. We're going to discuss this again</p> <p>21 when we talk about Section 465.</p> <p>22 Did you -- do you know who is the manager</p> <p>23 of the LTB entity that you refer to in your report?</p> <p>24 A. Hold on just one second. Okay. I</p> <p>25 apologize. Say that one more time.</p>

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<p style="text-align: right;">198</p> <p>1 Q. Do you know who the manager of LTB1, LLC,</p> <p>2 that you referred to in your report is?</p> <p>3 A. No, I do not recall.</p> <p>4 Q. Did anyone -- did anyone tell you?</p> <p>5 A. No.</p> <p>6 Q. Did you ask?</p> <p>7 A. I did not ask.</p> <p>8 Q. If it turned out that LTB1, LLC, and any</p> <p>9 other LTB involved with this case -- that entity's</p> <p>10 manager was Neldon Johnson, would that matter to you?</p> <p>11 A. I would like to know it. I don't know if</p> <p>12 it would have any impact on my opinions, but I can do</p> <p>13 the same thing and see if that makes a difference.</p> <p>14 Q. And you know that Neldon Johnson is the</p> <p>15 manager for RaPower3 as well, right?</p> <p>16 A. I believe -- yes, that's -- that was my</p> <p>17 understanding.</p> <p>18 Q. So Neldon Johnson told you that?</p> <p>19 A. Yes.</p> <p>20 Q. Okay. Have you ever heard of the entity</p> <p>21 DCL16A before?</p> <p>22 A. No, I have not.</p> <p>23 Q. Okay.</p> <p>24 A. DCL16A?</p> <p>25 Q. Yes.</p>	<p style="text-align: right;">200</p> <p>1 A. That's correct.</p> <p>2 Q. Okay. And when you say the O and M</p> <p>3 agreement, we're talking about Exhibit B to your</p> <p>4 report at Exhibit 651?</p> <p>5 A. That's correct.</p> <p>6 Q. Okay. So, in your view, does it matter if</p> <p>7 the operator, as you call them, actually does</p> <p>8 anything?</p> <p>9 A. I think the -- well, I think the operator</p> <p>10 would have to follow through on its contract.</p> <p>11 Q. Okay. So the operator would have to, for</p> <p>12 example, perform routine O and M services?</p> <p>13 A. Yes.</p> <p>14 Q. Additional services? And I'm looking at</p> <p>15 page 2 of Exhibit B to your report under Operator</p> <p>16 Scope of Work.</p> <p>17 A. Okay. Yes.</p> <p>18 Q. And transition services?</p> <p>19 A. Correct.</p> <p>20 Q. What do these terms mean?</p> <p>21 A. My assumption is they mean provide the</p> <p>22 services necessary to operate and maintain the -- the</p> <p>23 solar panels and the production of electricity</p> <p>24 when -- when that production is finally happening.</p> <p>25 Q. Okay. And that's not happening right now.</p>
<p style="text-align: right;">199</p> <p>1 A. No.</p> <p>2 Q. Okay. Would it -- would it surprise you</p> <p>3 to know, since you've never heard of it before, that</p> <p>4 DCL16A is partially owned by Neldon Johnson and the</p> <p>5 rest is owned by member of his family?</p> <p>6 A. Would it surprise me? No.</p> <p>7 Q. No?</p> <p>8 A. I don't think so.</p> <p>9 Q. Okay. If DCL16A owns RaPower3 and LTB,</p> <p>10 and Neldon Johnson and his family owns DCL16A, is it</p> <p>11 fair to conclude that ultimately Neldon Johnson</p> <p>12 and/or members of his family control RaPower3 and</p> <p>13 LTB?</p> <p>14 A. Well, if your statements are true, I think</p> <p>15 that's a fair conclusion.</p> <p>16 Q. Okay. Are you aware of any LTB entity</p> <p>17 having experience operating or maintaining solar</p> <p>18 lenses or alternative energy systems?</p> <p>19 MR. PAUL: Objection. It exceeds the</p> <p>20 scope of his expert opinion.</p> <p>21 THE WITNESS: No, I'm not.</p> <p>22 Q. (BY MR. MORAN) Well, your opinion talks</p> <p>23 about the operator -- which is, you believe, LTB1,</p> <p>24 LLC -- is responsible for performing all services</p> <p>25 described in the O and M agreement.</p>	<p style="text-align: right;">201</p> <p>1 Never has happened.</p> <p>2 A. That --</p> <p>3 Q. That's a yes?</p> <p>4 A. That's -- my understanding is that's</p> <p>5 correct.</p> <p>6 Q. Okay.</p> <p>7 A. It may also apply -- and I haven't gone</p> <p>8 and looked back, but to provide those same services</p> <p>9 before electricity is being performed -- being</p> <p>10 produced.</p> <p>11 Q. Can you say that again, one more time?</p> <p>12 A. These services may also be required to be</p> <p>13 performed before electricity has been produced.</p> <p>14 Q. So when you drew the conclusions you make</p> <p>15 in your expert report, was it your understanding that</p> <p>16 this operator, LTB in some form, was a going concern?</p> <p>17 A. Yes, that was my understanding.</p> <p>18 Q. All right. Well, would it surprise you to</p> <p>19 know that Neldon Johnson testified that LTB1, at</p> <p>20 least, is not currently an active company?</p> <p>21 A. Yeah, I think that would surprise me.</p> <p>22 Q. Okay. Neldon Johnson testified on behalf</p> <p>23 of LTB1, and he testified that LTB1 has never had any</p> <p>24 employees.</p> <p>25 A. Okay.</p>

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<p style="text-align: right;">202</p> <p>1 Q. So I guess my question to you is, if LTB1 2 is not currently a going concern, it's not currently 3 an active company, it doesn't have any employees, how 4 can it provide the services it's actually 5 contractually required to provide?</p> <p>6 A. I guess my first point would be -- and, 7 again, this might be a misunderstanding on my part of 8 the facts -- but the contract is with LTB and not 9 LTB1. I don't know if that makes a difference or 10 not.</p> <p>11 Q. Well, I can only go off your report. You 12 talk about LTB1, though.</p> <p>13 A. That's true. And I'd be willing to admit 14 that I may have had a typo there or misunderstood how 15 that fact were -- of which entity was the operator.</p> <p>16 Q. Who do you think came up with the term 17 LTB1, LLC, when it was written in the report?</p> <p>18 A. I did.</p> <p>19 Q. Where would you have gotten the term LTB1, 20 LLC?</p> <p>21 A. Generally from talking with -- from 22 reviewing these reports, from looking at the website 23 and -- and other discussions with Mr. Paul and his -- 24 the attorneys there.</p> <p>25 Q. Did -- was there any discussion of --</p>	<p style="text-align: right;">204</p> <p>1 agree that he is director and manager of both 2 RaPower3 and LTB, but if he's signing a contract that 3 purports to bind LTB, how can he sign as a director 4 of RaPower3?</p> <p>5 A. Perhaps he felt just his name was 6 necessary. I'm not sure. I'm not sure.</p> <p>7 Q. Did you ask?</p> <p>8 A. I did not ask.</p> <p>9 Q. Okay. Did you notice this before today?</p> <p>10 A. I did not notice that before today.</p> <p>11 Q. Okay. Neldon Johnson, when he was 12 testifying on behalf of LTB1, LLC, stated that LTB1, 13 at least, doesn't have any safety and operating 14 guidelines, nonetheless, they are required to have 15 these under the Operations and Maintenance Agreement. 16 Does that affect your conclusions at all?</p> <p>17 A. No, I don't think so. I mean, I can only 18 speculate that those were in the process of being 19 created.</p> <p>20 Q. Well, Neldon Johnson testified that they 21 don't exist.</p> <p>22 A. Okay.</p> <p>23 Q. So you're speculating -- did you ask 24 Neldon Johnson that question?</p> <p>25 A. No, I did not.</p>
<p style="text-align: right;">203</p> <p>1 since you brought it up -- LTB, LLC, and what 2 services it would be providing?</p> <p>3 A. Not that I recall, other than what's here 4 in the operator agreement.</p> <p>5 Q. Directing your attention to the end of the 6 operator agreement. The operator agreement is signed 7 by Neldon Johnson as director of RaPower3.</p> <p>8 A. That is correct. At least that's -- 9 that's how I'm reading it.</p> <p>10 Q. Does the fact that Neldon Johnson signs as 11 director of RaPower3 on contracts that bind LTB a 12 fact that gives you any pause?</p> <p>13 A. Well, I -- I guess I would certainly like 14 to understand it better, but, overall, I don't think 15 that makes too much of a difference in the opinions 16 that I've given.</p> <p>17 Q. Do you think that the operations and 18 maintenance agreements would be considered binding if 19 they're signed by someone who doesn't even -- who 20 acts on behalf of another entity?</p> <p>21 A. There may be an argument that they could 22 be. It sounds like, at least according to you, 23 that -- that he was authorized to act on both 24 companies -- on behalf of both companies.</p> <p>25 Q. Well, I understand that -- yeah, I do</p>	<p style="text-align: right;">205</p> <p>1 Q. Okay. If it turns out to be a fact that 2 LTB1, LLC, does not have any safety and operating 3 guidelines, does that affect your conclusions at all?</p> <p>4 A. I don't think so. They can certainly -- I 5 don't -- I'm not sure there is a legal requirement 6 that they have safety and operating guidelines.</p> <p>7 Q. What about this contract? They are 8 apparently contractually obligated to have that.</p> <p>9 A. Very good. You know, if -- if a company 10 wants -- or if an investor wants to sue them under 11 that, I suppose -- if they didn't exist -- then they 12 could -- they could sue them under this contract.</p> <p>13 Q. Page 5 of your report you say, "Over the 14 years, the operator has developed manufacturing 15 processes and construction techniques to reduce the 16 risk of damages to solar lenses and other equipment 17 in the alternative energy system."</p> <p>18 Where did you get that fact?</p> <p>19 A. I got that from being on site where 20 Mr. Neldon Johnson was explaining to me the ways that 21 they had changed installation to --</p> <p>22 Q. Who is "they"?</p> <p>23 A. Whoever -- Neldon Johnson's company, 24 whether -- he didn't say whether it was RaPower3 or 25 LCB1 -- LTB1, excuse me, or LTB.</p>

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<p style="text-align: right;">206</p> <p>1 Q. When You say the "the operator," my 2 understanding is that the operator is an LTB entity. 3 A. Right. Right. 4 He -- he showed us how the lenses had been 5 installed, explained how they had learned, because of 6 some of the wind issues that they deal with, how they 7 had to attach it to -- or how those needed to be 8 attached to the solar array to avoid or at least 9 reduce the risk that they get broken or damaged in 10 some way. 11 Q. All right, but in your report it says the 12 operator has done this. I want to know why you said 13 "the operator." 14 A. I got the information from Neldon Johnson. 15 I assumed he was giving me information related -- he 16 was the only source I had of information related to 17 the construction of the solar arrays. 18 Q. All right. So if Neldon Johnson -- 19 withdrawn. 20 I'll represent to you that my colleague 21 here deposed Mr. Johnson and he testified on behalf 22 LTB1. I've read Mr. -- that transcript, and despite 23 my colleague here's best of efforts we were not able 24 to glean anything that LTB -- LTB, LTB1, LLC, LTB 25 O & M, LLC -- we are not able to understand anything</p>	<p style="text-align: right;">208</p> <p>1 A. I think there's an obligation on the part 2 of the -- the purchasers to pay the purchase price. 3 Q. When? 4 A. I'm going to look here at Exhibit A. 5 Q. Is it when the lens begin producing 6 revenue? 7 A. I think there's something related to that, 8 but there is -- they do have an obligation to pay. 9 There's in paragraph five, In the event 10 the purchaser fails to pay any of the annual 11 installments when due, interest shall accrue. And 12 seller has some rights upon default if there is a 13 failure to pay. 14 Q. Okay. When do those annual installments 15 become due? 16 A. Again, my understanding from the agreement 17 and what we've looked at here today is it's on the 18 installation date. 19 Q. Okay. And I think you've testified that 20 no one knows when that installation date is. 21 A. That's true. 22 Q. Okay. So do you agree with me that no one 23 is obligated to pay on these promissory notes until 24 this installation date, which is at some point in the 25 future?</p>
<p style="text-align: right;">207</p> <p>1 that an entity with the acronym LTB does. 2 You're welcome to read that transcript 3 yourself. So I want to understand if it turns out 4 that LTB in any form doesn't do anything, does that 5 affect your conclusions? 6 A. Well, if -- if it means that RaPower is 7 the ultimate operator, I don't think that affects the 8 conclusions. 9 Q. No? 10 A. There are sale leaseback transactions in 11 all sorts of situations. I don't think that would 12 be -- again, I'd have to go look at it and -- and I 13 would be happy to do so, to see if that has any 14 impact on my opinion. 15 Q. All right. We're still in the Nickeson 16 case, believe it or not. The Tenth Circuit also 17 evaluated whether the notes -- the promissory notes 18 that were part of the transaction had any commercial 19 value. 20 Let me ask you this: Do you believe that 21 the promissory notes that are signed in the 22 transaction we're discussing today have any 23 commercial value? 24 A. Yes, I do. 25 Q. Why do you say that?</p>	<p style="text-align: right;">209</p> <p>1 A. That appears to be true, yes. 2 Q. Okay. Nonetheless, you believe that these 3 promissory notes have commercial value? 4 A. I think there's an obligation there. 5 Q. Obligation of what? 6 A. An obligation to pay. Now, it may -- the 7 timing of it may be not set to a specific day. 8 Q. Do you think that fact affects the value 9 of these promissory notes? 10 A. I think it could have some effect on it. 11 Q. Some effect? 12 A. I don't think it makes them worthless. 13 Q. Okay. Do you know of a market for this 14 type of debt? 15 A. I don't. 16 Q. Okay. Then why do you think that these 17 promissory notes have commercial value? 18 A. Again, because I believe there's an 19 obligation to pay. 20 Q. Would you buy these notes? 21 A. Perhaps. 22 Q. You would? Would you pay their face 23 value? 24 A. I -- maybe. I think that's irrelevant, 25 but, maybe.</p>

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<p style="text-align: right;">210</p> <p>1 Q. I'm just trying to understand the basis</p> <p>2 for your opinion that these things have commercial</p> <p>3 value.</p> <p>4 A. Sure.</p> <p>5 Q. Under the terms of this con -- the</p> <p>6 Equipment Purchase Agreement, I think it's fair to</p> <p>7 say that the amount due and owing is the difference</p> <p>8 between the down payment and the \$3,500. Is that</p> <p>9 your understanding?</p> <p>10 A. That's my understanding.</p> <p>11 Q. Okay. So that's roughly about \$2,500?</p> <p>12 A. Correct.</p> <p>13 Q. All right. So this is a promise to pay</p> <p>14 \$2,500 at some undefined point in the future?</p> <p>15 MR. PAUL: Objection. Misstates the</p> <p>16 documents.</p> <p>17 Q. (BY MR. MORAN) Do you agree with that</p> <p>18 statement?</p> <p>19 A. I think that sounds fair.</p> <p>20 Q. Okay. So we've got a promissory note to</p> <p>21 pay \$2,500 at some point in the future. What would</p> <p>22 you pay for it? You just testified you would -- you</p> <p>23 would be willing to purchase that paper. What would</p> <p>24 you pay?</p> <p>25 A. Well, I'd look at several factors and --</p>	<p style="text-align: right;">212</p> <p>1 the factors considered therein affect whether or not</p> <p>2 you would advise this hypothetical client who bought</p> <p>3 lenses that they are in a trade or business?</p> <p>4 A. I think they would influence it, but I</p> <p>5 don't think they would impact or affect the opinions</p> <p>6 that I've rendered.</p> <p>7 Q. Why not?</p> <p>8 A. I -- well, I think -- like I put in my</p> <p>9 report, I believe that these contracts and -- and the</p> <p>10 transactions put them in -- operating in a trade or</p> <p>11 business that they are materially participating in.</p> <p>12 Q. Tell me, why can't Judge Nuffer look at</p> <p>13 the Nickeson case, the 183 factors, a myriad of other</p> <p>14 cases that are considered relevant to owning a trade</p> <p>15 or business to make his decision in this case? Why</p> <p>16 does he need you?</p> <p>17 A. Well, I think his decision in this case</p> <p>18 has to do with whether there's a abusive tax shelter</p> <p>19 or not. These issues influence that, but that's not</p> <p>20 the ultimate issue of the case, as my -- as I</p> <p>21 understand it.</p> <p>22 So, no, there is nothing preventing him</p> <p>23 from reading these cases, certainly not, but my</p> <p>24 opinion -- or my experience is that courts are always</p> <p>25 interested in -- in getting information or help, if</p>
<p style="text-align: right;">211</p> <p>1 boy, I don't know.</p> <p>2 Q. Well, based on what you know of this case,</p> <p>3 would you pay face value?</p> <p>4 A. It's possible.</p> <p>5 Q. You would?</p> <p>6 A. It's possible.</p> <p>7 Q. Do you know what collateral secures the</p> <p>8 repayment?</p> <p>9 A. My understanding is it's the lenses</p> <p>10 themselves.</p> <p>11 Q. Any other collateral?</p> <p>12 A. Not that I recall.</p> <p>13 Q. Okay. Does the value of the promissory</p> <p>14 note have any effect on your opinion that this</p> <p>15 transaction has economic substance?</p> <p>16 A. No, I don't believe so.</p> <p>17 Q. No? Okay. All right. We've discussed</p> <p>18 several factors that the Tenth Circuit in the</p> <p>19 Nickeson case deemed relevant to whether or not a</p> <p>20 taxpayer was engaged in a trade or business.</p> <p>21 Does anything that we've discussed since</p> <p>22 the lunch break affect your opinion that RaPower3's</p> <p>23 customers -- let me rephrase that.</p> <p>24 Does anything that we've discussed since</p> <p>25 our lunch break in regards to the Nickeson case and</p>	<p style="text-align: right;">213</p> <p>1 it's helpful.</p> <p>2 Q. Tell me, customarily in litigation who</p> <p>3 provides the arguments as to how the facts should</p> <p>4 apply to the law?</p> <p>5 A. Who provides the arguments?</p> <p>6 Q. Yes.</p> <p>7 A. Generally in a case, a -- the parties do.</p> <p>8 Q. And their attorneys?</p> <p>9 A. Yes.</p> <p>10 Q. Okay.</p> <p>11 (EXHIBIT 655 WAS MARKED.)</p> <p>12 Q. Mr. Hawes, you've been given a copy of</p> <p>13 26 USC Section 465 -- oh, withdraw that.</p> <p>14 You've been given a copy of Exhibit...</p> <p>15 A. 655.</p> <p>16 MR. MORAN: 655.</p> <p>17 Q. Do you recognize this?</p> <p>18 A. It appears to be a copy of a tax statute,</p> <p>19 Section 465 of the Internal Revenue Code.</p> <p>20 Q. Okay. Have you ever had occasion to read</p> <p>21 Section 465?</p> <p>22 A. I believe I have, but not recently.</p> <p>23 Q. I'll represent to you that Section 465 is</p> <p>24 colloquially called the at-risk rules. And I'll just</p> <p>25 ask this question. Why do you think that -- or how</p>

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<p style="text-align: right;">214</p> <p>1 do you think Section 465, if at all, applies to the</p> <p>2 transaction in this case?</p> <p>3 A. It appears to limit deductions to the</p> <p>4 amount of risk that a taxpayer may be subjected to.</p> <p>5 Q. Okay. I'm going to direct your attention</p> <p>6 to Section 465 (b)(3)(A), in general.</p> <p>7 A. Okay.</p> <p>8 Q. It says, "Except to the extent provided in</p> <p>9 regulations, for purposes of paragraph (1)(B),</p> <p>10 amounts borrowed shall not be considered at risk with</p> <p>11 respect to an activity if such amounts are borrowed</p> <p>12 from any person who has an interest in such activity</p> <p>13 or from a related person to a person (other than the</p> <p>14 taxpayer) having such an interest."</p> <p>15 Did I read that correctly?</p> <p>16 A. Yes, you did.</p> <p>17 Q. Okay. Now, according to the Equipment</p> <p>18 Purchase Agreement, who finances the promissory note?</p> <p>19 A. That is the seller, which is RaPower.</p> <p>20 Q. Okay. And what amount is financed?</p> <p>21 A. The total amount less the down payment.</p> <p>22 Q. Okay. And that's \$3,500?</p> <p>23 A. The total amount is \$3,500.</p> <p>24 Q. Less the down payment is somewhere in the</p> <p>25 \$2,500 neighborhood, right?</p>	<p style="text-align: right;">216</p> <p>1 A. Okay.</p> <p>2 Q. Do you disagree with that? I mean, you</p> <p>3 are the tax expert, so I want to know.</p> <p>4 A. I think there's an argument that that's</p> <p>5 the case. There are other things in this section</p> <p>6 that may limit that or may expand that. But just</p> <p>7 looking at the one provision I'm not sure explains</p> <p>8 the whole situation.</p> <p>9 Q. All right. Well, we don't have time today</p> <p>10 to go through Section 456 ad nauseam, but my only</p> <p>11 question to you is, why didn't you consider</p> <p>12 Section 465 in your expert report?</p> <p>13 A. We -- I looked at this as a -- and this</p> <p>14 relates a lot to -- and I'm just kind of scanning</p> <p>15 over -- scanning over Section 465. But, again, my --</p> <p>16 my understanding was that the obligation to pay put</p> <p>17 that at risk -- put that amount at risk. I did not</p> <p>18 look at Section 465 specifically.</p> <p>19 Q. Is there a reason?</p> <p>20 A. But I -- I felt that as they were -- as</p> <p>21 taxpayers were involved in this business or trade and</p> <p>22 materially participating in their leasing business,</p> <p>23 that -- that they qualified for the credit and</p> <p>24 qualified for the deduction and that's --</p> <p>25 Q. So you didn't look at Section 465?</p>
<p style="text-align: right;">215</p> <p>1 A. Say that one more time.</p> <p>2 Q. I said \$3,500 less the down payment --</p> <p>3 minus the down payment is approximately \$2,500.</p> <p>4 A. \$2,500 that --</p> <p>5 Q. That is financed.</p> <p>6 A. That is financed. That sounds about</p> <p>7 right.</p> <p>8 Q. Okay. And it's financed by RaPower3?</p> <p>9 A. That's correct.</p> <p>10 Q. Okay. So how can that \$2,500 be</p> <p>11 considered at risk in this transaction?</p> <p>12 A. I think, again, I would point to the</p> <p>13 obligation of the party to pay.</p> <p>14 Q. But it's financed by RaPower3.</p> <p>15 A. I'm not sure that takes away the</p> <p>16 obligation of the party to pay.</p> <p>17 Q. And RaPower3 is related to LTB, as we've</p> <p>18 discussed, right?</p> <p>19 A. You've -- you've told me that that's been</p> <p>20 the testimony in other -- in other depositions.</p> <p>21 Q. Okay. So the way I'm reading this section</p> <p>22 of 465, if the amounts that you borrow from anyone</p> <p>23 else who has an interest in the activity, which would</p> <p>24 be this -- the entire transaction, that amount is not</p> <p>25 at risk.</p>	<p style="text-align: right;">217</p> <p>1 A. Not specifically as it relates to do this</p> <p>2 case.</p> <p>3 Q. Did it ever occur to you to look at</p> <p>4 Section 465?</p> <p>5 A. No, it didn't.</p> <p>6 Q. Are you going to look at Section 465 after</p> <p>7 today's deposition?</p> <p>8 A. I certainly will.</p> <p>9 Q. Okay. And if that changes your</p> <p>10 conclusions, will you let me know?</p> <p>11 A. Yes.</p> <p>12 MR. MORAN: Okay. All right. Take a</p> <p>13 five-minute break.</p> <p>14 (A break was taken from 2:53 p.m. to</p> <p>15 2:58 p.m.)</p> <p>16 MR. MORAN: We'll go back on the record.</p> <p>17 Q. Mr. Hawes, directing your attention to --</p> <p>18 A. Before we go on, maybe I'll make one quick</p> <p>19 comment about 465 before we leave that.</p> <p>20 Q. Go ahead.</p> <p>21 A. Is that okay?</p> <p>22 Q. Yes. Perfect time for that.</p> <p>23 A. I guess my -- my thought in looking at it</p> <p>24 a little bit quicker is Section 465 doesn't</p> <p>25 necessarily determine whether a deduction can or</p>

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<p style="text-align: right;">218</p> <p>1 can't be taken. It just determines whether it can be 2 limited in certain tax years. So I'm not sure 3 Section 465 would -- would impact whether or not the 4 deduction is proper, just whether or not the amount 5 of the deduction you take in that particular tax year 6 is proper.</p> <p>7 Q. Okay. So, in your view, Section 456, at 8 least, is based on the amount of the deduction?</p> <p>9 A. And I'm -- yes, and I'm -- well, maybe not 10 the amount, but what it's -- what it's saying here in 11 Section (a)(2) is it says, "Any loss from an activity 12 to which this section applies not allowed under this 13 section for the taxable year shall be treated as a 14 deduction allocable to such activity in the first 15 succeeding taxable year." So it may be carried over 16 into succeeding taxable years.</p> <p>17 Q. It may be carried over, but I'll represent 18 to you that the defendants in this case have told 19 customers that they can deduct in their current tax 20 year and carry back to the year's previous deductions 21 and credits based on the full \$3,500.</p> <p>22 A. Well, I think the -- the basis is -- is 23 different than whether or not they can be -- whether 24 the deduction is proper. You can have a deduction. 25 What you base it on is another question. And when</p>	<p style="text-align: right;">220</p> <p>1 sentence, it says, "Although a lens leasing business 2 is the rental of tangible person property and, 3 therefore, is per se a passive of activity under 4 IRC Section 469(c)(2) and (j)(8), for purposes of 5 this opinion, I assume that the activity qualifies 6 for the incidental activity exception as described in 7 Temp. Tres. Reg Section 1.469-1 8 (T)(e)(3)(vi)(C)(1)-(3)."</p> <p>9 Did I read that correctly?</p> <p>10 A. Yes.</p> <p>11 Q. Okay. I take it you are familiar with 12 Section 469?</p> <p>13 A. Yes.</p> <p>14 Q. Okay. How are you familiar with 15 Section 469?</p> <p>16 A. Well, most recently as it relates to this 17 case.</p> <p>18 Q. All right. In your legal career have you 19 ever had a case involving Section 469?</p> <p>20 A. Not specifically that I can recall.</p> <p>21 Q. Okay. So when was the first time you 22 heard of Section 469?</p> <p>23 A. I think specifically it's related to this 24 case.</p> <p>25 Q. Okay. Who mentioned it to you?</p>
<p style="text-align: right;">219</p> <p>1 you could take it is another question.</p> <p>2 Q. Okay. So what do you base your 3 depreciation on?</p> <p>4 A. It's based on the cost of the product.</p> <p>5 Q. Which is the basis, right?</p> <p>6 A. Right.</p> <p>7 Q. Okay. So if the defendants in this case 8 have told their customers that they can take 9 deductions and credits based on \$3,500, do you think 10 that statement is affected in any way by Section 465?</p> <p>11 A. It might have some impact, but, again, 12 I -- my -- my opinion is based on the fact that 13 they're engaged in the leasing business and they are 14 materially participating in it.</p> <p>15 Q. The fact that the financing is provided by 16 an entity with an interest in the transaction doesn't 17 affect you?</p> <p>18 A. Well, like I said, it influences it, but I 19 don't think it changes my opinion.</p> <p>20 Q. All right. Now I'm directing your 21 attention to Exhibit -- to footnote 68, which appears 22 on page 22 of your expert report in Exhibit 651. Do 23 you see footnote 68?</p> <p>24 A. Yes, I do.</p> <p>25 Q. And directing your attention to the second</p>	<p style="text-align: right;">221</p> <p>1 A. I discovered it in my research, talked 2 with Jenni Davenport and her research.</p> <p>3 Q. Did Paul Jones mention it?</p> <p>4 A. Not that I can recall.</p> <p>5 Q. Okay. If Mr. Paul didn't mention 6 Section 469 specifically --</p> <p>7 MS. HEALY GALLAGHER: Mr. Jones?</p> <p>8 THE WITNESS: This is Mr. Paul.</p> <p>9 MR. MORAN: I'm sorry.</p> <p>10 Q. If Mr. Jones didn't mention Section 469 11 specifically, did he discuss active versus passive 12 rules?</p> <p>13 A. I've talked with him before about active 14 versus passive rules.</p> <p>15 Q. In the context of this case?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. And what did you discuss with 18 Mr. Jones regarding passive/active rules?</p> <p>19 A. Just the -- kind of the basic principles 20 of what the -- what the passive limitations are in 21 terms of taking deductions for passive activity 22 versus active activity -- active business activity.</p> <p>23 Q. Okay. Did you know what those rules were 24 before you talked to Mr. Jones, or did he tell you 25 what they were?</p>

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<p style="text-align: right;">222</p> <p>1 A. I knew about them generally. I hadn't had</p> <p>2 a case specifically -- or at least I haven't had a</p> <p>3 case for many years that -- where that was</p> <p>4 implicated, so it was more a refresher to kind of</p> <p>5 help me get a grasp around -- around those principles</p> <p>6 again.</p> <p>7 Q. Okay. And you say that you made an</p> <p>8 assumption regarding the incidental activity</p> <p>9 exception.</p> <p>10 A. That's true.</p> <p>11 Q. And I'm referring to Exhibit -- footnote</p> <p>12 68 in your report.</p> <p>13 A. That's true.</p> <p>14 Q. Okay. Why did you make that assumption?</p> <p>15 A. I believed it applied.</p> <p>16 Q. Did anyone suggest that you make that</p> <p>17 assumption?</p> <p>18 A. No, and I -- anyway, I believe that it</p> <p>19 applied in this case.</p> <p>20 Q. Okay. When was the first time you heard</p> <p>21 of that incidental activity exception?</p> <p>22 A. When I read through the statute. Or,</p> <p>23 excuse me, the regs.</p> <p>24 Q. Okay. So do you agree with the statement</p> <p>25 that -- under IRC Section 469 provides that rental</p>	<p style="text-align: right;">224</p> <p>1 same temporary treasury regulation that you cited</p> <p>2 before.</p> <p>3 Q. Why don't we take a look at it.</p> <p>4 Mr. Hawes, I'm handing you what's been</p> <p>5 previously marked as Exhibit 628. Do you recognize</p> <p>6 Exhibit 628?</p> <p>7 A. It appears to be a printout from</p> <p>8 LexisNexis with the temporary treasury regulation</p> <p>9 that we've been talking about, 1.469-1.</p> <p>10 Q. T?</p> <p>11 A. T, yes. Sorry.</p> <p>12 Q. All right. And you cite to -- we already</p> <p>13 put it in the record, but -- what we'll put on the</p> <p>14 record is -- your footnote says 1.469-1T(e)(3)(vi)</p> <p>15 (1)-(3).</p> <p>16 A. That's right.</p> <p>17 Q. Okay. And generally that encompasses</p> <p>18 what -- the definition of a passive activity. Is</p> <p>19 that your understanding as well?</p> <p>20 A. That the -- the reg itself?</p> <p>21 Q. The reg defines what a passive activity</p> <p>22 is.</p> <p>23 A. Yes.</p> <p>24 Q. Okay. And you call it an incidental</p> <p>25 activity exception. I see that in subpart (D) in the</p>
<p style="text-align: right;">223</p> <p>1 activities are per se passive?</p> <p>2 A. Rental activities of tangible personal</p> <p>3 property.</p> <p>4 Q. Are per se passive?</p> <p>5 A. That's my understanding.</p> <p>6 Q. Okay. Do you believe that the</p> <p>7 hypothetical taxpayer, that you've provided an</p> <p>8 opinion on, that they have a rental activity?</p> <p>9 A. Yes.</p> <p>10 Q. Okay. So that's an assumption you entered</p> <p>11 your analysis with?</p> <p>12 A. That's true.</p> <p>13 Q. And then absent qualifying for the</p> <p>14 incidental activity exception you describe here,</p> <p>15 their activity would be considered passive?</p> <p>16 A. There may be another exception that</p> <p>17 applies that I looked at after I submitted the</p> <p>18 report.</p> <p>19 Q. What exception is that?</p> <p>20 A. The one where -- that says they hold it</p> <p>21 out during regular business hours for -- for use by</p> <p>22 customers. I can't remember the exact language.</p> <p>23 Q. Do you remember where that language</p> <p>24 appears?</p> <p>25 A. It's -- it should be -- it's right in that</p>	<p style="text-align: right;">225</p> <p>1 middle of page 4. Do you see that?</p> <p>2 A. Middle of page 4. Right here. Yes.</p> <p>3 Q. And then also it ref -- I think that's</p> <p>4 further defined on the next page, page 5 of</p> <p>5 Exhibit 628, rental of property incidental to a</p> <p>6 nonrental activity of the taxpayer?</p> <p>7 A. Right.</p> <p>8 Q. Okay. So subpart Roman numeral 6 on page</p> <p>9 5, that's what -- the exception you are referring to</p> <p>10 in footnote 68; is that right?</p> <p>11 A. That's correct.</p> <p>12 Q. And my reading of that subpart is that</p> <p>13 the -- it refers to rental of property incidental to</p> <p>14 a nonrental activity of a taxpayer. Is that correct?</p> <p>15 A. That's correct.</p> <p>16 Q. All right. So you agree -- what led you</p> <p>17 to -- what are the facts that led you to make the</p> <p>18 assumption that this subpart in the regulation</p> <p>19 applied?</p> <p>20 A. That they were -- the taxpayers would</p> <p>21 be -- own an interest in their trade or business,</p> <p>22 that the property was used in a trade or business</p> <p>23 during the taxable year, and the gross rental income</p> <p>24 would not meet the -- the levels that -- that are in</p> <p>25 the statute, the two percent level.</p>

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<p style="text-align: right;">226</p> <p>1 Q. Okay. What are the facts that you -- that</p> <p>2 were given to you that led you to believe that that</p> <p>3 assumption was -- was an assumption you should make?</p> <p>4 What do you know about this hypothetical taxpayer</p> <p>5 that would lead you to that assumption?</p> <p>6 A. That that taxpayer would begin a business,</p> <p>7 I guess, if that's the right word, or have a</p> <p>8 business, and that the -- the property would be used</p> <p>9 in that trade or business activity, and that the</p> <p>10 rental income would not reach the -- beyond that two</p> <p>11 percent level.</p> <p>12 Q. What do you know about the rental income</p> <p>13 received by any RaPower3 customer in this case?</p> <p>14 A. Well, I just know the -- what it says in</p> <p>15 the contract about rental income amounts and when</p> <p>16 those start being paid.</p> <p>17 Q. Have those ever started being paid?</p> <p>18 A. As far as I know, no.</p> <p>19 Q. Okay. All right. So you just went to</p> <p>20 the -- kind of the subpart of this exception, but the</p> <p>21 exception is titled, "Rental of property incidental</p> <p>22 to a nonrental activity of the taxpayer."</p> <p>23 Am I misreading the --</p> <p>24 A. You're reading that correct.</p> <p>25 Q. Okay. And I think we agree that your</p>	<p style="text-align: right;">228</p> <p>1 Mr. Shepard says, "We should not consider ourselves</p> <p>2 in an energy business."</p> <p>3 So I'll ask you again, what is the leasing</p> <p>4 business of this hypothetical taxpayer incidental to</p> <p>5 to support your assumption that this exception</p> <p>6 applies?</p> <p>7 A. My assumption was that it -- that they</p> <p>8 were involved in the energy business as well. So</p> <p>9 Greg Shepard may disagree with me -- or I may</p> <p>10 disagree with him in that e-mail.</p> <p>11 Q. Greg Shepard is a defendant in this case.</p> <p>12 Are you aware of that?</p> <p>13 A. Yes, I am.</p> <p>14 Q. You're here offering an expert opinion on</p> <p>15 his behalf, I believe, right?</p> <p>16 A. Yes.</p> <p>17 Q. Okay. So you disagree with the person who</p> <p>18 is paying you?</p> <p>19 A. I've done it before.</p> <p>20 Q. Okay. So it's your testimony that your</p> <p>21 hypothetical taxpayer also has an energy business?</p> <p>22 A. That's correct.</p> <p>23 Q. Okay. What does that business consist of?</p> <p>24 A. Well, it -- they are associated with the</p> <p>25 business of the production of electricity and energy.</p>
<p style="text-align: right;">227</p> <p>1 hypothetical taxpayer is engaged in a rental</p> <p>2 activity, right?</p> <p>3 A. Yes, that's correct.</p> <p>4 Q. My question to you, Mr. Hawes, is, what is</p> <p>5 that rental activity incidental to?</p> <p>6 A. In that regard, my feeling was it was</p> <p>7 incidental to the production of electricity -- the</p> <p>8 process or the business of the production of</p> <p>9 electricity.</p> <p>10 Q. But I thought they were in the leasing</p> <p>11 business.</p> <p>12 A. That's correct.</p> <p>13 Q. Okay. Are they in the energy business?</p> <p>14 A. I think -- I think anybody who gets</p> <p>15 involved in this has some desire to be -- or most</p> <p>16 people have some desire to be in the energy business,</p> <p>17 but the degree to which each of them participates</p> <p>18 might be different.</p> <p>19 Q. I'll get you a copy of Plaintiff's</p> <p>20 Exhibit 342. Mr. Jamison, I think Greg Shepard</p> <p>21 disagrees with you. I direct you to --</p> <p>22 A. I'm Mr. Hawes.</p> <p>23 Q. I'm sorry. Mr. Hawes, I think Mr. Shepard</p> <p>24 disagrees with you. I'm directing your attention to</p> <p>25 Plaintiff's Exhibit 32, paragraph number two.</p>	<p style="text-align: right;">229</p> <p>1 Q. I think you testified earlier that to your</p> <p>2 knowledge no electricity has ever been produced by</p> <p>3 the lenses at issue in this case?</p> <p>4 A. That's correct. That's correct.</p> <p>5 Q. Okay. So I -- in light of Mr. Shepard's</p> <p>6 insistence that there is no energy business, in light</p> <p>7 of the fact that there is no apparent activity in</p> <p>8 this energy business, do you still persist in your</p> <p>9 belief and the assumption that the incidental</p> <p>10 activity exception applies?</p> <p>11 A. I think there's potential that it may not,</p> <p>12 but I'm not sure it makes that much difference.</p> <p>13 Q. Okay. Do you think that that's something</p> <p>14 you should consider in reaching your expert opinion</p> <p>15 in this case?</p> <p>16 A. Sure. Absolutely.</p> <p>17 Q. Okay. Did you consider the facts I've</p> <p>18 shown you today when you drafted your report?</p> <p>19 A. I didn't have this e-mail when I drafted</p> <p>20 my report. So did I consider this e-mail? No, I did</p> <p>21 not.</p> <p>22 Q. When you say "this e-mail," what are you</p> <p>23 referring to?</p> <p>24 A. Sorry. Exhibit 32.</p> <p>25 Q. Okay. You also cite to the Misko case.</p>

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<p style="text-align: right;">230</p> <p>1 A. That's correct.</p> <p>2 Q. In footnote 68. Tell me, briefly, what</p> <p>3 are the facts in the Misko case that you relied on?</p> <p>4 A. Misko case, there was a lawyer who had a</p> <p>5 law firm. He was changing his practice and decided</p> <p>6 to set up a different business to purchase lots -- or</p> <p>7 technical equipment, I guess, computers, printers,</p> <p>8 other types of things like that.</p> <p>9 Q. Okay.</p> <p>10 A. And then he would lease that to his law</p> <p>11 firm.</p> <p>12 Q. So in that case the leasing business was</p> <p>13 incidental to his law practice, right?</p> <p>14 A. Yes.</p> <p>15 Q. Okay. Did that lawyer have any -- he</p> <p>16 spent most of his time practicing law, right?</p> <p>17 A. I'm assuming he did.</p> <p>18 Q. Okay. I've read the Misko case. That's</p> <p>19 the fact that I drew from it, is that he was</p> <p>20 primarily a lawyer, he had a -- a leasing business</p> <p>21 that was incidental to his law practice and that's</p> <p>22 why the tax court allowed -- applied the incidental</p> <p>23 activity exception that you are trying to apply to a</p> <p>24 purported energy business --</p> <p>25 A. That's true.</p>	<p style="text-align: right;">232</p> <p>1 MS. HEALY GALLAGHER: Yes.</p> <p>2 THE WITNESS: Yes. I apologize.</p> <p>3 Q. (BY MR. MORAN) Mr. Hawes, you testified</p> <p>4 that you assumed this hypothetical taxpayer was</p> <p>5 engaged -- would be engaged in the energy business.</p> <p>6 Again, what facts led you to make that assumption?</p> <p>7 MR. PAUL: Objection. Asked and answered.</p> <p>8 THE WITNESS: Again, that he -- that the</p> <p>9 taxpayer would purchase the lenses, I'm assuming, or</p> <p>10 at least the taxpayers that I would counsel in this</p> <p>11 regard have some interest in being involved in the</p> <p>12 energy business -- or the energy industry and this</p> <p>13 might be a way for them to do that.</p> <p>14 Q. (BY MR. MORAN) Okay. How would this</p> <p>15 hypothetical customer be involved in the energy</p> <p>16 business?</p> <p>17 A. Their investing and leasing and</p> <p>18 participating in the production of electricity -- or</p> <p>19 the potential production of electricity.</p> <p>20 Q. And what does LTB do?</p> <p>21 A. They manage the -- the assets, the lenses.</p> <p>22 They take care of them and service them, make sure</p> <p>23 they're operating appropriately.</p> <p>24 Q. Okay. And what does the lens owner do?</p> <p>25 If LTB is taking care of all of that, what does the</p>
<p style="text-align: right;">231</p> <p>1 Q. -- that defendants in this case insist</p> <p>2 doesn't exist and that hasn't ever produced income or</p> <p>3 really done anything.</p> <p>4 A. That's correct.</p> <p>5 Q. Okay. Nonetheless, you believe the Misko</p> <p>6 case is applicable to the facts here?</p> <p>7 A. I think it has some applicability. I</p> <p>8 mean, every case is different, but...</p> <p>9 Q. Why -- why do you think that it has some</p> <p>10 applicability? Do you not think it can be</p> <p>11 distinguished?</p> <p>12 A. Sure, I think there's some distinguishing</p> <p>13 factors, but I think there is some applicability</p> <p>14 to -- to be drawn from that case.</p> <p>15 Q. What is that applicability?</p> <p>16 A. That in -- that there is an exception for</p> <p>17 incidental activity, and I think that there is</p> <p>18 some -- there is an argument that that exception</p> <p>19 applies here.</p> <p>20 Q. Who gave you the Misko case? Who found</p> <p>21 the Misko case?</p> <p>22 A. Jenni Davenport found it first, and then</p> <p>23 she referred it to me.</p> <p>24 Q. So she brought it to your attention?</p> <p>25 A. Uh-huh (affirmative).</p>	<p style="text-align: right;">233</p> <p>1 owner do?</p> <p>2 A. They buy the lens.</p> <p>3 Q. And they lease it to LTB?</p> <p>4 A. They lease it to LTB.</p> <p>5 Q. And LTB pays them money?</p> <p>6 A. That's correct.</p> <p>7 Q. And that's the lease part of the</p> <p>8 transaction; is that right?</p> <p>9 A. That's right. That's right.</p> <p>10 Q. So what else does the lens owner have to</p> <p>11 do with the energy business that you say they are in?</p> <p>12 A. Other than participating in -- I mean,</p> <p>13 there could be other aspects. I'm not sure off the</p> <p>14 top of my head.</p> <p>15 Q. Did you consider any?</p> <p>16 A. No, I don't believe so.</p> <p>17 Q. Then I really am a bit flummoxed here on</p> <p>18 why you believe this hypothetical taxpayer is engaged</p> <p>19 in an energy business in addition to a leasing</p> <p>20 business.</p> <p>21 A. Okay. Well, it's --</p> <p>22 Q. I don't understand.</p> <p>23 MR. PAUL: Again, there wasn't a question</p> <p>24 there, so you don't --</p> <p>25 Q. (BY MR. MORAN) Can you help me</p>

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<p style="text-align: right;">234</p> <p>1 understand?</p> <p>2 A. That was the assumption that I went off</p> <p>3 when I wrote the report.</p> <p>4 Q. Okay.</p> <p>5 A. Again, I'm -- I'm not sure it's as</p> <p>6 applicable here. It's similar to 465 in that I'm not</p> <p>7 sure 469 -- the regs in 469 eliminate a deduction as</p> <p>8 opposed to determine when and against which income</p> <p>9 you can take the deduction.</p> <p>10 Q. Okay. We don't have time to get into all</p> <p>11 the intricacies of 469 today, fortunately.</p> <p>12 MR. PAUL: Amen.</p> <p>13 Q. (BY MR. MORAN) You also referred to</p> <p>14 another exception that you thought might apply that</p> <p>15 doesn't appear in your report. For the record, I'll</p> <p>16 object to you offering that -- that type of testimony</p> <p>17 if it's not in your report, but can you tell me where</p> <p>18 that appears?</p> <p>19 A. This is in -- I need to get the right</p> <p>20 subsection.</p> <p>21 Q. You are looking at Exhibit 628?</p> <p>22 A. Yes, Exhibit 628, subsection (e) -- let's</p> <p>23 see -- (e)(3)(2) -- or (ii).</p> <p>24 Q. What page are you on?</p> <p>25 A. Page 4, (ii)(E).</p>	<p style="text-align: right;">236</p> <p>1 be some argument that the -- the electrical</p> <p>2 customers. In terms of the leasing business, it's I</p> <p>3 -- I -- I keep forgetting -- LTB, LTB1.</p> <p>4 Q. Okay. So it's LTB or LTB1. That sounds</p> <p>5 exclusive. And the exception you are referring to</p> <p>6 only applies to nonexclusive use by various</p> <p>7 customers. Can you help me understand how this</p> <p>8 subsection could possibly apply?</p> <p>9 A. Well, I think it -- it depends on the</p> <p>10 taxpayer. There are different situations where this</p> <p>11 may come into play. Again, I'd ask questions; I'd</p> <p>12 advise a taxpayer to see if this made a difference.</p> <p>13 Q. Okay.</p> <p>14 A. But, again, I don't think it impacts</p> <p>15 whether they take the deduction; it just maybe</p> <p>16 impacts what income they can deduct against.</p> <p>17 Q. Okay. So the facts that you are</p> <p>18 describing that may or may not apply to these</p> <p>19 regulations, do Neldon Johnson or Greg Shepard have</p> <p>20 any knowledge either, one, of these regulations or,</p> <p>21 two, of their hypothetical customers' tax situations?</p> <p>22 A. Do they have any knowledge?</p> <p>23 Q. (Nods head.)</p> <p>24 A. That I don't know.</p> <p>25 Q. Did you ever discuss that with them?</p>
<p style="text-align: right;">235</p> <p>1 Q. Okay. So right beneath the incidental --</p> <p>2 the incidental activity exception we were just</p> <p>3 discussing?</p> <p>4 A. Yes.</p> <p>5 Q. Okay. What are the defined business hours</p> <p>6 of this hypothetical taxpayer's, I guess, leasing</p> <p>7 business?</p> <p>8 A. I'm assuming that they could -- sunup to</p> <p>9 sundown, if we're doing solar energy.</p> <p>10 Q. Are you aware of anywhere these business</p> <p>11 hours are written down?</p> <p>12 A. I am not.</p> <p>13 Q. Okay. Did anyone give you any facts to</p> <p>14 suggest that there are defined business hours of</p> <p>15 these purported leasing activities?</p> <p>16 A. No, they didn't.</p> <p>17 Q. Or the -- let me ask that again.</p> <p>18 I guess the business hours of the</p> <p>19 nonrental activities -- so now we're back to the --</p> <p>20 you would be referring to the energy business that</p> <p>21 the hypothetical taxpayer is involved in. Withdraw</p> <p>22 that question.</p> <p>23 Who are the various customers that would</p> <p>24 cause this exception to apply?</p> <p>25 A. I think -- again, potentially, there may</p>	<p style="text-align: right;">237</p> <p>1 A. No.</p> <p>2 Q. Okay. All right. Mr. Hawes, throughout</p> <p>3 your report you talk about solar process heat?</p> <p>4 A. Yes.</p> <p>5 Q. What does the term "solar process heat"</p> <p>6 mean to you?</p> <p>7 A. Heat that is produced through a solar</p> <p>8 process.</p> <p>9 Q. That's it?</p> <p>10 A. That's my understanding of it.</p> <p>11 Q. Okay. I'm going to mark an exhibit.</p> <p>12 Where did you get that understanding?</p> <p>13 A. I think, in general, I just took it from</p> <p>14 the -- the words that are used.</p> <p>15 Q. Did you do any research?</p> <p>16 A. I did look to see if there was any</p> <p>17 definition. I saw one place that I felt said what</p> <p>18 solar process heat wasn't.</p> <p>19 Q. Where was that?</p> <p>20 A. I don't recall off the top of my head.</p> <p>21 Q. Was it a statute? Was it a regulation?</p> <p>22 Was it an Internet site?</p> <p>23 A. It was on the Internet. Again, I don't</p> <p>24 recall specifically where it was.</p> <p>25 (EXHIBIT 656 WAS MARKED.)</p>

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<p style="text-align: right;">238</p> <p>1 Q. Mr. Hawes, you've been given a copy of</p> <p>2 Exhibit 656. Do you recognize Exhibit 656?</p> <p>3 A. Yes. It appears to be a copy of Treasury</p> <p>4 Regulation 1.48-9.</p> <p>5 Q. Have you ever seen this regulation before?</p> <p>6 A. Yes.</p> <p>7 Q. When?</p> <p>8 A. In the process of preparing my report.</p> <p>9 Q. Okay. I direct your attention to page 8,</p> <p>10 subsection (d), Solar Energy Property.</p> <p>11 A. Okay.</p> <p>12 Q. This definition of solar energy property</p> <p>13 partly tracks your definition of solar energy</p> <p>14 property on page 7 of your report. I'd invite you to</p> <p>15 compare them.</p> <p>16 A. Okay.</p> <p>17 Q. The main difference that I see is that you</p> <p>18 include solar process heat in your definition of</p> <p>19 solar energy property.</p> <p>20 A. Let me see where you're...</p> <p>21 Q. On page 7 of your report, under the</p> <p>22 heading Solar Energy Property, you say, "Qualified</p> <p>23 energy property includes solar energy property, which</p> <p>24 is equipment that uses solar energy to generate</p> <p>25 electricity, to heat, cool, or provide hot water for</p>	<p style="text-align: right;">240</p> <p>1 if you need to updated anything in your report, I</p> <p>2 invite you to do so. You are free to look at</p> <p>3 Section 48.</p> <p>4 A. Okay.</p> <p>5 Q. But on my take from these regulations --</p> <p>6 and, again, I'm not an expert -- I don't purport to</p> <p>7 be -- but solar process heat seems to be excluded</p> <p>8 from the definition of solar energy property, and I'm</p> <p>9 asking you because --</p> <p>10 A. Right.</p> <p>11 Q. -- you're the expert on this.</p> <p>12 A. You know, some -- and I'll look at that</p> <p>13 statute, but if I look back at Exhibit F to my</p> <p>14 report, where there is this Bloomberg Law Analysis</p> <p>15 under subsection (1)(a) it's talking about solar</p> <p>16 energy property. "Solar energy property is equipment</p> <p>17 that uses solar energy to generate electricity to</p> <p>18 heat, cool or provide hot water for use in a</p> <p>19 structure, or to provide solar process heat, but it</p> <p>20 does not include property used to generate energy for</p> <p>21 heating a swimming pool."</p> <p>22 My memory is that the term solar process</p> <p>23 heat is included in the statute.</p> <p>24 Q. Of Section 48?</p> <p>25 A. Of Section 48.</p>
<p style="text-align: right;">239</p> <p>1 use in a structure, or to provide solar process</p> <p>2 heat."</p> <p>3 Then when I look in the definition of</p> <p>4 solar energy property in Exhibit 656 I see all those</p> <p>5 terms except for solar process heat.</p> <p>6 Do you agree with me?</p> <p>7 A. I agree with that, yes. I'm trying to</p> <p>8 remember -- I don't have the statute in front of me.</p> <p>9 Section 48.</p> <p>10 Q. All right. Well, now I'm going to direct</p> <p>11 your attention to page 10 of Exhibit 656. Under</p> <p>12 paragraph seven it says, "Solar Process Heat</p> <p>13 Equipment. Solar energy property does not include</p> <p>14 equipment that uses solar energy to generate steam at</p> <p>15 high pressures -- at high temperatures for use in</p> <p>16 industrial or commercial processes (solar process</p> <p>17 heat)."</p> <p>18 A. Okay.</p> <p>19 Q. Does this shed any light on whether or not</p> <p>20 solar process heat is considered solar energy</p> <p>21 property?</p> <p>22 A. Well, I would like to look at the statute.</p> <p>23 I don't know if you have a copy of the statute with</p> <p>24 you.</p> <p>25 Q. Mr. Hawes, we are running out of time. So</p>	<p style="text-align: right;">241</p> <p>1 Q. Okay. You let me know.</p> <p>2 MR. PAUL: He just did.</p> <p>3 Q. (BY MR. MORAN) On page 8 of your report</p> <p>4 you also -- you also say that, "It is not necessary</p> <p>5 for solar energy property to comprise a completely</p> <p>6 functional solar system in order to qualify for the</p> <p>7 credit."</p> <p>8 Did I read that correctly?</p> <p>9 A. That's accurate.</p> <p>10 Q. Okay.</p> <p>11 A. Although I didn't see where you were</p> <p>12 reading from.</p> <p>13 Q. I was reading from page 8 of your report,</p> <p>14 in the first full paragraph. Starting with, "It is</p> <p>15 not necessary."</p> <p>16 A. Oh, there we go. Yes. Okay.</p> <p>17 Q. And you cite to the Cooper case.</p> <p>18 A. Correct.</p> <p>19 Q. Okay. Who -- when was the first time you</p> <p>20 heard of the Cooper case?</p> <p>21 A. I found the Cooper case when I went</p> <p>22 through that Exhibit F that we were just looking at,</p> <p>23 this Bloomberg Law Analysis.</p> <p>24 Q. Did Paul Jones ever suggest the Cooper</p> <p>25 case to you?</p>

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<p style="text-align: right;">242</p> <p>1 A. We've talked about the Cooper case.</p> <p>2 Q. Okay.</p> <p>3 A. But I -- I found it as I went through this</p> <p>4 analysis.</p> <p>5 Q. The Bloomberg analysis?</p> <p>6 A. The Bloomberg analysis.</p> <p>7 Q. Who found the Bloomberg analysis?</p> <p>8 A. I found the Bloomberg analysis.</p> <p>9 Q. Okay. Where did you find that?</p> <p>10 A. I found it on Bloomberg.</p> <p>11 Q. Okay. Is that --</p> <p>12 A. It's an online research tool.</p> <p>13 Q. Do you subscribe to that or is publicly</p> <p>14 available?</p> <p>15 A. No, I subscribe to it.</p> <p>16 Q. All right. I read the Cooper case and --</p> <p>17 can you tell me, briefly, the facts of the Cooper</p> <p>18 case, as you understood them?</p> <p>19 A. My memory of the case is that there was a</p> <p>20 company that was selling -- I want to say solar water</p> <p>21 heating units, that they would install on taxpayers'</p> <p>22 roofs. They were doing it in a similar</p> <p>23 transaction -- what I believe to be a similar</p> <p>24 transaction to this current case, where they -- the</p> <p>25 taxpayer would buy the -- buy the water heater and</p>	<p style="text-align: right;">244</p> <p>1 mattered to the court about how many years after it</p> <p>2 happened. So I didn't feel necessary to impose a</p> <p>3 time limit.</p> <p>4 Q. Okay. Do you know when the Cooper case</p> <p>5 was decided?</p> <p>6 A. '70 -- oh, '87. Sorry.</p> <p>7 Q. Okay.</p> <p>8 A. 1987.</p> <p>9 Q. And I believe it was tax years 1979 and</p> <p>10 1980 that were at issue?</p> <p>11 A. I think that's right.</p> <p>12 Q. Do you know when Section 469 of the tax</p> <p>13 code was enacted?</p> <p>14 A. Sometime in the '80s. I don't recall the</p> <p>15 exact year, but...</p> <p>16 Q. In forming your expert opinion did you</p> <p>17 give any analysis as to whether or not Section 469</p> <p>18 might have changed the results of the Cooper case?</p> <p>19 A. No, I did not.</p> <p>20 Q. Why not?</p> <p>21 A. I -- again, I didn't think it -- I didn't</p> <p>22 think it would have made a difference. That was my</p> <p>23 analysis.</p> <p>24 Q. Why?</p> <p>25 A. I felt like the Cooper case was pretty</p>
<p style="text-align: right;">243</p> <p>1 lease it to -- lease it to another entity.</p> <p>2 Q. Okay. My reading of the Cooper case is</p> <p>3 that there was actually a functional hot water</p> <p>4 heating system that was installed and operating on</p> <p>5 rooftops. Is that your understanding?</p> <p>6 A. That's my understanding as well, yes.</p> <p>7 Q. And that the tax court decided that the</p> <p>8 taxpayers might be able to take a deduction in year</p> <p>9 one even though it was installed in year two. Is</p> <p>10 that your understanding?</p> <p>11 A. Yes.</p> <p>12 Q. Okay.</p> <p>13 A. Yes.</p> <p>14 Q. Does the fact that the defendants in this</p> <p>15 case have been selling lenses that have never done</p> <p>16 anything for over 12 years -- does that affect your</p> <p>17 analysis of whether the Cooper case applies?</p> <p>18 A. I just used the language of the court.</p> <p>19 It's not necessary that it be part of a functioning</p> <p>20 system.</p> <p>21 Q. Okay. But it was part of a functioning</p> <p>22 system the year after the deductions were claimed.</p> <p>23 A. Right. Right.</p> <p>24 Q. Does that matter to you?</p> <p>25 A. I didn't see any -- anywhere where it</p>	<p style="text-align: right;">245</p> <p>1 clear. And it seemed to match our situation pretty</p> <p>2 closely. And there has been no other authority to</p> <p>3 suggest that 469 overruled Cooper or somehow impacted</p> <p>4 Cooper or that Cooper is no longer good law.</p> <p>5 Q. You agree that in Cooper there was a</p> <p>6 leasing business, right?</p> <p>7 A. Correct.</p> <p>8 Q. Okay. What makes you believe that the</p> <p>9 taxpayers in Cooper don't fall under the provision of</p> <p>10 469 that makes all rental activities per se passive?</p> <p>11 A. Again, I -- like I said, I haven't seen</p> <p>12 anything that coordinates the two. I haven't seen a</p> <p>13 case or any citation that says 469 overrules Cooper.</p> <p>14 As far as I know and as far as I could tell, Cooper</p> <p>15 was still good reasoning.</p> <p>16 Q. Okay. Did it ever occur to you to check</p> <p>17 and consider whether Section 469 might effect your</p> <p>18 reliance on Cooper, before today?</p> <p>19 A. Specifically, no. But I'm happy to</p> <p>20 research it a little.</p> <p>21 Q. Now that we discussed it, is that</p> <p>22 something that -- it's your expert opinion, not mine,</p> <p>23 and I just want to know what you think you're going</p> <p>24 to be testifying to.</p> <p>25 Since you're an expert I want to know why</p>

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<p style="text-align: right;">246</p> <p>1 you believe Cooper isn't affected at all by</p> <p>2 Section 469. I mean, I read it. I thought, "Gee,</p> <p>3 maybe 469 would apply," but, like I said, I'm not an</p> <p>4 expert, so I don't know how you can just dismiss</p> <p>5 Cooper out of --</p> <p>6 A. Well, I have a hard time putting my --</p> <p>7 again, I wouldn't -- I didn't see anything that</p> <p>8 suggested that another court has looked at that</p> <p>9 issue, so as far as I was aware, Cooper was good law.</p> <p>10 Q. Did you Shepardize the Cooper case?</p> <p>11 A. I did a little. I didn't do a full -- I</p> <p>12 did look to see if there was some citation -- some</p> <p>13 citations to the case. But in my -- in my view of</p> <p>14 it, I didn't see anything that overruled Cooper.</p> <p>15 Q. With the exception of the Bloomberg</p> <p>16 analysis, did you see any cases that supported your</p> <p>17 position that a system does not need to be functional</p> <p>18 for deductions to be claimed, and credits?</p> <p>19 A. With the exception of the Cooper case or</p> <p>20 the Bloomberg analysis, or both?</p> <p>21 Q. Well, I'm asking about when you</p> <p>22 Shepardized the Cooper case, did you see any</p> <p>23 authority, except for the Bloomberg analysis, to</p> <p>24 support your position that a system did not need to</p> <p>25 be functional before deductions or credits were</p>	<p style="text-align: right;">248</p> <p>1 A. Vaguely, yes.</p> <p>2 Q. What did you consider regarding</p> <p>3 Section 1603?</p> <p>4 A. I'm going to have to go back and look.</p> <p>5 I am failing to see my cite. I apologize.</p> <p>6 I'm trying to find my cite. I know our time is</p> <p>7 short. Is there...</p> <p>8 Q. I'm just going to show you an exhibit, see</p> <p>9 if --</p> <p>10 A. Sure.</p> <p>11 Q. -- it changes your opinion. I'm handing</p> <p>12 you what's been marked for identification as</p> <p>13 Plaintiff's Exhibit 492. This is a document that was</p> <p>14 produced pursuant to the United States subpoena by a</p> <p>15 gentleman by the name of Matthew Anderson. Roger --</p> <p>16 defendant Roger Freeborn confirmed that he wrote it.</p> <p>17 Mr. Freeborn says in the first sentence, "The</p> <p>18 RaPower3 renewable energy program allows average Joes</p> <p>19 like you and I to qualify for a federally approved</p> <p>20 1603 tax credit incentive program."</p> <p>21 Did I read that correctly?</p> <p>22 A. Yes.</p> <p>23 Q. In your report you represent that no 1603</p> <p>24 credit has been granted.</p> <p>25 Do you recall that?</p>
<p style="text-align: right;">247</p> <p>1 claimed?</p> <p>2 A. I didn't see any other -- I didn't see</p> <p>3 that language in any other case.</p> <p>4 Q. So you didn't see anything else other than</p> <p>5 the Bloomberg analysis to support your position?</p> <p>6 A. Well, other than the Cooper case language</p> <p>7 and the Bloomberg analysis. Although my</p> <p>8 assumption -- and maybe this is off. My assumption</p> <p>9 is that the Bloomberg analysis is current and has --</p> <p>10 has gone through all the cases that have -- or that</p> <p>11 may have some implication. And they continue to rely</p> <p>12 on the Cooper case as good law.</p> <p>13 Q. What cases were those?</p> <p>14 A. No, the Bloomberg analysis and --</p> <p>15 Q. Oh, the Bloomberg analysis. Okay.</p> <p>16 A. The Bloomberg analysis continues to rely</p> <p>17 of them.</p> <p>18 Q. Okay. When you Shepardized Cooper did you</p> <p>19 see any cases that were post 469 enactment that</p> <p>20 relied on Cooper for a similar transaction?</p> <p>21 A. Not that I recall.</p> <p>22 Q. Okay. Mr. Hawes, you also assumed that --</p> <p>23 you made some assumptions with respect to</p> <p>24 Section 1603.</p> <p>25 Do you recall that?</p>	<p style="text-align: right;">249</p> <p>1 A. Yes, I do recall. Although I'm trying to</p> <p>2 remember.</p> <p>3 Q. Looking at Exhibit 492, does that change</p> <p>4 your conclusion -- or your belief regarding the 1603</p> <p>5 credit?</p> <p>6 A. I believe my opinion -- and correct me if</p> <p>7 I'm wrong -- I believe my opinion was that no 1603</p> <p>8 credits have been taken.</p> <p>9 Q. Okay.</p> <p>10 A. I -- that was my -- the information that I</p> <p>11 had.</p> <p>12 Q. All right. If that's your understanding,</p> <p>13 I'll accept that as your testimony.</p> <p>14 A. There we go. Yeah.</p> <p>15 Q. Now, looking at Exhibit 492, there is some</p> <p>16 reference to 1603 and an approval by the federal</p> <p>17 government. Does that concern you at all?</p> <p>18 A. Again, my understanding was that there was</p> <p>19 an application for it, but it was not granted or it</p> <p>20 was withdrawn or something of that regard. I -- I --</p> <p>21 Q. Where did you get that information from?</p> <p>22 A. I got that from speaking with -- I believe</p> <p>23 Paul Jones told me about that.</p> <p>24 Q. All right. Mr. Hawes, is it fair to say</p> <p>25 you've learned a little bit more about this case</p>

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<p style="text-align: right;">250</p> <p>1 today?</p> <p>2 A. Sure. Absolutely.</p> <p>3 Q. All right.</p> <p>4 A. I wasn't -- I wasn't at all these</p> <p>5 depositions that you've referenced, so certainly have</p> <p>6 learned a lot about what happened there.</p> <p>7 Q. Okay. You've learned some facts that you</p> <p>8 weren't aware of before?</p> <p>9 A. Yes.</p> <p>10 Q. You've learned of some statements the</p> <p>11 defendants in this case have made?</p> <p>12 A. Yes.</p> <p>13 Q. Does any of that give you pause about your</p> <p>14 expert opinion in this case?</p> <p>15 A. No, I don't think so.</p> <p>16 Q. You don't think so?</p> <p>17 A. No.</p> <p>18 Q. You're still going to walk into federal</p> <p>19 district court and offer a legal opinion about the</p> <p>20 facts of this case?</p> <p>21 A. Yes.</p> <p>22 Q. You're going to look Judge Nuffer in the</p> <p>23 eye and say that he needs help in analyzing the law</p> <p>24 applicable to this case?</p> <p>25 A. I don't know if I would say he needs help,</p>	<p style="text-align: right;">252</p> <p>1 A. It gives some sense of how the laws apply</p> <p>2 to what and how the law was used with respect to the</p> <p>3 actual taxpayers.</p> <p>4 Q. If Judge Nuffer is going to have all the</p> <p>5 facts the parties enter into the record of this case</p> <p>6 and that are deemed admissible -- if he's got all</p> <p>7 those facts available to him -- and I think we've</p> <p>8 established today that when you wrote your expert</p> <p>9 opinion you did not have all the facts -- why does he</p> <p>10 need you?</p> <p>11 A. It's up to Judge Nuffer to determine</p> <p>12 whether or not he needs or would like help or some</p> <p>13 other information from this aspect. So I -- I mean,</p> <p>14 I'm not going to posit as to whether or not he -- he</p> <p>15 will rely on my expert report or my -- my opinions</p> <p>16 that I've stated, but I've been asked to provide</p> <p>17 them, and so I've provided them.</p> <p>18 Q. Okay. Have you ever been arrested?</p> <p>19 A. No.</p> <p>20 Q. Have you ever been charged with a crime?</p> <p>21 A. No.</p> <p>22 Q. Do you have any ill will toward the</p> <p>23 federal government?</p> <p>24 A. No.</p> <p>25 Q. Do you agree that some level of taxation</p>
<p style="text-align: right;">251</p> <p>1 but I would say I'm here to offer it. I know this</p> <p>2 isn't the issue that he's going to be determining as</p> <p>3 a matter of the case, so it's some -- some helpful</p> <p>4 information.</p> <p>5 Q. So if he's not going to be considering the</p> <p>6 issue that you've provided an opinion on, how is it</p> <p>7 helpful?</p> <p>8 A. Well, I don't know if it -- maybe that's</p> <p>9 not fair to say, that he won't be considering it. I</p> <p>10 don't think he's been asked to make a ruling on</p> <p>11 whether the tax credits were appropriate or not in</p> <p>12 this case.</p> <p>13 Q. What has he been asked to rule on?</p> <p>14 A. He's been asked to rule on whether there</p> <p>15 was an abusive tax shelter.</p> <p>16 Q. And your opinion about what you would</p> <p>17 advise a hypothetical taxpayer is relevant how?</p> <p>18 A. I think if -- that if there's some</p> <p>19 evidence and argument that the -- that the tax</p> <p>20 credits were properly taken, then that has some</p> <p>21 impact on whether there was a fraudulent abusive tax</p> <p>22 shelter.</p> <p>23 Q. What does a hypothetical taxpayer's</p> <p>24 position have to do with tax positions that were</p> <p>25 actually taken and put on tax returns?</p>	<p style="text-align: right;">253</p> <p>1 is required to fund the government?</p> <p>2 A. Yes.</p> <p>3 Q. Okay. Do you have any issues with the IRS</p> <p>4 collecting taxes that are legally owed?</p> <p>5 A. No.</p> <p>6 Q. Okay. Do you believe that everyone should</p> <p>7 pay the taxes they legally owe?</p> <p>8 A. Yes, I do.</p> <p>9 Q. Do you have a YouTube page?</p> <p>10 A. No.</p> <p>11 MR. MORAN: You don't, okay.</p> <p>12 Pass the witness to Mr. Paul.</p> <p>13 MR. PAUL: All right. I just have a short</p> <p>14 series of questions I want to ask, since I know you</p> <p>15 guys need to catch a plane.</p> <p>16 EXAMINATION</p> <p>17 BY MR. PAUL:</p> <p>18 Q. Mr. Hawes, can you turn to Exhibit 654 in</p> <p>19 front of you?</p> <p>20 A. 654. Got it.</p> <p>21 Q. Exhibit 654 is a ruling on an appeal from</p> <p>22 a tax court decision, correct?</p> <p>23 A. That's correct.</p> <p>24 Q. And in that case the tax court judge made</p> <p>25 a ruling on the Nickesons' tax treatment, correct?</p>

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<p style="text-align: right;">254</p> <p>1 A. That's correct.</p> <p>2 Q. And in Exhibit 654 the Tenth Circuit court</p> <p>3 ruled and, in fact, affirmed the tax court judge's</p> <p>4 determination of the Nickesons' tax treatment,</p> <p>5 correct?</p> <p>6 A. That's correct.</p> <p>7 MR. MORAN: Objection. Leading.</p> <p>8 Q. (BY MR. PAUL) Are you aware of any tax</p> <p>9 court opinion that rejects any taxpayer's purchase or</p> <p>10 treatment of RaPower lenses?</p> <p>11 MR. MORAN: Objection. Leading.</p> <p>12 THE WITNESS: I am not aware.</p> <p>13 Q. (BY MR. PAUL) Are you aware of any</p> <p>14 circuit court opinion ruling on or denying any</p> <p>15 RaPower3 taxpayer's treatment of solar tax credits</p> <p>16 for depreciation?</p> <p>17 MR. MORAN: Objection. Leading.</p> <p>18 THE WITNESS: No, I am not.</p> <p>19 MR. PAUL: That's all I've got. Have a</p> <p>20 safe flight.</p> <p>21 MR. MORAN: I have one more thing. Can we</p> <p>22 mark an exhibit?</p> <p>23 MR. PAUL: Of course.</p> <p>24 MR. MORAN: One more thing. Can we mark</p> <p>25 this as an exhibit?</p>	<p style="text-align: right;">256</p> <p>1 getting all the signatures.</p> <p>2 Q. Okay. And the second thing, Mr. Hawes,</p> <p>3 I'm going to ask you for a copy of your notes that</p> <p>4 appear here.</p> <p>5 MS. HEALY GALLAGHER: Well, what I suggest</p> <p>6 we do, we'll mark them -- mark those, and then we'll</p> <p>7 make copies of the marked exhibit.</p> <p>8 (EXHIBIT 658 WAS MARKED.)</p> <p>9 MR. MORAN: With that, I have no further</p> <p>10 questions.</p> <p>11 (Discussion off the record.)</p> <p>12 Q. (BY MR. MORAN) Mr. Hawes, I'm handing you</p> <p>13 a copy of what's been marked for identification as</p> <p>14 Plaintiff's Exhibit 658. Do you recognize it?</p> <p>15 A. Yes. These are -- these are a copy of the</p> <p>16 few notes that I've taken during this deposition.</p> <p>17 Q. Is it a copy or the actual notes?</p> <p>18 A. I'm sorry. This is the actual version of</p> <p>19 the notes that I have taken in this deposition.</p> <p>20 MR. MORAN: Okay. With that, we have</p> <p>21 nothing further.</p> <p>22 We are off the record.</p> <p>23 (Deposition concluded at 3:56 p.m.)</p> <p>24 * * *</p> <p>25</p>
<p style="text-align: right;">255</p> <p>1 (EXHIBIT 657 WAS MARKED.)</p> <p>2 FURTHER EXAMINATION</p> <p>3 BY MR. MORAN:</p> <p>4 Q. Mr. Hawes, you've been given a copy of</p> <p>5 Exhibit 657?</p> <p>6 A. Yes.</p> <p>7 Q. Do you recognize this document?</p> <p>8 A. I do.</p> <p>9 Q. Okay. What is it?</p> <p>10 A. This is a copy of my engagement letter to</p> <p>11 provide expert witness services for the defendants in</p> <p>12 this case.</p> <p>13 Q. Okay. And it's a true and accurate copy</p> <p>14 of your engagement letter?</p> <p>15 A. Yes, other than the fact that I brought</p> <p>16 a -- an unsigned copy.</p> <p>17 Q. Okay. There is a copy that exists that's</p> <p>18 signed?</p> <p>19 A. Yes.</p> <p>20 Q. Who is it signed by?</p> <p>21 A. I believe we were working through --</p> <p>22 there's several people to sign it, and so the</p> <p>23 signature pages are -- we're still collecting some.</p> <p>24 Q. Okay.</p> <p>25 A. But we've -- we've -- we're working on</p>	<p style="text-align: right;">257</p> <p>1 REPORTER'S CERTIFICATE</p> <p>2 STATE OF UTAH)</p> <p>3) ss.</p> <p>4 COUNTY OF SALT LAKE)</p> <p>5</p> <p>6 I, Dawn M. Perry, Certified Shorthand</p> <p>7 Reporter and Notary Public in and for the State of</p> <p>8 Utah, do hereby certify:</p> <p>9</p> <p>10 That prior to being examined, the witness,</p> <p>11 KURT O. HAWES, was by me duly sworn to tell the</p> <p>12 truth, the whole truth, and nothing but the truth;</p> <p>13</p> <p>14 That said deposition was taken down by me</p> <p>15 in stenotype on October 4, 2017, at the place therein</p> <p>16 named, and was thereafter transcribed and that a true</p> <p>17 and correct transcription of said testimony is set</p> <p>18 forth in the preceding pages.</p> <p>19</p> <p>20 I further certify that, in accordance with</p> <p>21 Rule 30(e), a request having been made to review the</p> <p>22 transcript, a reading copy was sent to the witness,</p> <p>23 for the witness to read and sign under penalty of</p> <p>24 perjury and then return to me for filing with</p> <p>25 Christopher R. Moran, Attorney at Law.</p> <p>26 I further certify that I am not kin or</p> <p>27 otherwise associated with any of the parties to said</p> <p>28 cause of action and that I am not interested in the</p> <p>29 outcome thereof.</p> <p>30</p> <p>31 WITNESS MY HAND this 10th day of October,</p> <p>32 2017.</p> <p>33 Dawn M. Perry, CSR</p>

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<p style="text-align: right;">258</p> <p>1 ACKNOWLEDGMENT OF DEPONENT</p> <p>2</p> <p>3 I, _____, do hereby</p> <p>4 acknowledge that I have read and examined the</p> <p>5 foregoing testimony, and the same is a true, correct</p> <p>6 and complete transcription of the testimony given by</p> <p>7 me, and any corrections appear on the attached Errata</p> <p>8 Sheet signed by me.</p> <p>9</p> <p>10</p> <p>11</p> <p>12</p> <p>13</p> <p>14 _____ (DATE) KURT O. HAWES</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	