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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, INTERNATIONAL
AUTOMATED SYSTEMS, INC., LTB1,
LLC, R. GREGORY SHEPARD,
NELDON JOHNSON, and ROGER
FREEBORN,

Defendants.

Civil No. 2:15-cv-00828 DN

**UNITED STATES' MOTION FOR
PARTIAL SUMMARY JUDGMENT**

Judge David Nuffer
Magistrate Judge Evelyn J. Furse

I. Introduction

Defendants Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc. (“IAS”), LTB1, LLC (“LTB”), R. Gregory Shepard, and Roger Freeborn have promoted an abusive tax scheme centered on purported solar energy technology featuring “solar lenses” (called, herein, the “solar energy scheme”) to customers across the United States. By doing so, they have repeatedly engaged in conduct subject to penalty under the Internal Revenue Code.¹ Defendants’ conduct has caused serious harm to the U.S. Treasury, the system of honest and voluntary tax compliance, and their customers. Defendants raked in tens of millions of dollars from the solar energy scheme at the expense of the U.S. Treasury, and left their customers owing the IRS millions of dollars. Defendants should be enjoined from promoting their abusive solar energy scheme.²

On this motion for partial summary judgment,³ however, the United States is not seeking resolution of this entire case. Instead, the United States asks this Court to enter an order of partial summary judgment on discrete claims in this case against Johnson, RaPower-3, IAS, Shepard, and Freeborn.⁴ These defendants told customers that, if they bought solar lenses and signed the transaction documents Defendants provided, the customers were in the business of “leasing out” solar lenses. As a result, Defendants asserted, a customer could lawfully claim on his federal income tax return a depreciation deduction for the lenses and a solar energy tax credit. These

¹ 26 U.S.C. § 6700(a)(2)(A), (a)(2)(B).

² 26 U.S.C. §§ 7402(a), 7408(b).

³ Fed. R. Civ. P. 56(a).

⁴ See ECF No. 2 Counts VII-XI.

statements, and Defendants other statements about factual and legal matters relevant to these transactions and the purportedly related tax benefits, were false or fraudulent.⁵

The undisputed facts show that Defendants knew or had reason to know that their statements were false or fraudulent⁶ because critical features of the solar energy scheme are ones that courts have long identified as red flags of abusive tax schemes: 1) since 2005, no customer earned rental income generated by a third-party purchaser from “leasing” his lenses; 2) Johnson, and not the customers, controlled the customers’ purported “lens leasing businesses”; 3) the transaction documents Defendants gave customers were illusory, with little cash outlay and substantial debt that customers were and are unlikely to pay; and 4) Defendants promoted the solar energy scheme based on the tax benefits it would provide.

Because the undisputed facts show that injunctive relief is appropriate to prevent recurrence of this conduct, the United States also requests that this Court enjoin Defendants from making or furnishing (or causing others to make or furnish) these false or fraudulent statements.⁷

⁵ 26 U.S.C. § 6700(a)(2)(A).

⁶ 26 U.S.C. § 6700(a)(2)(A).

⁷ 26 U.S.C. § 6700(a)(2)(A); § 7408(b). The United States has other claims at issue in this case that are not presented for decision on this motion, including whether these Defendants made or furnished gross valuation overstatements, § 6700(a)(2)(B), and the full extent of the equitable relief warranted in response to Defendants’ abusive conduct. The United States asks that the Court refrain from entering a final order in this case until after trial, when the United States will submit additional evidence and present the remaining issues to be tried.

II. Statement of Elements and Undisputed Material Facts

A. Defendants organized (or assisted in the organization of), a plan or arrangement, and participated (directly or indirectly) in the sale of an interest in the plan or arrangement.⁸

1. Neldon Johnson is and has been the manager, and a direct and indirect owner of, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC (among other entities). He is the sole decision-maker for each entity.⁹

2. Johnson claims to have invented certain solar energy technology.¹⁰

3. Johnson's purported solar energy technology involves solar thermal lenses placed in arrays on towers.¹¹

4. His idea is that the lens arrays will track the sun as it moves across the sky during the day.¹²

5. His idea is that radiation from the sun would hit the lens, which would then bend and intensify the radiation in a specific point called a "solar image."¹³

6. His idea is that the solar image would hit a receiver which would be suspended underneath the lenses.¹⁴

⁸ 26 U.S.C. § 6700(A)(1).

⁹ Pl. Ex. 579, Deposition of Neldon Johnson, vol. 1, ("Johnson Dep., vol. 1") 36:1-39:12, 46:3-47:3, 52:20-57:1, 74:1-14, 77:4-87:12 (June 28, 2017); [ECF No. 22](#) ¶ 12.

¹⁰ Johnson Dep., vol. 1, 134:19-135:2; Pl. Ex. 509 at video clip 12_4_38-5_15.

¹¹ Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 12_4_00-4-23; Johnson Dep., vol. 1, 139:23-144:19.

¹² Pl. Ex. 504 at 14.

¹³ Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 16_12_24-12_41; Johnson Dep., vol. 1, 139:23-144:19; Pl. Ex. 509 at video clip 12_4_38-5_15.

7. The beam of concentrated light would then heat a heat transfer fluid in the receiver.¹⁵

8. The heat transfer fluid – oil, molten salt, water, or another heat transfer fluid, Johnson has not decided, to date, which to use¹⁶ – would then be pumped to a heat exchanger¹⁷.

9. The heat exchanger would use the heat to boil water and create steam.¹⁸

10. Johnson's idea is that the steam would turn a turbine, which would generate electricity.¹⁹

11. His idea is that the electricity would then be sent onto electric wires.²⁰

12. The wires would be connected to the electrical grid.²¹

13. Once the lenses were installed and "started up," the "operation and maintenance" of the lenses would be turned over to a company called LTB, LLC.²²

14. LTB, LLC, is another entity that Johnson created and controls.²³

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¹⁴ Johnson Dep., vol. 1, 87:16-91:1; Pl. Ex. 509 at video clip 16_12_24-12_41; Johnson Dep., vol. 1, 139:23-144:19; Pl. Ex. 509 at video clip 12_4_38-5_15.

¹⁵ Johnson Dep., vol. 1, 139:23-144:19.

¹⁶ Johnson Dep., vol. 1, 151:18-163:3.

¹⁷ Johnson Dep., vol. 1, 139:23-144:19.

¹⁸ Johnson Dep., vol. 1, 139:23-144:19.

¹⁹ Johnson Dep., vol. 1, 139:23-144:19.

²⁰ Johnson Dep., vol. 1, 139:23-144:19.

²¹ Johnson Dep., vol. 1, 139:23-144:19.

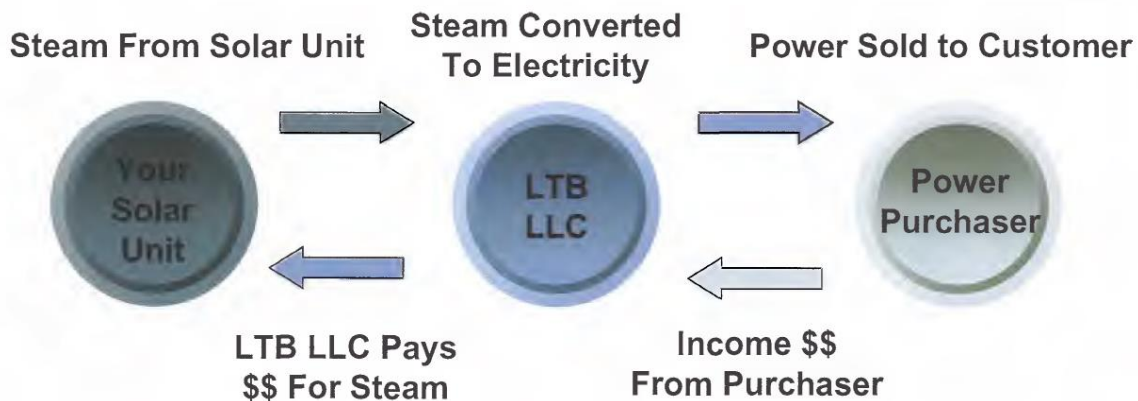
²² Pl. Ex. 94 at 2.

²³ LTB, LTB1, and still another entity called LTB O&M, LLC, are all Johnson-created and -controlled entities. Pl. Ex. 673, Deposition of LTB1, LLC, ("LTB1 Dep.") 8:11-13:23 (July 1, 2017). The only difference between them is

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15. According to Johnson, LTB would maintain and operate the lenses and “market the power generated by the solar units.”²⁴

16. Johnson illustrated this idea as early as 2006²⁵ as follows:



17. Johnson took some college classes in the sciences and engineering in or before 1975 but does not have a college degree in any subject.²⁶

18. Neither Johnson, nor anyone else connected with him or one of his entities, has ever operated or maintained a solar energy power plant of any kind.²⁷

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their names. *Id.* For all practical purposes, Johnson makes no distinction between the entities; each has come into existence because the prior LTB-entity was dissolved in its state of incorporation. *Id.* Because all contracts described herein reference “LTB,” we will use that name going forward.

²⁴ Pl. Ex. 531 at 2. Over the years, Defendants have used terms like “solar unit” or “alternative energy system” to mean “lens.” See Johnson Dep., vol. 1, 185:11-186:9, 192:1-193:12, 242:25-243:5; Pl. Ex. 685, Deposition of R. Gregory Shepard (“Shepard Dep.”), 61:24-63:4 (May 22, 2017); Pl. Ex. 462 at 1. The only things that IAS and RaPower-3 have ever sold are “lenses.” Johnson Dep., vol. 1, 185:18-19; Pl. Ex. 682, Deposition of RaPower-3, LLC (“RaPower-3 Dep.”) 32:25-33:3 (June 30, 2017). For the sake of consistency, the United States will use the word “lens” in this brief.

²⁵ Pl. Ex. 581, Deposition of International Automated Systems, Inc., (“IAS Dep.”), 162:1-165:9, 171:10-173:20 (June 29, 2017); Pl. Ex. 532 at 6; see also Pl. Ex. 531.

²⁶ Pl. Ex. Johnson Dep., vol. 2, 43:23-44:1, 69:8-71:5, 81:18-23.

19. In or around 2006 through 2008, Johnson directed IAS to erect, at most, 19 towers on “the R&D Site” near Delta, Utah, in Millard County.²⁸

20. Johnson also directed that IAS install solar lenses in those towers.²⁹

21. To date, those are the only towers that Johnson has built, and the only lenses that he has had installed.³⁰

22. Johnson promotes this purported solar energy technology through the IAS website, radio spots, and social media.³¹

23. To make money from this purported solar energy technology, Johnson decided to sell a component of the purported technology: the solar lenses.³²

24. Johnson recognized that his strength was not in sales, so he directed that IAS use independent sales representatives to sell lenses.³³

25. He also created a bonus incentive program for people who bought lenses, to spread the word about the solar lenses and sell them to more and more people.³⁴

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²⁷ RaPower-3 Dep. 12:25-15:12, 61:10-62:15; LTB1 Dep. 8:11-14, 19:16-31:9.

²⁸ IAS Dep. 62:15-64:1; Pl. Ex. 8A at 12-13; Shepard Dep. 128:6-129:1, 172:23-173:3.

²⁹ IAS Dep. 62:15-64:1.

³⁰ IAS Dep. 62:15-64:1; Johnson Dep., vol. 1, 88:20-89:10; Pl. Ex. 509 at video clip 12_4_00-4-23.

³¹ *E.g.*, Pl. Ex. 2; Johnson Dep., vol. 1, 240:2-17; IAS Dep. 242:10-247:22; Pl. Ex. 539.

³² *See* RaPower-3 Dep. 36:4-39:8.

³³ IAS Dep. 145:21-146:9; Pl. Ex. 463; *see* RaPower-3 Dep. 140:9-143:4; Pl. Ex. 504.

³⁴ Johnson Dep., vol. 1, 228:19-234:17.

26. Johnson decided that the bonus program would be a cheaper and more effective way to sell lenses than doing conventional advertising.³⁵

27. Johnson drafted some promotional materials to describe this arrangement, “IAUS Solar Unit Purchase Overview” and IAS “Solar Equipment Purchase.”³⁶

28. Johnson showed IAS salespeople these descriptive materials about the structure of the transaction, the purported technology, and the federal tax benefits that Johnson said a customer could lawfully claim when he bought a lens from IAS.³⁷

29. He told IAS’s initial salespeople what he understood the tax laws to mean.³⁸

30. R. Gregory Shepard has been an IAS shareholder since the mid-1990s.³⁹ He became one of IAS’s initial salespeople in or around September 2005, and began selling solar lenses.⁴⁰

31. IAS paid Shepard (and its other salespeople) a commission of 10 percent of the money generated from his sales.⁴¹

32. Shepard’s professional background, before becoming involved with the solar energy scheme, was in sports performance as a coach and trainer.⁴²

³⁵ Johnson Dep., vol. 1, 228:19-234:17.

³⁶ IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Exs. 531, 532.

³⁷ IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Exs. 531, 532.

³⁸ Johnson Dep., vol. 1, 240:18-241:10, 247:11-248:12; RaPower-3 Dep. 117:22-119:11; Pl. Ex. 473.

³⁹ Shepard Dep. 43:19-46:1.

⁴⁰ Shepard Dep. 70:14-71:22; Pl. Ex. 463.

⁴¹ Shepard Dep. 70:14-72:8; Pl. Ex. 463.

⁴² Shepard Dep. 27:2-30:24.

33. Shepard's information about Johnson's purported solar energy technology came from Johnson or members of Johnson's family, and Shepard's own observations on his site visits over the years.⁴³

34. Johnson told Shepard that a depreciation deduction and the solar energy tax credit are related to the sale of lenses.⁴⁴

35. Shepard never questioned how Johnson determined that purchasers of solar lenses were purportedly eligible for a depreciation deduction and the solar energy tax credit.⁴⁵

36. In 2010, Johnson created RaPower-3, LLC. He is its manager and the sole decision-maker for the company.⁴⁶

37. Once formed, RaPower-3, not IAS, sold solar lenses to individuals.⁴⁷

38. RaPower-3's only business activity is selling solar lenses through a multi-level marketing (otherwise known as "network marketing") approach to increase sales.⁴⁸

39. If a person wants to sell solar lenses through RaPower-3, that person need only sign up to become a "distributor."⁴⁹

⁴³ Johnson Dep., vol. 1, 209:11-210:3, 211:16-215:23; Shepard Dep. 36:6-40:23, 46:2-57:5, 183:14-187:13; Pl. Ex. 8A; RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

⁴⁴ Johnson Dep., vol. 1, 279:19-22; IAS Dep. 162:1-165:9, 194:6-20; Pl. Ex. 531.

⁴⁵ Shepard Dep. 284:23-286:3.

⁴⁶ RaPower-3 Dep. 32:16-33:14.

⁴⁷ RaPower-3 Dep. 32:16-33:14; *see* IAS Dep. 23:22-25:22.

⁴⁸ RaPower-3 Dep. 32:16-33:14, 36:4-39:8.

⁴⁹ RaPower-3 Dep. 32:22-34:9.

40. RaPower-3 encourages distributors to bring still more people in to the multi-level marketing system and build an extensive “downline.”⁵⁰

41. RaPower-3 pays its distributors as much as 10 percent commission on lens sales in each distributor’s respective downline.⁵¹

42. Johnson directed RaPower-3 to create a site online (<https://rapower3.net>) where a customer can access and sign a contract to buy lenses and sign other transaction documents that Johnson provides (described below).⁵²

43. Changing from a direct-sales model through IAS to an internet-ready, multi-level marketing model through RaPower-3 led to “[h]undreds of people across the nation purchas[ing] solar lenses.”⁵³

44. Selling lenses through RaPower-3 gave Johnson “much needed revenue” to continue his operations.⁵⁴

45. When Johnson started RaPower-3, Shepard transitioned from being an IAS salesperson to a RaPower-3 distributor.⁵⁵

46. Shepard considers himself and other distributors in the RaPower-3 system as “team members.”⁵⁶

⁵⁰ See RaPower-3 Dep. 36:4-39:8, 49:10-15.

⁵¹ RaPower-3 Dep. 36:4-39:8.

⁵² RaPower Dep. 39:9-41:2; Pl. Ex. 511; LTB1 Dep. 39:6-25.

⁵³ Pl. Ex. 8A at 9.

⁵⁴ Pl. Ex. 8A at 9.

⁵⁵ RaPower-3 Dep. 48:8-49:1. By January 2015, Shepard had approximately one thousand people on his RaPower-3 email distribution list. Shepard Dep. 305:11-19.

47. But Shepard, who gave himself the title “Chief Director of Operations” for RaPower-3 to sell more lenses, is the team member “at the top.”⁵⁷

48. Among other things, Shepard created the website www.rapower3.com⁵⁸ and moderates an online discussion board called “IAUS & RaPower[-]3 Forum.”⁵⁹

49. On the RaPower-3 website, Shepard describes the technology and the transactions underpinning the solar energy scheme, promotes sales, and provides links to the site with the transaction documents.⁶⁰

50. Shepard uses the Forum to communicate with people who have already bought lenses and who own IAS stock.⁶¹

51. Shepard also organizes groups of people to visit the R&D Site, the site where component parts of the purported solar technology system are manufactured (the “Manufacturing Facility”), and the site on a large field with a few semi-constructed component parts (the “Construction Site”).⁶²

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⁵⁶ Shepard Dep. 113:8-115:3.

⁵⁷ Shepard Dep. 102:11-103:3, 113:8-115:3, 123:6-15; *see also* RaPower-3 Dep. 108:5-18

⁵⁸ Shepard Dep. 25:22-26:8; Pl. Ex. 459; *see also* Pl. Exs. 1, 19, 20, 24, 25, 34, 419, 352, 674, 676, 678, 679, 680.

⁵⁹ Shepard Dep. 286:5-24.

⁶⁰ *See* Pl. Ex. 688, Deposition of Roger Freeborn (“Freeborn Dep.”) 23:2-24:14 (May 31, 2017); Pl. Ex. 490.

⁶¹ Shepard Dep. 286:5-289:13; Pl. Ex. 481.

⁶² *E.g.*, Pl. Ex. 419 at 1; Johnson Dep., vol. 1, 87:23-89:10; Pl. Ex. 509 at video clip 12_4_00-4-23.

52. He organized at least one “RaPower[-]3 National Convention” in 2012, at which Johnson spoke.⁶³

53. When other RaPower-3 distributors have issues or questions, they look to Shepard for guidance and advice, and to be the conduit to Johnson.⁶⁴

54. Shepard told Roger Freeborn about RaPower-3, asked Freeborn if he wanted to buy lenses, and brought Freeborn into his multi-level marketing downline.⁶⁵

55. The two men knew each other through a company Shepard used to own, Bigger, Faster, Stronger (“BFS”).⁶⁶ BFS sold athletic equipment and strength and conditioning programming primarily to high schools and middle schools around the country.⁶⁷

56. Freeborn was a teacher and football coach, and taught BFS clinics around the country.⁶⁸

57. When Freeborn started selling lenses for RaPower-3, at the end of a BFS clinic, he would “talk to the coaches about the possibility of creating a fundraising program to raise money for their sport” through the sale of RaPower-3 solar lenses.⁶⁹

⁶³ Shepard Dep. 302:8-303:23; RaPower-3 Dep. 140:4-145:15; Pl. Ex. 504; Pl. Exs. 114, 270.

⁶⁴ Shepard Dep. 113:8-115:3, Pl. Ex. 469; Pl. Ex. 189 at 1-3.

⁶⁵ Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18; Pl. Ex. 695, Deposition of Robert Rowbotham (“Rowbotham Dep.”) 145:4-146:15 (Aug. 8, 2016).

⁶⁶ Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18; Rowbotham Dep. 13:20-17:13.

⁶⁷ Rowbotham Dep. 13:20-17:13; Freeborn Dep. 15:21-18:18.

⁶⁸ Shepard Dep. 115:11-117:10; Freeborn Dep. 15:21-18:18, 28:2-11, 107:10-108:21; Pl. Ex. 503; Rowbotham Dep. 23:17-24:19.

⁶⁹ Freeborn Dep. 98:10-102:6; Pl. Ex. 246.

58. Freeborn was a prolific salesman for RaPower-3, especially among the teachers and coaches that he reached through BFS's customer list.⁷⁰

59. Freeborn called himself the "National Director" of RaPower-3.⁷¹

60. Freeborn's information about IAS, RaPower-3, the transactions and the technology underpinning the solar energy scheme, and the tax benefits purportedly associated with buying lenses came from Johnson, Shepard, and Freeborn's own observations on his site visits.⁷²

61. Freeborn used marketing materials that Shepard sent him and created his own to send or present to customers.⁷³

62. Freeborn also organized webinars for people to hear from him and Shepard about RaPower-3.⁷⁴ He spoke at the 2012 "National Convention" that Shepard organized.⁷⁵

63. Because Freeborn lacked a background in federal tax, Freeborn relied on Johnson's assurance that Johnson would pay his attorneys' fees if he ever ran into trouble because of RaPower-3.⁷⁶

⁷⁰ Shepard Dep. 115:11-117:10; Rowbotham Dep. 149:18-150:11; Freeborn Dep. 46:2-47:17; Pl. Ex. 493 (partial Freeborn downline list); Pl. Ex. 54; Pl. Ex. 697, Deposition of Brian Zeleznik ("Zeleznik Dep.") 19:9-23, 45:16-46:11 (Aug. 2, 2016); Pl. Ex. 689, Deposition of Peter Gregg ("Gregg Dep.") 21:18-22:9, 34:6-25, 39:9-19 (Nov. 16, 2016); Pl. Ex. 693, Deposition of Frank Lunn, IV ("Lunn Dep.") 33:24-37:20 (Aug. 1, 2016).

⁷¹ Freeborn Dep. 44:7-45:23; Pl. Ex. 492 at 2.

⁷² Shepard Dep. 117:18-118:11; Freeborn Dep. 20:15-22:23, 28:19-34:18; *see also* Pl. Ex. 109 at 1-3.

⁷³ Freeborn Dep. 48:2-55:1; Pl. Exs. 496, 497; *see* Pl. Ex. 492 at 2 (directing customers to www.rapower3.com); Pl. Ex. 294. Freeborn Dep. 86:10-93:7; Pl. Exs. 501, 502; Pl. Ex. 85.

⁷⁴ Pl. Ex. 237.

⁷⁵ Pl. Ex. 504 at 5. Topic: "The Ra3 role behind the scenes."

64. At Johnson's direction, Shepard fired Freeborn from RaPower-3 in June 2013.⁷⁷

65. Freeborn has continued, however, to collect commissions on solar lens sales through his downline through at least the end of 2016.⁷⁸

66. To date, IAS or RaPower-3 have paid Freeborn more than \$230,000 in commissions for his sales of solar lenses and sales of solar lenses in his downline.⁷⁹

67. Freeborn has generated, through a "charitable foundation," approximately \$75,000 more in commissions for lens sales.⁸⁰ It follows from IAS's and RaPower-3's commission structures (which, at their most generous, pay 10 percent of revenue received) that either Freeborn or those in his downline have generated well over \$3 million in actual revenue to IAS or RaPower-3.

68. Defendants' customers have been audited by the IRS for claiming the tax benefits Defendants promote.⁸¹

69. Johnson is also paying the attorneys' fees for all customers whose tax benefits have been disallowed by the IRS.⁸²

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⁷⁶ Freeborn Dep. 102:7-108:21; Pl. Ex. 412 at Response to Interrogatory No. 7 (Freeborn stated that he is "SELF-EDUCATED" in the field of federal income taxes and energy tax credits.).

⁷⁷ Freeborn Dep. 55:14-56:28; Shepard Dep. 118:12-119:14; Pl. Ex. 80.

⁷⁸ Pl. Ex. 678. The United States served these Requests for Admission on December 29, 2016. *Id.* at 6. Freeborn never responded. Accordingly, all Requests are admitted. [Fed. R. Civ. P. 36\(a\)\(3\)](#).

⁷⁹ Pl. Ex. 678. Freeborn Dep. 98:10-102:6.

⁸⁰ Freeborn Dep. 98:10-102:6.

⁸¹ *E.g.*, Deposition of John Howell ("Howell Dep.") 211:11-213:14 (Aug. 23, 2017) (aware of 150 cases in Tax Court); Shepard Dep. 250:17-251:3.

70. The United States filed this injunction case in November 2015.⁸³

71. Johnson is paying for Shepard's and Freeborn's attorneys' fees to defend this case.⁸⁴

72. To date, Johnson, Shepard, IAS, and RaPower-3 continue to organize sales of solar lenses, and participate (directly or indirectly) in the sale of solar lenses.⁸⁵

73. They have not changed their promotion in any appreciable way since 2005.⁸⁶

74. They are not deterred from promoting the scheme, not by the IRS' disallowance of their audited customers' depreciation deductions and solar energy tax credits or by the complaint filed in this case.⁸⁷

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⁸² Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23.

⁸³ [ECF No. 2](#).

⁸⁴ Johnson Dep., vol. 1, 282:19-284:10; IAS Dep. 229:16-230:23.

⁸⁵ Johnson Dep., vol. 1, 240:2-17; 245:24-246:22; Pl. Ex. 539; Pl. Ex. 686, Deposition of Matthew Shepard ("M. Shepard Dep.") 155:23-157:6 (April 18, 2017); Pl. Ex. 424; 426, 679.

⁸⁶ Shepard Dep. 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25.

⁸⁷ Shepard Dep. 311:2-315:5; RaPower-3 Dep. 197:13-199:4; IAS Dep. 226:9-25.

B. In connection with organizing or selling any interest in a plan or arrangement:

1. Defendants made or furnished (or caused another person to make or furnish) statements regarding the allowability of any deduction or credit because of participating in the plan or arrangement.⁸⁸

75. While they sold solar lenses, and organized efforts to sell solar lenses, Defendants told their customers that, if they bought a solar lens and signed the transaction documents Defendants provide, their customers were in the “trade or business” of “leasing” solar lenses.⁸⁹

76. According to Defendants, because their customers are in the trade or business of leasing solar lenses, their customers are allowed to claim on their federal income tax returns a business tax deduction for depreciation on the solar lenses and a solar energy tax credit.⁹⁰

a. Defendants told customers, and prospective customers, about the structure of the transactions.

77. The structure and pricing of the transactions that purportedly create the customers’ solar lens leasing business have changed over time.

78. As early as 2005, Johnson directed that IAS “lease” the solar lenses to customers.⁹¹

⁸⁸ 26 U.S.C. § 6700(A)(2)(a).

⁸⁹ *E.g.*, Pl. Ex. 32. Occasionally, Shepard has claimed that customers have been “in the solar energy business.” Shepard Dep. 243:11-244:3; Pl. Ex. 43 at 1 (“AM I REALLY IN THE SOLAR ENERGY BUSINESS? Yes.”). But in recent years, Shepard has made it clear that “We should not consider ourselves in an ‘energy’ business. We are buying lenses and leasing them – THAT is our business – LEASING – NOT producing energy” Pl. Ex. 32.

⁹⁰ A collection of Johnson’s statements: IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 531 at 3; *see also* Pl. Ex. 532 at 7-10. A collection of Shepard’s statements: Pl. Ex. 93 (as a result of purchasing a lens, “the investor gets his \$9,000 back in the form of a Tax Credit, plus the depreciation which adds extensive value over a six year period plus the income from power produced by the Solar Pod.”); Shepard Dep. 148:21-149:25; *e.g.*, Pl. Ex. 125 (letter from Shepard telling a customer that he is “qualif[ied] . . . for the Internal Revenue Service solar energy tax credit” because RaPower-3 “put [their lenses] into service”). A collection of Freeborn’s statements: Freeborn Dep. 47:24-53:18; Pl. Exs. 214, 294, 492, 496, 499, 501.

79. Customers paid \$9,000 for leasing the lenses from IAS.⁹²

80. Shepard leased lenses from IAS in 2005.⁹³

81. According to the lease agreement, IAS would build solar towers and install the customers' lenses at a specific site – in the case of Shepard's lenses, Yermo, California.⁹⁴

82. At the same time a customer leased the lenses from IAS, he signed a sublease agreement with LTB.⁹⁵

83. The idea was that, once IAS had installed (for example) Shepard's lenses in Yermo, California, LTB would take over operation and maintenance of Shepard's lenses to generate revenue for Shepard.⁹⁶

84. Shepard's lease agreement states that IAS will provide him "plans, specifications and other documentation and engineering as required to obtain approval" to operate the lenses from "local state and federal agencies" at an "undetermined" time.⁹⁷

85. IAS set benchmarks for additional approvals and for installation of Shepard's lenses based on that "undetermined" date for plans.⁹⁸

(...continued)

⁹¹ Shepard Dep. 57:7-59:3; Pl. Ex. 462; LTB1 Dep. 43:16-46:24; Rowbotham Dep. 46:27-53:14; Pl. Ex. 91.

⁹² Pl. Ex. 462 at 2.

⁹³ Pl. Ex. 462.

⁹⁴ Pl. Ex. 462.

⁹⁵ Shepard Dep. 57:7-59:3, 73:1-74:2; Pl. Exs. 462, 464.

⁹⁶ LTB1 Dep. 43:16-46:24; Pl. Ex. 464 at 2.

⁹⁷ Pl. Ex. 462 at 1.

⁹⁸ Pl. Ex. 462 at 2.

86. In 2006, Johnson changed the transaction's structure. Instead of a customer leasing lenses from IAS, the customer would buy lenses.⁹⁹

87. At that time, the total price for a lens was \$30,000, but the customer paid only \$9,000 in down payment.¹⁰⁰

88. IAS financed the remaining \$21,000, interest free.¹⁰¹

89. According to the 2006 contract, the \$21,000 would be paid by the customer in \$700 annual payments over 30 years.¹⁰²

90. But the obligation to start paying \$700 annually would only begin five years *after* IAS installed and began operating the customer's lens at a specific "Installation Site" in Delta, Utah.¹⁰³

91. Shepard's contract, which he signed on December 22, 2006, required IAS to install and "startup" his lenses within seven days: on or before December 29, 2006.¹⁰⁴

92. According to the contract, if IAS failed to "furnish, deliver, install and startup" the lenses by December 31, 2007, it would refund the Shepard's down payment of \$9,000.¹⁰⁵

93. IAS continued to sell lenses with, generally, the same or similar transaction terms through 2009.¹⁰⁶

⁹⁹ Pl. Ex. 8A at 7; Pl. Ex. 93; Pl. Ex. 94.

¹⁰⁰ Pl. Ex. 93; Pl. Ex. 94 ¶ 3; *see also* Pl. Ex. 532 at 7-8.

¹⁰¹ Pl. Ex. 531 at 2.

¹⁰² Pl. Ex. 94 ¶ 3.

¹⁰³ Pl. Ex. 94 ¶ 3.

¹⁰⁴ *E.g.*, Pl. Ex. 94 ¶ 3.

¹⁰⁵ Pl. Ex. 94 ¶ 7.

94. Freeborn bought his first lenses from IAS under these terms in August 2009.¹⁰⁷

95. With the transition to RaPower-3 in 2010, Johnson changed the price of a lens to \$3,500.¹⁰⁸

96. Customers also started purchasing lenses via the internet at rapower3.net.

97. On that site, a potential customer enters the number of lenses he wishes to purchase, and the website “figures” the amount the customer owes and the amount of the customer’s down payment.¹⁰⁹

98. The site also provides all transaction documents for customers to sign electronically: an Equipment Purchase Agreement, an Operations & Maintenance Agreement (“O&M”), and, at times in the past, a bonus contract.¹¹⁰

99. Customers do not negotiate the price of a lens, or other terms of the transactions Defendants promote.¹¹¹

(...continued)

¹⁰⁶ IAS Dep. 182:16-183:4; Pl. Ex. 533; *see also* Pl. Exs. 95, 181, 535; IAS Dep. 196:21-198:19.

¹⁰⁷ Pl. Ex. 533.

¹⁰⁸ Johnson Dep., vol. 1, 206:15-23; Pl. Ex. 687, Deposition of Robert Aulds (“Aulds Dep.”) 141:3-13, 146:17-147:5 (March 14, 2017).

¹⁰⁹ Aulds Dep. 141:3-13.

¹¹⁰ Aulds Dep. 141:3-13; *see also* Pl. Ex. 667.

¹¹¹ RaPower Dep. 39:9-41:2; *e.g.* Pl. Exs. 119, 181, 511. Aulds Dep. 141:3-13, 146:17-147:5; Gregg Dep. 55:19-56:13; Howell Dep. 39:17-40:4, 95:3-5, 134:14-135:22; Pl. Ex. 692, Deposition of Richard Jameson (“Jameson Dep.”) 74:22-76:10, 176:5-17 (Sept. 20, 2017); Pl. Ex. 693, Lunn Dep. 114:11-115:4; Pl. Ex. 694, Deposition of Preston Olsen (“Olsen Dep.”) 23:2-25:6, 28:16-29:3, 105:1-106:6 (Aug. 10, 2016); Pl. Ex. 696, Deposition of Lynette Williams (“Williams Dep.”) 23:5-23, 28:16-29:7, 66:20-69:16 (Aug. 9, 2016); Zeleznik Dep. 67:3-12.

100. The Equipment Purchase Agreement states the number of lenses the customer purportedly purchases from RaPower-3.¹¹²

101. The contract states that RaPower-3 will install and “startup” the lenses the “Installation Site,” which is “a site yet to be determined.”¹¹³

102. The Installation Site is “any place that Neldon [Johnson] wants it to be.”¹¹⁴

103. There is no date-certain in the Equipment Purchase Agreement by which the customer’s lenses must be installed in a tower and producing revenue.¹¹⁵

104. Instead, the “Installation Date” is defined as “the date the [lens] has been installed and begins to produce revenue.”¹¹⁶

105. RaPower-3 commits that each lens will sustain a specific “energy production rate” for the first five years from the “Installation Date.”¹¹⁷

106. If the lenses do not sustain the promised “energy production rate,” the buyer may terminate the Equipment Purchase Agreement and is not obligated to pay any remaining balance for his lenses.¹¹⁸

¹¹² Pl. Ex. 25 at 1; Pl. Ex. 511. The contract uses the term “Alternative Energy System,” which is undefined in the contract itself. *See generally* Pl. Ex. 511. It means “solar lens.” IAS Dep. 181:9-182:5; Pl. Ex. 181; Rowbotham Dep. 63:11-21; Pl. Ex. 94; *see* Shepard Dep. 57:7-59:6; Pl. Ex. 462.

¹¹³ Pl. Ex. 511 at 1.

¹¹⁴ Shepard Dep. 157:18-24; Pl. Ex. 119 at 1.

¹¹⁵ *See generally* Pl. Ex. 511.

¹¹⁶ Pl. Ex. 511 at 2.

¹¹⁷ Pl. Ex. 511 at 4-5.

¹¹⁸ Pl. Ex. 511 at 5; Shepard Dep. 234:14-235:4; Pl. Ex. 474.

107. At the same time the customer electronically signs the Equipment Purchase Agreement, the customer electronically signs an Operation and Maintenance Agreement (“O&M”) with LTB.¹¹⁹

108. According to Defendants, by signing the O&M, the customer is “holding out for lease” his solar lenses to LTB.¹²⁰

109. The O&M states that once a customer’s lenses are installed at a “Power Plant” on the “Installation Site” (defined only by reference to the Equipment Purchase Agreement), LTB will operate and maintain the customer’s lenses to produce revenue.¹²¹

110. According to the O&M, LTB is “entitled to receive all revenue” from sales, but will make a quarterly “rental payment” to the customer for using that customer’s lens(es) to produce the energy it will sell.¹²²

111. In a single year, the total rental payments to any customer for a single lens may not exceed \$150.¹²³

112. There is no date-certain in the O&M by which a customer’s lenses are required to begin producing revenue.¹²⁴

¹¹⁹ Pl. Ex. 121; Pl. Ex. 25 at 1. Defendants maintain that LTB is the committed entity on the O&M, despite the contract being on RaPower-3 letterhead and being signed by “Seller,” “Neldon Johnson,” Director of “RaPower-3.” Johnson Dep., vol. 1, 219:2-223:23; *e.g.*, Pl. Exs. 511, 512. *See also* [ECF No. 22](#) ¶ 25, [ECF No. 23](#) ¶ 25.

¹²⁰ Pl. Ex. 121; Pl. Ex. 25 at 1; Pl. Ex. 557 at 1; Pl. Ex. 473; Pl. Ex. 533 at 2.

¹²¹ Pl. Ex. 121 at 1, 2, 4.

¹²² Pl. Ex. 121 at 4.

¹²³ Pl. Ex. 121 at 4.

¹²⁴ *See generally* Pl. Ex. 121, 512.

113. The Equipment Purchase Agreement states that the full price of a single lens is \$3,500.¹²⁵

114. But a typical solar lens customer does not pay the full price upon signing the Equipment Purchase Agreement.

115. Instead, a customer pays for his lenses in the following stages.¹²⁶

116. First, he pays \$105 per lens at the time he signs the Equipment Purchase Agreement, often near the end of the calendar year.¹²⁷

117. Second, he pays an additional \$945 on or before June 30 of the following year, for a total of \$1,050.¹²⁸

118. This leaves \$2,450 remaining on the \$3,500 lens purchase price.

119. The Equipment Purchase Agreement states that the customer will begin paying off the remaining \$2,450 once the customer's lens has been installed and producing revenue for five years.¹²⁹

120. For the first five years of revenue production, the customer will receive \$150 yearly rental payment per lens.¹³⁰

¹²⁵ Pl. Ex. 511 at 2.

¹²⁶ Pl. Ex. 511 at 2.

¹²⁷ Pl. Ex. 511 at 2.

¹²⁸ Shepard Dep. 150:17-153:21; Pl. Ex. 119 at 2, Pl. Ex. 511 at 2.

¹²⁹ Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

¹³⁰ Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

121. After the first five years, LTB will take the customer's \$150 annual rental payment and divide it between the customer and RaPower-3: \$82 per year for RaPower-3 to pay off the outstanding balance and \$68 for the customer/lens owner.¹³¹

122. LTB will make these payments for 30 years.¹³²

123. RaPower-3 provides nearly interest-free financing for the \$2,450 debt remaining on each lens.¹³³

124. The only security for the customer's promise to pay is the lens itself.¹³⁴

125. At times, the Equipment Purchase Agreement has provided that, if the tax laws change after the date the customer signs the contract in a way that "materially reduce[s] any tax benefit" of the agreement to the customer, the customer may retroactively reduce the number of lenses he bought on the date of signing.¹³⁵

126. Also, if a solar lens customer no longer desires to "own" lenses, Johnson will refund the person's money and let them out of the contract.¹³⁶

127. From time to time in the past, a solar lens customer could also sign a "bonus referral contract."¹³⁷

¹³¹ Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

¹³² Pl. Ex. 511 at 2; Shepard Dep. 154:9-156:17.

¹³³ *E.g.*, \$82 per year times 30 years is \$2,460. Thus, according to the Equipment Purchase Agreement, RaPower-3 would collect \$10 per lens in interest, for financing \$2,450 for at least 30 years.

¹³⁴ Pl. Ex. 511 at 3.

¹³⁵ Pl. Ex. 511 at 4 (2014 contract); Pl. Ex. 119 at 4 (2012 contract); Pl. Ex. 174 (2010 contract).

¹³⁶ Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468; Pl. Ex. 282 (In January 2015, Shepard told customers being audited that "[w]e . . . believe we will prevail against the IRS in court. However, if you would like to part company, we will refund your money and you can pay the IRS and move in a different direction.").

128. The bonus contracts, over time, varied in the amount a customer could purportedly earn, and the basis for the customer's payout – either the first billion dollars in IAS gross sales or the second billion dollars in IAS gross sales.¹³⁸

129. If a customer signed a bonus contract before May 23, 2011, the bonus contract states that the customer will be paid a maximum of \$6,000 per lens the customer bought, only after IAS reaches \$1 billion in gross sales.¹³⁹

130. If a customer signed a bonus contract between May 24, 2011 and February 29, 2012, the contract states that the customer will be paid a maximum of \$2,000 per lens the customer bought during that time period, only after IAS reaches \$1 billion in gross sales.¹⁴⁰

131. If a customer purchased lenses and signed a bonus contract between March 1, 2012 and July 31, 2014, the contract states that the customer will be paid a maximum of \$2,000 per lens the customer bought during that time period, only after IAS \$2 billion in gross sales.¹⁴¹

132. Defendants told customers that the bonus contract was the key to being able to claim a depreciation deduction related to the solar lenses because the promise of the bonus made the “system . . . profitable in order to meet IRS requirements.”¹⁴²

(...continued)

¹³⁷ Johnson Dep., vol. 1, 228:19-234:17; Pl. Ex. 185 at 3; *compare* [ECF No. 2](#) Compl. ¶ 25 with [ECF No. 22](#) ¶¶ 25 & 32; Pl. Ex. 1.

¹³⁸ [ECF No. 22](#) ¶ 32.

¹³⁹ [ECF No. 22](#) ¶ 32; *see also* Pl. Ex. 297.

¹⁴⁰ [ECF No. 22](#) ¶ 32.

¹⁴¹ [ECF No. 22](#) ¶ 32.

133. Johnson told a customer in 2010 that “[t]his bonus program makes certain that each purchase was made for an economic reason. This reason would be such that anyone would see the value of the transaction as to its economic values beyond just a tax savings.”¹⁴³

134. But Johnson has not offered bonus contracts since July 2014.¹⁴⁴

b. Defendants told customers, and prospective customers, about Johnson’s purported solar energy technology.

135. Defendants told customers, and prospective customers, about Johnson’s purported solar energy technology.¹⁴⁵

136. Over the years, Shepard touted “[g]reat progress”¹⁴⁶ having been made on component parts of the technology through “[e]laborate testing”¹⁴⁷ and “research and development”¹⁴⁸ of “technologies needing refinement”¹⁴⁹.

(...continued)

¹⁴² Johnson Dep., vol. 1, 234:18-237:15; Pl. Ex. 185 at 1; IAS Dep. 203:7-204:6; Johnson Dep., vol. 1, 235:17-25; Shepard Dep. 261:17-262:7; Pl. Ex. 340.

¹⁴³ Pl. Ex. 185 at 1; *see also* Pl. Ex. 34.

¹⁴⁴ ECF Doc. 22 ¶ 32.

¹⁴⁵ *E.g.*, Pl. Ex. 185 at 1; Johnson Dep., vol. 1, 173:11-177:16; Pl. Exs. 16 & 17. Johnson gave these white papers to Shepard. Johnson Dep., vol. 1, 185:15-23; Shepard Dep. 126:9-128:5. Shepard made them available to the public (including Freeborn) on rapower3.com. Freeborn Dep. 24:16-25:23; Pl. Ex. 491; M. Shepard Dep. 244:24-246:8; Pl. Ex. 441. RaPower-3 Dep. 140:4-143:17; Pl. Ex. 504; Shepard Dep. 199:10-204:14; Pl. Ex. 471; Shepard Dep. 250:13-252:21; Pl. Ex. 72; Pl. Ex. 109 at 1-3; *see also* Freeborn Dep. 95:3-98:1; M. Shepard Dep. 157:8-20; Pl. Ex. 425 at 1. Johnson Dep., vol. 1, 211:16-215:23; Shepard Dep. 36:6-40:23, 183:14-187:13; Pl. Ex. 8A; Pl. Ex. 676.

¹⁴⁶ Pl. Ex. 8A at 10.

¹⁴⁷ Pl. Ex. 8A at 10.

¹⁴⁸ Pl. Ex. 8A at 7.

¹⁴⁹ *E.g.*, Pl. Ex. 8A at 8; Pl. Ex. 504 at 5-7, 10-22.

137. Shepard and Freeborn also told customers and prospective customers to expect construction of new towers, beyond the 19 towers on the R&D Site.¹⁵⁰

138. Freeborn stated, in June 2010, “Neldon Johnson of IAUS and [R. Gregory] Shepard are hard at work bringing [the rental] income stream into operation. We are very close to making putting [*sic*] everything together and becoming fully operational perhaps before the end of the summer.”¹⁵¹

139. Then, in February 2012, Freeborn told customers that “the IAUS energy fields are about to be erected.”¹⁵²

140. In June 2012, Defendants told participants in the “RaPower[-] National Convention” about “what’s been accomplished in the last year” with respect to research and development, manufacturing, and construction.¹⁵³

141. In July 2012, Shepard wrote to customers “[n]ow that the R&D is done and the Manufacturing Plant is completed along with the manufacturing of so many components is done [*sic*], CONSTRUCTION WILL BEGIN THIS MONTH.”¹⁵⁴

142. In November 2012, Shepard told a customer that there were “21,000 lenses in inventory” and “150 towers ready to install” with “\$15M” in the bank.”¹⁵⁵

¹⁵⁰ *E.g.*, Pl. Exs. 216, 246, 270.

¹⁵¹ Pl. Ex. 246.

¹⁵² Pl. Ex. 216 at 1.

¹⁵³ Pl. Ex. 504 at 5-4.

¹⁵⁴ Pl. Ex. 270.

¹⁵⁵ Shepard Dep. 172:9-179:17 *and* Pl. Ex. 141.

143. In August 2013, Shepard told customers being audited by the IRS that a photo attached to his email showed “the main tower. There will be 17 to 18 satellite towers that will feed the main tower’s turbine and heat exchanger producing 1.5 megawatts of power.”¹⁵⁶

144. In November 2013, Shepard told customers “[w]e are doing great down in Delta.”¹⁵⁷

145. He identified one tower as “fully completed,” “another ten satellite towers nearly completed,” and an additional four towers “not yet complete.”¹⁵⁸

146. Shepard told customers that “[t]hese fifteen towers will complete the first project. Probably in two weeks, the 2d project will begin. It will consist of 150 towers. All towers and trusses have already been delivered. All the lenses have been framed and many other components have already been made.”¹⁵⁹

147. Shepard also told customers that “[t]he dual axis hydraulic tracking systems were working with the new Ram. The lenses heated up our molten salt storage container to over a thousand degrees.”¹⁶⁰

148. As of June 2014, Shepard wrote to customers “[t]wenty-five construction workers will be employed to install twenty towers a day or close to two megawatts a day. To install that

¹⁵⁶ Shepard Dep. 250:13-251:3; Pl. Ex. 72 at 1.

¹⁵⁷ Pl. Ex. 348 at 1

¹⁵⁸ Pl. Ex. 348 at 1

¹⁵⁹ Pl. Ex. 348 at 1

¹⁶⁰ Pl. Ex. 348 at 1

many towers/megawatts per day with only 25 workers is unprecedented in the history of energy construction. Target date to begin is before summer's end in 2014.”¹⁶¹

149. In December 2015, Shepard heard from a customer who was “a little worried about the amount of time that it is taking to get those lenses on towers and generating rental income.”¹⁶²

150. Shepard assured the customer that “The extra time was getting the mass production and installation capabilities up to 25 towers a day. That has pretty much been completed. I’m pretty sure that the first quarter of 2016 will be a very good one for us. It will all work out.”¹⁶³

151. When the customer asked if Shepard could say if he thought “the lenses will be on towers and generating rental income in 2016,” Shepard responded “I very much think so!”¹⁶⁴

152. Shepard has also told customers about progress toward obtaining a contract to sell power to a third party purchaser.¹⁶⁵

153. In August 2013, Shepard told customers that 18 or 19 towers would be producing 1.5 megawatts of power which would “soon be put on power poles going to Rocky Mountain Power which is Utah’s largest utility company.”¹⁶⁶

¹⁶¹ Shepard Dep. 179:21-183:8; Pl. Ex. 420 at 1.

¹⁶² Pl. Ex. 159.

¹⁶³ Pl. Ex. 159.

¹⁶⁴ Pl. Ex. 159.

¹⁶⁵ Pl. Exs. 157, 292.

154. In April 2015, Shepard told customers that “we are now in the process of negotiating a [power purchase agreement] for the first set of towers that will be going up,”¹⁶⁷ such that rental income from their lenses could start soon.

155. Over the years, Shepard and Freeborn also told customers to expect bonus contract payouts “soon.”¹⁶⁸

c. Defendants sold solar lenses by emphasizing the purported tax benefits.

156. From the start, Defendants have told their customers that they can “zero out” their federal income tax liability by buying enough solar lenses and claiming both a depreciation deduction and solar energy tax credit for the lenses.¹⁶⁹

157. In the materials he wrote in 2006, Johnson included four pages on the tax benefits of buying a lens, due to depreciation and the solar energy tax credit.¹⁷⁰

158. Defendants tell customers to calculate both the deduction and the credit based on the full price of a lens, not the amount the customer actually pays.¹⁷¹

(...continued)

¹⁶⁶ Shepard Dep. 250:13-251:3; Pl. Ex. 72 at 1; *see also* RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267 at 1 (“The first project will consist of 15 towers that will produce about 1.5 Megawatts for Rocky Mountain Power. We are almost done.”).

¹⁶⁷ Shepard Dep. 204:15-209:11; Pl. Ex. 292.

¹⁶⁸ *E.g.*, Pl. Ex. 61 at 1 (In 2010, “They have really started putting an emphasis on the bonus contract which seems to indicate that we are close.”); Pl. Ex. 48 at 1 (In 2012, “Rental income & Bonus payments are expected to begin soon.”); Pl. Ex. 49 at 1 (“Rental and bonus income should start in 2014.”).

¹⁶⁹ Johnson Dep., vol. 1, 247:11-248:12; *see also* IAS Dep. 162:1-165:9, Pl. Ex. 531. According to Shepard, “the greater one’s tax liability, the greater will be the depreciation benefit.” Pl. Ex. 24 at 1; *see also* Pl. Ex. 20 at 2; *See* Lunn Dep. 188:18-189:20.

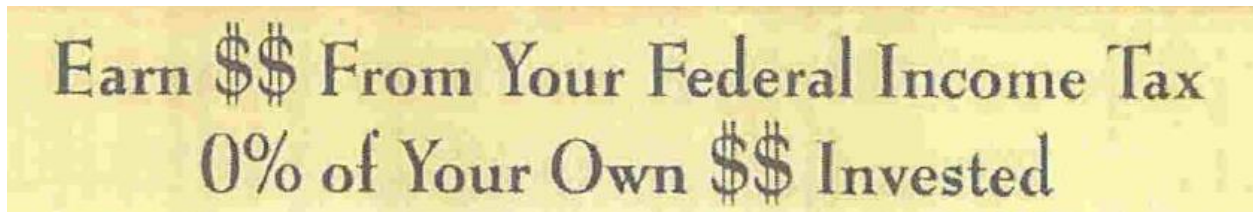
¹⁷⁰ Pl. Ex. 531 at 3-6.

159. Johnson wrote that “[t]he person buying a [lens] receives a \$9,000 tax credit from the IRS for each [lens] purchased. . . . The retail value of IAUS’s [lens] is \$30,000. The federal tax credit at 30% of \$30,000 is \$9,000.”¹⁷²

160. Johnson connected the amount of depreciation a purchaser could take to the impact of the tax credit: “Half of the tax credit (\$4,500) must be subtracted from the \$30,000 purchase amount when using it to calculate depreciation of the equipment. Therefore, only \$25,000 of the \$30,000 value can be depreciated.”¹⁷³

161. Johnson presented tables for purchasers who were in different tax brackets to illustrate the tax-reducing effect of buying lenses and claiming a depreciation deduction and the solar energy tax credit for them.¹⁷⁴

162. At the same time, Johnson told people they could¹⁷⁵:



(...continued)

¹⁷¹ E.g., Pl. Ex. 24 at 1; Pl. Ex. 43 at 1; Pl. Ex. 531 at 2-3 (using prices Johnson established in 2006).

¹⁷² Pl. Ex. 531 at 3.

¹⁷³ Pl. Ex. 531 at 3.

¹⁷⁴ Pl. Ex. 531 at 4-6.

¹⁷⁵ Pl. Ex. 532 at 12.

163. Shepard offered a way for a prospective or returning customer to “determin[e] how many solar lenses you should buy”: “look at the taxes you paid last year and what you expect to pay this year.”¹⁷⁶

164. According to Shepard, the “objective” is to “zero out your taxes while maximizing your ability to bring clean, renewable energy to our country.”¹⁷⁷

165. To accomplish this objective, Shepard gave prospective customer the formula to decide how many lenses to buy: take the customer’s anticipated tax liability for the current year and multiply it by a number that “has been designed to give most taxpayers 1.5 times their money back in relation to their total down payment. For example, for a \$10K down payment . . . you may get back at least \$15K in tax benefits.”¹⁷⁸

166. Shepard showed customers and prospective customers how to calculate those tax benefits¹⁷⁹:

Example: Taxable 2014 Liability is projected to be \$10,000 plus there was \$10,000 paid in 2013 taxes.
 $(10,000 + 10,000 \times .00085 = 17.$

Purchase Price: 17 systems \times \$3,500 = \$59,500.

Down Payment: 17 systems \times \$1,050 = \$17,850.

Tax Credit: \$59,500 \times 30% = \$17,850.

Depreciation (Net Operating Loss): One half of the tax credit is \$8,925. Subtract that from the purchase price of \$59,500 = \$50,575.

¹⁷⁶ Shepard Dep. 232:4-234:10; Pl. Exs. 20, 24, 474.

¹⁷⁷ Shepard Dep. 232:4-234:10; Pl. Ex. 20 at 2; Pl. Ex. 24 at 1.

¹⁷⁸ Pl. Ex. 20 at 2.

¹⁷⁹ Pl. Ex. 24 at 1; *see also id.* at 2.

167. Shepard showed the financial bottom line for a prospective lens buyer¹⁸⁰:

Money Details:

1. You purchased 9 systems and paid \$9,450 as a down payment.
2. After your tax refund of \$10,000 in 2014, you will have made \$550 thanks to your RaPower3 purchase plus you will make about another \$4,800 over the next four years.
3. Your profit is created by your depreciation.
4. Don't forget the rental income of $\$150 \times 9 \times \text{five years} = \$6,750$ and $\$68 \times 9 \times 30 \text{ years} = \$18,360$ (for a total of \$25,110).

168. Put more simply, Shepard showed customers exactly where and how, on a federal individual income tax return, to enter numbers to “zero out” their tax liability¹⁸¹:

Form 1040 Department of the Treasury—Internal Revenue Service (109) **2011** U.S. Individual Income Tax Return OMB No. 1545-0074 IRS Use Only—Do not write or staple in this space.

For the year Jan. 1-Dec. 31, 2011, or other tax year beginning . 2011, ending . 20

Your first name and initial **RAPOWER3** Last name **TEAM MEMBER** See separate instructions. Your social security number

If a joint return, spouse's first name and initial Last name Spouse's social security number

Home address (number and street), if you have a P.O. box, see instructions. Apt. no. **▲ Make sure the SSN(s) above and on line 6c are correct.**

Do not write on this form. If you have a question, see instructions.

1099-R If tax was withheld, 11 Alimony received

12 Business income or (loss). Attach Schedule C or C-EZ **DEPRECIATION** 11 12 **2,973** Per System

13 Capital gain or (loss). Attach Schedule D if required. If not required, check here ☐ 13

If you did not get a W-2, see instructions. 14 Other gains or (losses). Attach Form 4797 14

15a IRA distributions 15a b Taxable amount 15b

Form 1040 (2011)

Tax and Credits

38 Amount from line 37 (adjusted gross income) **38**

39a Check ☐ You were born before January 2, 1947, ☐ Blind. Total boxes checked **39a**

If: ☐ Spouse was born before January 2, 1947, ☐ Blind. checked **39a**

b If your spouse itemizes on a separate return or you were a dual-status alien, check here ☐ 39b

40 Itemized deductions (from Schedule A) or your standard deduction (see left margin) **40**

41 Subtract line 40 from line 38 **41**

42 Exemptions. Multiply \$3,700 by the number on line 6d. **42**

43 Taxable income. Subtract line 42 from line 41. If line 42 is more than line 41, enter -0- **43 GOAL IS ZERO**

44 Tax (see instructions). Check if any from: a ☐ Form(s) 9814 b ☐ Form 4872 c ☐ 862 election **44**

Get this number low enough for zero taxes

¹⁸⁰ Pl. Ex. 24 at 1; see also Pl. Ex. 20 at 2.

¹⁸¹ Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 13; Lunn Dep. 164:12-171:1; see also Shepard Dep. 241:18-243:8; Olsen Dep. 191:6-192:6; Pl. Ex. 158.

Other Taxes	52	Residential energy credits. Attach Form 5695	52	
	53	Other credits from Form: <input type="checkbox"/> 3800 <input type="checkbox"/> 8901 <input type="checkbox"/>	53	TAX CREDIT
	54	Add lines 47 through 53. These are your total credits	54	IF NEEDED
	55	Subtract line 54 from line 46. If line 54 is more than line 46, enter -0-	55	\$1,250
	56	Self-employment tax. Attach Schedule SE	56	PER SYSTEM
	57	Unreported social security and Medicare tax from Form: <input type="checkbox"/> 4137 <input type="checkbox"/> 8919	57	
	58	Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5320 if required	58	
	59a	Household employment taxes from Schedule H	59a	
	59b	First-time homebuyer credit repayment. Attach Form 5405 if required	59b	
	60	Other taxes. Enter code(s) from instructions	60	
61	Add lines 55 through 60. This is your total tax	61	GOAL IS ZERO	
Payments	62	Federal income tax withheld from Forms W-2 and 1099	62	

Refund	72	If line 72 is more than line 61, subtract line 61 from line 72. This is the amount you overpaid	72	
Direct deposit? See instructions	74a	Amount of line 72 you want refunded to you. If Form 8888 is attached, check here	74a	GOAL IS ALL TAX WITH HELD
	b	Routing number	b	Type: <input type="checkbox"/> Checking <input type="checkbox"/> Savings
	d	Account number	d	
Amount You Owe	75	Amount of line 72 you want applied to your 2012 estimated tax	75	
	76	Amount you owe. Subtract line 72 from line 61. For details on how to pay, see instructions	76	
	77	Estimated tax penalty (see instructions)	77	

169. Freeborn told customers “you can be tax free like GE for 15 years” by buying lenses.¹⁸² Freeborn gave customers the following calculations¹⁸³:

Fourth, there are certain numbers that all RaPower3 team members need to have down per system:

1. Retail Price - \$3500;
2. Full Down Payment - \$1050;
3. Up Front/Enrollment Cost - \$105;
4. Federal Energy Credit - \$1050;
5. Bonus - \$2,000;
6. Residual Income - \$150/year first 5 years, \$68/year the next 30 years;
7. Depreciation - \$2,975, 50% Bonus depreciation the first year;
8. Rule of thumb - multiply Line 55 of Form 1040 by 6, and then multiply that sum by .0007 to determine the number of systems to be purchased to offset federal income taxes through 2016. Remember, your client can always purchase more systems to extend his tax free status beyond 2016 since the tax credits may be forwarded 20 years.

170. Freeborn told people in his downline to start with the following pitch if they wanted to sell more lenses¹⁸⁴:

1. Listen for the tax return complaining conversations
2. Ask the M A G I C Question: “Do you like figuring (Paying) taxes?”
3. Explain to them your experience: “Well neither do I; that’s why I DON’T pay any. Would you like to learn how not to as well?”

171. Shepard and Freeborn also assisted customers with preparing their federal income taxes to claim a depreciation deduction and solar energy tax credit as a result of buying solar lenses.¹⁸⁵

¹⁸² Pl. Ex. 220; *see also* Pl. Ex. 207 (“With this program you are awarded the . . . tax privileges that General Electric gets, i.e., pay no federal taxes. In fact, full [par]ticipation makes you tax free till [*sic*] 2020.”).

¹⁸³ Pl. Ex. 501 at 2; *see also* Freeborn Dep. 71:2-20; Pl. Ex. 499. Freeborn and his brother created a charity that they used to sell solar lenses. Pl. Exs. 498, 499, 500. The “charity” sold at least 450 lenses. Pl. Ex. 498.

¹⁸⁴ Pl. Ex. 85 at 3; *see also* Pl. Ex. 214.

172. Shepard told people how to complete their tax returns “properly” to claim the tax benefits purportedly associated with buying solar lenses.¹⁸⁶

173. As Shepard told other RaPower-3 “leadership” team members in 2011, “I have someone from Florida that is FAXING his 1040 return to me. I told him that I can tell him in two minutes if his CPA did it right.”¹⁸⁷

174. Shepard has corresponded with tax professionals to give them information and instruction about the transactions and the technology that purportedly qualify their customers for the tax benefits Defendants promote.¹⁸⁸

175. Shepard also advises customers under audit on how to respond to the IRS to defend disallowed and lens-related depreciation deductions and solar energy tax credits.¹⁸⁹

176. RaPower-3 has touted “success stories” on its website. None of the “success stories” involved the actual production of solar energy.¹⁹⁰

177. Rather, all of the so-called “success stories” involved customers receiving the substantial tax benefits that Defendants promote.¹⁹¹

(...continued)

¹⁸⁵ *E.g.*, Pl. Exs. 88, 109; Pl. Ex. 674 (“TAX TIME SUCCESS STORIES” note customers having received help from Shepard and Freeborn to complete taxes). Pl. Ex. 323; Gregg Dep. 127:19-128:8; *see also* Pl. Ex. 218 (offering information from RaPower-3 to support claimed tax benefits on customers’ returns); Pl. Ex. 217 (offering instructions on how to use TurboTax to claim tax benefits).

¹⁸⁶ *E.g.* Shepard Dep. 243:11-244:14; Pl. Ex. 43 at 1.

¹⁸⁷ Shepard Dep. 241:1-14; Pl. Ex. 112.

¹⁸⁸ Shepard Dep. 210:20-211:24; Pl. Ex. 471.

¹⁸⁹ *E.g.*, Pl. Ex. 70 at 1-2.

¹⁹⁰ *E.g.* Pl. Ex. 674.

178. In mid-2016, after this lawsuit was filed, Johnson changed the way RaPower-3 and Shepard promoted the tax benefits purportedly connected with solar lenses.¹⁹²

179. According to Shepard and Johnson, a customer may still buy lenses on the same terms described above, and claim depreciation and the solar energy tax credit.¹⁹³

180. But the customer may instead pay a lower price, *not* claim depreciation, and still claim the solar energy tax credit.¹⁹⁴

2. Defendants knew or had reason to know that their statements were false or fraudulent as to material matters.¹⁹⁵

181. Defendants knew, or had reason to know, that their customers were not in a trade or business of leasing out solar lenses and, therefore, that their customers were not allowed a depreciation deduction or a solar energy tax credit.¹⁹⁶

182. This is because Defendants knew the following facts throughout the entire time they promoted the solar energy scheme:

(...continued)

¹⁹¹ *E.g.* Pl. Ex. 674.

¹⁹² Shepard Dep. 244:22-250:11. Recently, Defendants also began promoting a “home system” for solar energy production. Pl. Ex. 680. They tell customers that they can get the home system “for free” if customers “use[] the federal tax solar credit program correctly.” *Id.* at 1.

¹⁹³ Shepard Dep. 244:22-250:11; RaPower-3 Dep. 190:5-193:18; Pl. Ex. 352.

¹⁹⁴ Shepard Dep. 244:22-250:11; RaPower-3 Dep. 190:5-193:18; Pl. Ex. 352.

¹⁹⁵ [26 U.S.C. § 6700\(A\)\(2\)\(a\)](#).

¹⁹⁶ Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 8.

- a. **Defendants knew, or had reason to know, that the only way a customer has “made money” from buying a lens is from the purported tax benefits.**

183. Shepard and Freeborn sold the lenses by telling people “There’s three ways you can make money [from owning a lens]. You can do it through tax benefits, you can do it through the rental program, and you can do it through the bonus program.”¹⁹⁷

184. But they both knew that the only way a customer has ever “made money” from buying a lens is through the tax benefits; no customer has earned money from rental income or income from a bonus contract.¹⁹⁸

- i. **No customer has been paid rental income generated from the use of his lens to generate power bought by a third-party purchaser.**

185. The only towers that currently exist are the same towers that Johnson built in 2006: the (at most) 19 towers on the R&D site.¹⁹⁹

186. Assuming 19 towers, at most 2,584 lenses have been installed.²⁰⁰

187. According to Johnson, he owned the lenses that were originally installed in the towers in 2006.²⁰¹

¹⁹⁷ Shepard Dep. 92:17-94:13, 241:1-14; Pl. Ex. 112 (“The first way to make money at RaPower[-]3 is with taxes. So we need to make sure everyone is maximizing their return.”); Freeborn Dep. 82:16-83:19; Pl. Ex. 246; *see also* Freeborn Dep. 48:2-55:1; Pl. Exs. 48 at 1, 496, 497.

¹⁹⁸ Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246. Freeborn testified that the income from commissions on solar lens sales is also “functional.” Freeborn Dep. 82:16-85:17; Pl. Ex. 246. But the multi-level marketing component of RaPower-3 is not connected to lens ownership. RaPower-3 Dep. 33:8-34:9. A distributor need not buy a lens in order to sell lenses for RaPower-3. *Id.*

¹⁹⁹ RaPower-3 Dep. 80:16-18.

²⁰⁰ *See* Shepard Dep. 129:17-131:2 (assuming 18 towers installed rather than 19).

188. Since that date, Johnson testified, as customers purchased lenses, ownership of different lenses in the towers transferred from him to the customer.²⁰²

189. Johnson testified that he created another entity, Cobblestone Centre, LLC (“Cobblestone”), to construct towers and install lenses.²⁰³

190. His idea is that once the towers are constructed and the lenses installed, he would have LTB take over operation and maintenance of the towers and lenses.²⁰⁴

191. No customer has authorized Cobblestone to install his lenses.²⁰⁵

192. Shepard knows that an entity named Cobblestone exists, but does not know anything else about it.²⁰⁶

193. Hundreds, if not thousands, of customer “lenses” are *not* installed in towers.²⁰⁷ They are in undifferentiated stacks of pallets of uncut plastic sheets in a warehouse in Millard County, Utah.²⁰⁸

194. Plaskolite ships IAS rectangular sheets of grooved plastic, in pallets wrapped in still more plastic.²⁰⁹

(...continued)

²⁰¹ IAS Dep. 63:24-67:3.

²⁰² IAS Dep. 63:24-67:3.

²⁰³ LTB1 Dep. 32:8-34:6.

²⁰⁴ LTB1 Dep. 32:8-24.

²⁰⁵ LTB1 Dep. 38:25-39:5.

²⁰⁶ Shepard Dep. 123:16-124:6.

²⁰⁷ See Shepard Dep. 39:13-42:5, 60:21-61:17; Pl. Ex. 460. Using “lenses” in this sentence is generous to Defendants in light of the procedural posture.

²⁰⁸ See Shepard Dep. 39:13-42:5, 60:21-61:17; Pl. Ex. 460; Johnson Dep., vol. 1, 192:15-197:1.

195. Before any rectangular sheet of plastic can be installed on a tower, Cobblestone must cut the rectangle into triangles and add frames to the plastic triangles.²¹⁰

196. Whether a customer's plastic lens is purportedly on a tower or in a pallet inside a warehouse, Defendants do not know which customer owns which lens.²¹¹

197. Johnson testified that he has "generated electricity" using lenses on the R&D Site a "hundred times,"²¹² but no one other than him has seen it happen²¹³.

198. Johnson testified that he could have "put power on the grid" at "any time since 2005" and he "could have done that easily"²¹⁴.

199. But Johnson testified that, since 2005, he has made a "business decision" not to put electricity on the grid.²¹⁵

200. Johnson also testified that every time he thinks he is finished and ready to connect to a third-party purchaser, he finds a problem, needs to create some new invention, or otherwise needs to make an improvement to his system.²¹⁶ So he has never been finished.²¹⁷

(...continued)

²⁰⁹ Johnson Dep., vol. 1, 192:15-197:1; *compare* Pl. Ex. 2 with Pl. Ex. 460.

²¹⁰ Johnson Dep., vol. 1, 52:20-53:2, 74:11-14, 192:15-197:1; LTB1 Dep. 32:8-24.

²¹¹ Johnson Dep., vol. 1, 199:10-206:14; Pl. Ex. 509 at video clip 10_0_47-0_57; [ECF No. 246](#), Pl. Ex. 669, at 1 ("RaPower3, LLC does not currently track the location of lenses as all lenses are located at the facility warehouse or are being installed into solar arrays at the Delta, Utah, facility."); *E.g.*, Pl. Ex. 412 at Response to Interrogatory No. 12; Shepard Dep. 59:4-61:17.

²¹² Johnson Dep., vol. 1, 164:3-165:17.

²¹³ Johnson Dep., vol. 1, 164:3-165:17; Shepard Dep. 129:17-131:18; Freeborn Dep. 20:15-22:23, 28:19-34:18, 42:12-25.

²¹⁴ RaPower-3 Dep. 163:15-166:18

²¹⁵ RaPower-3 Dep. 163:15-166:18.

201. Johnson has not produced data (for example, from testing the components alone or as a purported system), research, or third-party validation, to support his ideas of how he claims his system would work, or records of it working.²¹⁸

202. In 2005, when he first began selling solar lenses, Shepard knew that IAS was “still a long ways away” from generating electricity for a third-party purchaser²¹⁹ and that “more research and development had to be done . . . to make the technology economically viable”²²⁰.

203. To date, Shepard has never seen the lenses in the towers at the R&D Site generate electricity.²²¹

204. Johnson has told Shepard that they have done so “for R&D purposes.”²²²

205. Nonetheless, as recently as February 19, 2016, Shepard admitted having “no proof that [the purported solar] towers are up and running.”²²³

206. Freeborn has never seen the lenses in the towers that currently stand at the R&D Site generate electricity.²²⁴

(...continued)

²¹⁶ RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

²¹⁷ RaPower-3 Dep. 155:4-166:18; Pl. Ex. 267.

²¹⁸ *E.g.*, Johnson Dep., vol. 1, 69:8-10, 109:10-16, 151:18-153:4, 164:3-165:17, 177:13-179:24.

²¹⁹ Shepard Dep. 46:2-47:12.

²²⁰ Shepard Dep. 54:17-24.

²²¹ Shepard Dep. 129:17-131:18.

²²² Shepard Dep. 129:17-131:18.

²²³ Pl. Ex. 279 at 1; *see also* Shepard Dep. 187:14-195:3 (noting that a prospective lens purchaser in or around 2013 “wanted to see a project up and running before they committed,” which Shepard could not show them); Pl. Ex. 470 at 6-7.

207. Nonetheless, Freeborn believed that because he saw lenses concentrate heat on an early site visit, he had “proof of concept” that they would be used in a system to generate electricity.²²⁵

208. Freeborn thought that the other components of the system “would all be added later.”²²⁶

209. Freeborn testified that getting the “individual parts” of Johnson’s purported technology to “work in concert . . . seems to be the hurdle.”²²⁷

(...continued)

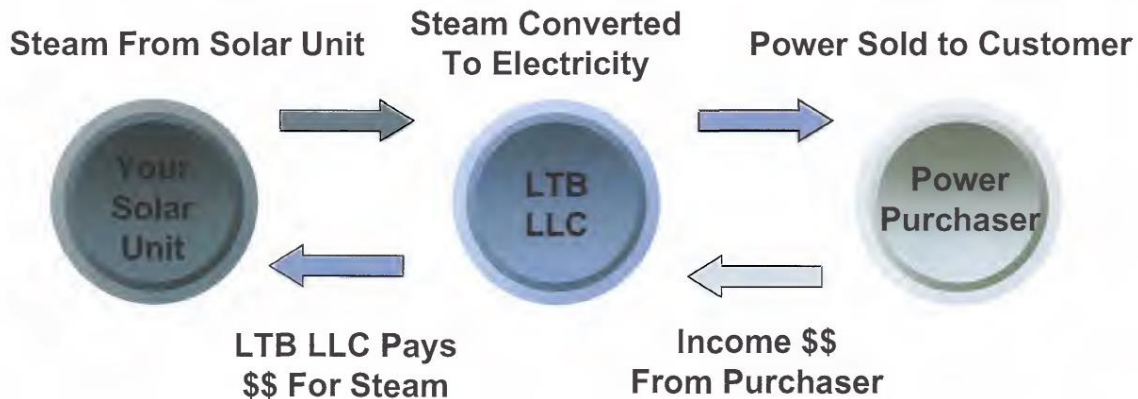
²²⁴ Freeborn Dep. 20:15-22:23, 28:19-34:18, 42:12-25.

²²⁵ Freeborn Dep. 28:19-34:18.

²²⁶ Freeborn Dep. 28:19-34:18. In early 2010, Freeborn told customers he would be sending out a “video [he] shot with Neldon while [he] visited the site last week.” Pl. Ex. 213 at 1.

²²⁷ Freeborn Dep. 95:3-13; *see also* Pl. Ex. 412 at Response to Interrogatory No. 10 (“I am unaware of the status of production [of energy], whether or in what form and measurements.”).

210. After 11 years of selling lenses, Johnson's technology has never generated energy for which a third-party "power purchaser" has paid²²⁸ according to Johnson's vision from 2006²²⁹:



211. In fact, LTB has never done anything; it has never had a bank account, any employees, or any revenue.²³⁰

212. Shepard first heard about LTB when he obtained his first lenses in 2005.²³¹

213. At that time, he did not ask about LTB's experience with operating and maintaining solar energy equipment.²³²

²²⁸ Johnson Dep., vol. 1, 164:3-165:17, 167:22-168:3, 172:4-17. Johnson testified that he or RaPower-3 (and not a third party power purchaser) paid a single customer a single check for having used her lenses to generate electricity that was used at Johnson's former grocery store in 2010. (RaPower-3 Dep. 6:18-7:23; Pl. Ex. 188.) The United States disputes that this customer was paid for the production of electricity (RaPower-3 Dep. 18:9-19:3; Pl. Ex. 690, Deposition of Roger Halverson ("Halverson Dep.") 43:22-53:24 (Oct. 18, 2016); Pl. Exs. 185, 186) but because of the procedural posture will assume for the sake of this motion that it is true. Even if true, it does not create a genuine issue of material fact on any claim presented for decision on this motion.

²²⁹ IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 532 at 6; *see also* Pl. Ex. 531; LTB1 Dep. 71:25-74:21, 88:7-17.

²³⁰ LTB1 Dep. 10:10-11:1, 14:7-16:7, 18:2-9, 42:10-43:5; Pl. Ex. 464; LTB1 Dep. 69:6-74:21, 90:19-91:8.

²³¹ Shepard Dep. 73:1-76:15; Pl. Ex. 464; LTB1 Dep., 75:25-77:14.

²³² Shepard Dep. 73:1-76:15; Pl. Ex. 464; LTB1 Dep., 75:25-77:14.

214. Shepard simply signed the agreement to lease his lenses to LTB.²³³

215. Shepard does not know what LTB did with his lenses after they had been subleased.²³⁴

216. Shepard does not know from whom LTB would collect any rent that it might pay him some day.²³⁵

217. Shepard knows, and has known since 2005, that LTB has never generated any income using his lenses.²³⁶

218. Shepard knows that no customer has been paid for the use of his or her lenses.²³⁷

219. He does not know who owns LTB, who runs it, or whether it has any expertise in operating and maintaining solar lenses,²³⁸ although he does believe that Johnson is connected to LTB in some fashion²³⁹.

220. He has never asked Johnson why LTB has never made a rental payment.²⁴⁰

221. In 2013, however, Shepard reported to customers that LTB was “considering using the solar lenses they are renting from RaPower[-]3 Team Members to provide heat and water for crop production in greenhouses.”²⁴¹

²³³ Shepard Dep. 73:1-76:15; Pl. Ex. 464.

²³⁴ Shepard Dep. 73:1-76:15; Pl. Ex. 464.

²³⁵ Shepard Dep. 153:22-154:4.

²³⁶ Shepard Dep. 34:18-35:24, 61:24-63:4, 73:1-76:15; Pl. Ex. 464.

²³⁷ Shepard Dep. 34:18-35:24, 67:1-12 93:17-94:13; Pl. Ex. 279 at 1.

²³⁸ Shepard Dep. 73:1-76:15; Pl. Ex. 464.

²³⁹ Shepard Dep. 96:19-100:4; Pl. Ex. 77.

²⁴⁰ LTB1 Dep. 86:20-87:9.

222. Johnson has told customers that LTB “placed [their lenses] in service” because LTB “has utilized solar energy from [the customer’s lenses] for the purpose of assisting IAS in research and development” for various components of Johnson’s solar energy technology.²⁴²

223. In July 2016, Shepard has told customers the same thing: that LTB “rents your solar lenses and utilizes the solar energy from your panels for the purpose of assisting IAS in research and development.”²⁴³

224. Shepard also made such a claim in 2014, when he told customers that LTB had rented their lenses to IAS for research and development since 2010.²⁴⁴ Shepard claimed that, therefore, customers’ “rental payments began to accrue” *in 2010*.²⁴⁵ Shepard said that he was “99.5% sure [customers would] start receiving rental payments” in 2014 for IAS’s purported past use of their lenses.²⁴⁶ This never happened.²⁴⁷

225. Freeborn knows, and has known since 2009, that he has never received rental income from his lenses.²⁴⁸

(...continued)

²⁴¹ Pl. Ex. 557.

²⁴² LTB1 Dep. 92:7-93:22; Pl. Ex. 558; RaPower-3 Dep. 117:22-118:23; Pl. Ex. 473.

²⁴³ Pl. Ex. 473.

²⁴⁴ Pl. Ex. 341.

²⁴⁵ Pl. Ex. 341.

²⁴⁶ Pl. Ex. 341.

²⁴⁷ Shepard Dep. 258:5-261:16; Johnson Dep., vol. 1, 239:18-240:1; LTB1 Dep. 88:18-90:18.

²⁴⁸ IAS Dep. 182:16-183:4; Pl. Ex. 533; Freeborn Dep. 39:23-40:24.

226. Freeborn never asked any questions about LTB, either before or after he agreed to “lease out” his lenses to LTB in 2009.²⁴⁹

227. Freeborn has never asked Johnson why LTB has never made a rental payment.²⁵⁰

228. No customer has asked questions of LTB, either before or after signing an agreement to “lease out” their lenses to LTB.²⁵¹

229. Defendants know that if the solar lenses are going to generate rental income for customers, a third party must be willing to purchase power that the lenses will purportedly create.²⁵²

230. They know, or have reason to know, that there never has been such an agreement in place.²⁵³

231. Shepard testified that, since 2010, he has “tried to put his own projects together” to get a third-party purchaser.²⁵⁴ “But we just kept running into road blocks. . . . Never got that

²⁴⁹ LTB1 Dep. 75:15-77:14.

²⁵⁰ LTB1 Dep. 75:15-77:14.

²⁵¹ LTB1 Dep. 75:15-77:14.

²⁵² Johnson Dep., vol. 1, 130:5-131:6; Shepard Dep. 34:18-35:24, 153:22-154:4; Freeborn Dep. 48:2-55:1; Pl. Ex. 496 & 497; Pl. Ex. 185 at 2 (Johnson told a customer, in early 2010, “[w]e do have power purchase agreements tentatively in place with other companies that have agreed to purchase the power produced from the solar energy equipment once the system is placed in service.”) *but see contra* IAS Dep. 149:4-16 (Johnson testified that IAS has never entered a power purchase agreement.). *See also* Pl. Ex. 504 at 22 (as of June 2012, Defendants knew that power purchase agreements were an integral part of a solar energy project)

²⁵³ Shepard Dep. 34:18-35:24, 153:22-154:4; Johnson Dep., vol. 1, 131:7-134:6; Pl. Ex. 412 at Response to Interrogatory No. 8.

²⁵⁴ Shepard Dep. 204:15-209:11; Pl. Ex. 292.

far. Every time I got close, they wanted to see a power project up and running. . . . And we didn't have that running yet.”²⁵⁵

232. Any other information that Shepard has about progress toward selling energy to an outside purchaser comes from Johnson.²⁵⁶

233. Johnson has no concrete plan to connect his purported solar energy technology to the electrical grid by the end of 2017, such that a third party could purchase electricity generated.²⁵⁷

ii. **No customer has been paid a bonus.**

234. The bonus contracts Johnson offered in the past are keyed to IAS's gross sales revenue.

235. Shepard and Freeborn know that no customer has been paid a bonus.²⁵⁸

236. Shepard does not know whether IAS has received sales revenue.²⁵⁹

237. Shepard does not know what sales would generate such revenue.²⁶⁰

238. Shepard admitted that, even if IAS had generated sales revenue, he would not necessarily know about it.²⁶¹

²⁵⁵ Shepard Dep. 205:21-12; *see also* IAS Dep. 204:24-207:10.

²⁵⁶ Shepard Dep. 46:2-57:5.

²⁵⁷ Johnson Dep., vol. 1, 111:11-114:3; Pl. Ex. 509 video clip 18_2_27-2_39 at timestamp 14:21:28; Johnson Dep., vol. 1, 115:24-120:13.

²⁵⁸ Shepard Dep. 34:18-35:24, 76:23-82:18, 93:17-94:13; Pl. Ex. 465.

²⁵⁹ Shepard Dep. 77:6-78:18.

²⁶⁰ Shepard Dep. 77:6-78:18.

²⁶¹ Shepard Dep. 77:6-78:18.

239. According to Johnson, IAS has never received any sales revenue.²⁶²

240. No customer has been paid a bonus.²⁶³

b. Defendants knew, or had reason to know, that their customers are not required to pay the full down payment, much less the full purchase price for a lens.

241. Shepard testified that Johnson “doesn’t seem to be too forceful in trying to collect delinquent payments,”²⁶⁴ and does not seem to even track which customers might be delinquent in paying their full down payment.²⁶⁵

242. Shepard does not believe that Johnson “does anything with people when they don’t pay.”

243. For example, one customer who purportedly purchased 500 lenses in January 2012 has not yet paid the “full down payment” of \$1,050 on all 500.²⁶⁶

244. This customer has not done so yet because he has not yet received the benefit of using all 500 to reduce his tax liability.²⁶⁷

245. RaPower-3 has not taken action to collect the remaining down payment.²⁶⁸

246. If a solar lens customer no longer desires to “own” lenses, Johnson will refund the person’s money and let them out of the contract.²⁶⁹

²⁶² Johnson Dep., vol. 1, 230:4-11.

²⁶³ Shepard Dep. 92:17-94:13; Freeborn Dep. 82:16-85:7; Pl. Ex. 246.

²⁶⁴ Shepard Dep. 112:9-113:7.

²⁶⁵ Shepard Dep. 110:9-113:7; Pl. Ex. 468.

²⁶⁶ Aulds Dep. 140:15-146:5.

²⁶⁷ Aulds Dep. 140:15-146:5.

²⁶⁸ Aulds Dep. 140:15-146:5.

247. Johnson “has always” offered this out.²⁷⁰

248. In December 2010, Johnson promised to refund customers’ money and void their Equipment Purchase Agreement, if they did not receive the tax benefits Defendants promote.²⁷¹

249. Johnson, via Shepard, reiterated this offer in January 2015 to customers who were being audited for having claimed the tax benefits that Defendants promote:

We . . . believe we will prevail against the IRS in court. However, if you would like to part company, we will refund your money and you can pay the IRS and move in a different direction. You can most likely get the IRS to drop the penalties. But, if you decide on the refund, then you would give up all bonuses and rental fees associated with those solar lenses.²⁷²

250. Customers know that they are not liable to make any payments on the debt they purportedly owe to RaPower-3 for the difference between their down payment and the remainder of the purchase price, at least until their lenses begin producing revenue.²⁷³

c. Defendants knew, or had reason to know, that Johnson, and not their customers, controlled the customers’ purported “solar lens leasing businesses.”

251. Johnson, Shepard, and Freeborn know that RaPower-3 customers do not exercise any control over their purported lens leasing business.²⁷⁴

(...continued)

²⁶⁹ Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468.

²⁷⁰ Shepard Dep. 304:4-305:10.

²⁷¹ Johnson Dep., vol. 1, 237:16-239:13; Pl. Ex. 383; Shepard Dep. 304:4-305:10; Pl. Ex. 282 at 1.

²⁷² Pl. Ex. 282.

²⁷³ Shepard Dep. 153:2-16; Gregg Dep. 53:20-55:9;

252. No customer has ever decided, for example, to buy a lens and then lease it to an entity other than LTB.²⁷⁵

253. Customers never take possession of their lenses.²⁷⁶

254. Because Defendants do not track which lens belongs to which customer, there is no way for a customer to know which specific lens he owns.²⁷⁷

255. Johnson's entities retain the lenses and control what happens to them (if anything).²⁷⁸

256. Defendants emphasize how *little* any customer would have to do with respect to "leasing out" their lenses: "[s]ince LTB installs, operates and maintains your lenses for you, having your own solar business couldn't be simpler or easier."²⁷⁹

(...continued)

²⁷⁴ *E.g.*, Freeborn Dep. 28:19-40:16 (noting that he did not know where his lenses were or are, or what, exactly, they were being used for, or by whom).

²⁷⁵ *See* LTB1 Dep. 87:10-88:6; RaPower-3 Dep. 62:21-64:5.

²⁷⁶ LTB1 Dep. 87:10-88:6.

²⁷⁷ *See* Johnson Dep., vol. 1, 199:10-206:14; Pl. Ex. 509 at video clip 10_0_47-0_57; Pl. Ex. 669 at 1 ("RaPower3, LLC does not currently track the location of lenses as all lenses are located at the facility warehouse or are being installed into solar arrays at the Delta, Utah, facility."); *E.g.*, Pl. Ex. 412 at Response to Interrogatory No. 12; Shepard Dep. 59:4-61:17.

²⁷⁸ LTB1 Dep. 32:8-34:15.

²⁷⁹ Pl. Ex. 19.

257. Shepard keeps customers updated about what Johnson's entities are doing with their lenses (if anything). Shepard described this very process when he wrote to customers in June 2014²⁸⁰:

From: Greg Shepard <greg@rapower3.com>
Sent: Friday, June 20, 2014 8:32 PM
To: undisclosed-recipients
Subject: Ra3 Construction Update
Attach: 016.JPG; 017.JPG

TO ALL: A big RaPower3 Welcome to all our new members.

PHOTOS #16 & 17 Installation: These two canvas buildings will add 20,000 square feet of construction space at the Delta, Utah project site. Twenty-five construction workers will be employed to install twenty towers a day or close to two megawatts a day. To install that many towers/megawatts per day with only 25 workers is unprecedented in the history of energy construction. Target date to begin is before summer's end in 2014.

QUESTIONS AND ANSWERS:

...

Q: Also, how do I as an owner know what my product is doing?

A: Through my e-mails and rapower3.com website. Your lenses are being used right now by virtue of your Bonus Contract. It is our goal to have your lenses operating in a tower before summer is over.

258. Johnson knows that solar lens customers do not contact LTB for any reason.²⁸¹

259. They do not inquire into LTB's experience operating and maintaining solar energy equipment, either before or after they sign the O&M to "lease out" their lenses to LTB.²⁸²

²⁸⁰ Pl. Ex. 420.

²⁸¹ LTB1 Dep. 75:15-77:14.

²⁸² LTB1 Dep. 75:15-77:14.

260. For example, in early 2014, one long-time RaPower-3 customer wrote to Shepard asking whether LTB has “a website, e-mail, contact #, or all of the above . . . ? I was unable to find anything online.”²⁸³

261. This customer, who was being audited by the IRS for having claimed the tax benefits Defendants promote, noted that none of this information is in his O&M, and “[w]hen you google the company name and address there is zero information about the company.”²⁸⁴

262. This customer told Shepard “I just want to be able to provide contact information for LTB if asked about it. . . . I fear it would be a big red flag if I cannot provide any contact information about the company who is supposed to be paying my rental fees.”²⁸⁵

d. Defendants knew, or had reason to know, that their customers do not have special expertise or prior experience in the solar lens leasing business.

263. Johnson wanted to allow “everyday people” to “take advantage of all the generous tax benefits” of “not just receiving solar tax credits, but also getting the depreciation benefit” from buying solar lenses through RaPower-3.²⁸⁶

264. Shepard and Freeborn knew that they sold solar lenses to individuals who generally work full-time jobs, like teachers, school administrators, coaches, and others.²⁸⁷

²⁸³ Pl. Ex. 77 at 1.

²⁸⁴ Pl. Ex. 77 at 1-2.

²⁸⁵ Pl. Ex. 77 at 1-2; Shepard Dep. 250:13-251:3; Pl. Ex. 72; *see also* Halverson Dep. 61:13-65:14; Pl. Ex. 189 at 1-3 (In 2011, a customer’s accountant wrote to Shepard asking what, if anything, was happening with the customer’s 2009 lens “purchase.”)

²⁸⁶ Pl. Ex. 8A at 7.

²⁸⁷ Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 12 (showing purported tax benefits of solar lens purchase for a “typical teaching couple.”); Pl. Ex. 674 (touting “TAX TIME SUCCESS STORIES” from RaPower-3 customers

(continued...)

265. They knew, or had reason to know, that their customers do not have special expertise in the solar energy industry.²⁸⁸

III. Legal Standard for Summary Judgment

A party may move for summary judgment on all or part of a claim.²⁸⁹ The moving party must show “that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”²⁹⁰ “An issue of material fact is ‘genuine’ if a reasonable [factfinder] could return a verdict for the nonmoving party.”²⁹¹ When the moving party bears the burden of proof on the issue presented for summary judgment, the moving party “must lay out the elements of the claim, cite the facts which it believes satisfies these elements, and demonstrate why the record is so one-sided as to rule out the prospect of a finding in favor of the non-movant on the claim.”²⁹² The non-moving party must oppose the motion by setting forth

(...continued)

with school-based jobs). Freeborn Dep. 44:11-45:3; Pl. Ex. 492 at 1 (noting that RaPower-3 program allows “‘Average Joes’ like you and I” to qualify for solar energy tax credits; using as an example RaPower-3 customer a husband and wife who are a teacher and a nurse, respectively); Pl. Ex. 216 (noting a “teacher from the Midwest” who is a customer); Pl. Ex. 109 at 1 (“Sadly, right now most of the \$6 Million is going to businesses rather than to teachers and coaches”); Pl. Ex. 214 (“The average dual income household, that pays taxes, forks over \$5,000 each year to the IRS. Enrolling into RaPower[-] could reduce your federal income tax burden to ZERO!”); Rowbotham Dep. 46:27-53:14.

²⁸⁸ See Shepard Dep. 239:16-240:10; Pl. Ex. 40 at 12; Pl. Ex. 674 (touting “TAX TIME SUCCESS STORIES” from RaPower-3 customers with school-based jobs). See Freeborn Dep. 44:11-45:3; Pl. Ex. 492 at 1.

²⁸⁹ Fed. R. Civ. P. 56(a).

²⁹⁰ Fed. R. Civ. P. 56(a).

²⁹¹ *Global Fitness Holdings, LLC v. Fed. Recovery Acceptance, Inc.*, 127 F. Supp. 3d 1198, 1206 (D. Utah 2015) (Nuffer, J.) (quoting *Universal Money Ctrs., Inc. v. Am. Tel. & Tel. Co.*, 22 F.3d 1527, 1529 (10th Cir.1994) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986)) (internal quotation marks omitted))).

²⁹² *Hotel 71 Mezz Lender LLC v. Nat’l Ret. Fund*, 778 F.3d 593, 601 (7th Cir. 2015); see also *United States v. Elsass*, 978 F. Supp. 2d 901, 934-936 (S.D. Ohio 2013) (granting the United States’ motion for summary judgment

(continued...)

“specific facts showing that there is a genuine issue for trial.”²⁹³ The court must view the facts, and reasonable inferences from those facts, in the light most favorable to non-moving party.²⁹⁴

A mere “scintilla” of evidence in support of the non-moving party is not enough to defeat a motion for summary judgment.²⁹⁵ Ultimately, a court must determine whether the evidence presented on the issue for disposition “presents a sufficient disagreement to require [a trial] or whether it is so one-sided that one party must prevail as a matter of law.”²⁹⁶ If the moving party must prevail as a matter of law, a court “shall grant summary judgment.”²⁹⁷

IV. Argument

One of the statutes under which the United States seeks an injunction is [26 U.S.C. § 7408](#). [Section 7408\(a\)](#) authorizes a district court to enjoin any person from engaging in conduct subject to penalty under [26 U.S.C. § 6700](#) if injunctive relief is appropriate to prevent recurrence of that conduct or any other activity subject to penalty under the Internal Revenue Code.²⁹⁸ Section 6700 is meant to attack abusive tax shelters “at their source: the organizer and

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against Tobias Elsass and his company, Fraud Recovery Group, Inc., concluding (among other things) that the undisputed material facts showed that each engaged in penalty conduct under § 6700)..

²⁹³ [Elsass](#), 978 F. Supp. 2d at 907-908 (quoting [Anderson](#), 477 U.S. at 250 (quotation and citation omitted)).

²⁹⁴ [Universal Money Centers](#), 22 F.3d at 1529.

²⁹⁵ [Universal Money Centers](#), 22 F.3d at 1529.

²⁹⁶ [Anderson](#), 477 U.S. at 251-52 quoted in [Elsass](#), 978 F. Supp. 2d at 908.

²⁹⁷ Fed. R. Civ. P. 56(a); see also [Elsass](#), 978 F. Supp. 2d at 934-936.

²⁹⁸ [26 U.S.C. § 7408\(b\)](#).

salesman.”²⁹⁹ It creates a penalty for a person who 1) organizes or sells any plan or arrangement involving taxes and 2) makes or furnishes, or causes another to make or furnish, a statement connecting the allowability of a tax benefit with participating in the plan or arrangement, which statement the person knows or has reason to know is false or fraudulent as to any material matter.³⁰⁰

A. Defendants organized, or assisted in organizing, the solar energy scheme, and sold solar lenses pursuant to the scheme.

“[A]ny ‘plan or arrangement’ having some connection to taxes” is a “plan” under § 6700.³⁰¹ The solar energy scheme is a “plan” under § 6700 because a key component of the scheme was its promoted connection to the federal tax benefits of a depreciation deduction and a solar energy tax credit.

All Defendants promoted the solar energy scheme. They organized, or assisted in organizing the scheme, and sold the scheme to customers either directly or through other people.³⁰² Johnson initiated the solar energy scheme and organized other people, including Shepard, to sell lenses pursuant to the scheme. Johnson directed IAS, and now, RaPower-3, to market the lenses in ways that would maximize sales. Johnson also established the contracts and

²⁹⁹ S. Rep. No. 97-494, 97 at 266 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1014.

³⁰⁰ 26 U.S.C. § 6700(a)(2)(A).

³⁰¹ *United States v. Raymond*, 228 F.3d 804, 811 (7th Cir. 2000), *overruled on other grounds by Hill v. Tangherlini*, 724 F.3d 965, 967 n. 1 (7th Cir. 2013); see also *United States v. Stover*, 650 F.3d 1099, 1107-08 (8th Cir. 2011) (The organizing, promoting, or selling element of § 6700 “should be defined broadly, and is satisfied simply by selling an illegal method by which to avoid paying taxes.” (quotations omitted).); *United States v. Benson*, 561 F.3d 718, 722 (7th Cir. 2009); *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787, at *8-9 (N.D. Cal. Feb. 25, 1987).

³⁰² See § 6700(a); *Stover*, 650 F.3d at 1108; *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1104 (9th Cir. 2000); *United Energy Corp.*, 1987 WL 4787, at *8-9.

infrastructure through which customers buy lenses. He has spoken to countless customers and prospective customers about his purported solar energy technology, also in an effort to increase sales. Johnson directed both IAS and RaPower-3 to pay commissions to people who sell solar lenses. He also gave Shepard and Freeborn information about the purported technology, the transactions underlying the solar energy scheme, and the purported tax benefits to publicize and, thereby, increase sales of solar lenses.

Shepard takes all Johnson's information about his solar energy scheme, adds his own observations, and then spreads all of it as widely as he can, especially through the internet and social media. Shepard's efforts include creating and managing a website solely devoted to selling solar lenses through RaPower-3; supporting and encouraging RaPower-3 "distributors" to increase their downline sales; convening and hosting events like the 2012 RaPower-3 National Convention and other tours of Defendants' facilities. When distributors or other customers have questions, they look to Shepard (as "Chief Director of Operations for RaPower-3") to answer them, or to get the answer from Johnson.

Freeborn was a prolific salesman for RaPower-3. As the self-titled "National Director for RaPower-3," he took information from Johnson and Shepard about the purported technology, the transactions, and the purportedly related tax benefits, and presented it to people in-person or by phone or email. His work resulted in more than \$300,000 in commissions; it follows from IAS's and RaPower-3's commission structure, that either Freeborn or those in his downline have generated well over \$3 million in actual revenue to IAS or RaPower-3. He still collects commission payments from his extensive sales for RaPower-3.

B. While promoting the solar energy scheme, Defendants made statements about the allowability of a depreciation deduction and a solar energy tax credit as a result of buying solar lenses.

The critical statements at issue on this motion are Defendants’ statements that, by buying a solar lens and signing Defendants’ transaction documents, a customer was in the “trade or business” of leasing solar lenses. Defendants, told customers they would be allowed a tax deduction for depreciation on the lens and the solar energy tax credit. As detailed above, Defendants made numerous statements to customers in support of these assertions while promoting the solar energy scheme.

C. Defendants’ statements were false or fraudulent as to material matters, and Defendants knew or had reason to know that they were false or fraudulent.

Defendants’ statements were false or fraudulent as to material matters, and Defendants knew or had reason to know it. Statements about “material matters” include those that “directly address[]” the tax benefits purportedly available to a participant in a tax scheme and those that “concern[] factual matters that are relevant to the availability of tax benefits.”³⁰³ “Material matters are those which would have a substantial impact on the decision-making process of a reasonably prudent investor and include matters relevant to the availability of a tax benefit.”³⁰⁴ “There is no matter more material to the sale of a tax avoidance package than whether the package effectively allows customers to avoid taxes.”³⁰⁵

³⁰³ *United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990); *Benson*, 561 F.3d at 724; *United Energy Corp.*, 1987 WL 4787, *9.

³⁰⁴ *Campbell*, 897 F.2d at 1320; *United States v. Buttorff*, 761 F.2d 1056, 1062 (5th Cir. 1985).

³⁰⁵ *Benson*, 561 F.3d at 724; see *Stover*, 650 F.3d at 1111 (affirming district court’s finding that a promoter’s promises of numerous tax advantages induced customers to purchase his tax arrangements).

A statement about a material matter is false in the tax law context if “untrue and known to be untrue when made.”³⁰⁶ A statement about a material matter can also be false because of what a plan promoter fails to say.³⁰⁷ Promoters are charged with knowledge of the law governing the tax benefits they promote.³⁰⁸ A promoter who does not tell customers all of the requirements to lawfully claim a deduction or credit has made a false statement.³⁰⁹ A promoter who does not

³⁰⁶ *Stover*, 650 F.3d at 1108.

³⁰⁷ 26 U.S.C. § 7408(c) (conduct subject to injunction is “any action, or failure to take action” which is subject to certain penalty provisions or the regulations governing practice before the IRS (emphasis added)); *Stover*, 650 F.3d at 1109 (8th Cir. 2011) (“Stover’s statements regarding all three schemes were also false because of what he failed to convey: that deductions taken under 26 U.S.C. § 162(a) must be ‘ordinary and necessary’ for the deducting business. The district court found that Stover ‘advised his clients to set up these entities in order to save taxes without also advising them of the potential pitfalls and the actions necessary to guard against the obvious conclusion that the transaction was a sham and bore no relation to reality.’ . . . [C]ourts have repeatedly held that a tax promoter’s failure to advise his clients of the requirements for a proper deduction qualifies as a false statement.”); *United States v. Gleason*, 432 F.3d 678, 682-683 (6th Cir. 2005) (affirming district court’s finding that a defendant “made false statements about the purported home-based business deductions” that the defendant claimed could be derived from using his abusive tax scheme because the defendant “did not properly qualify his assertions about the deductibility of weddings, college, travel, meals, golf, cars, and everyday household expenses by stating that business expenses must be ‘ordinary and necessary’ to the business, and that personal consumption expenditures must be ‘inextricably linked to the production of income[.]’” (internal citations omitted)); *Elsass*, 978 F. Supp. 2d at 935 (listing “examples of false statements made by [the defendants], keeping in mind that statements can be false based on what they fail to convey”).

³⁰⁸ See, e.g., *United States v. Campbell*, 704 F. Supp. 715, 725 (N.D. Tex. 1988) (“The Coral program was based on the deduction for research and experimental expenditures allowed by [I.R.C. § 174]. That section permits an electing taxpayer to currently deduct from gross income (rather than to amortize) the amount of expenditures ‘paid or incurred’ for research and experimental activities. Acquiring a project completed before the date of acquisition would not constitute an expenditure for research and experimentation under Section 174.” (citation omitted)); *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1055 (W.D.N.C. 1985) (“Under Section 46(c) of the Code, property must be placed in service in the year for which an investment tax credit is claimed. Music Masters represented to investors that these masters were purchased in 1982 and that the investors could deduct the investment tax credits for that year. These were material false statements, since the availability of credits for the 1982 year would have a substantial impact on a reasonably prudent investor in the investment program.” (citations omitted)).

³⁰⁹ E.g., *Stover*, 650 F.3d at 1109 (“When Stover’s client Donald Clark questioned whether it was a ‘legal and standard practice’ to create sham management companies solely for tax savings purposes, Stover replied that it was. Stover’s statements were false because they untruthfully conveyed that his clients’ tax arrangements did not need to have economic substance.”).

tell customers all of the facts relevant to whether the customers may lawfully claim a deduction or credit has made a false statement.³¹⁰

A court may conclude that a promoter had *reason to know* his statements are false or fraudulent based on “what a reasonable person in the defendant’s subjective position would have discovered.”³¹¹ The trier of fact may impute knowledge to a promoter, “so long as it is commensurate with the level of comprehension required by [his] role in the transaction.”³¹² A person selling a plan “would ordinarily be deemed to have knowledge of the facts revealed in the sales materials furnished to him by the promoter.”³¹³ A person who holds himself out as an authority on a tax topic has reason to know whether his statements about that topic are true or false.³¹⁴

Here, Defendants’ statements about “material matters” go to the law and facts applicable to whether their customers were in a “trade or business” related to leasing out solar lenses, or were holding the lenses “for the production of income.” Under the proper circumstances, the

³¹⁰ *United Energy Corp.*, 1987 WL 4787, *9 (among the false statements that the defendants made were “representations that [solar energy equipment] modules would be installed by the end of the year of purchase and that the solar farms were operational, letters stating that modules were installed and available for service, and statements reflecting payments for power that was never produced. The income projections also constituted false statements, as did, in some instances, the statement that a module existed at all.”).

³¹¹ *Campbell*, 897 F.2d at 1321-22 (quotation and alteration omitted); accord *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014).

³¹² *Campbell*, 897 F.2d at 1322; *Estate Pres. Servs.*, 202 F.3d at 1103; *United States v. Davison*, No. 08-0120-CV-W-GAF, 2010 WL 286419, at *1 (W.D. Mo. Jan. 19, 2010).

³¹³ *United States v. Harkins*, 355 F. Supp. 2d 1175, 1180 (D. Or. 2004) (quotation omitted).

³¹⁴ *United States v. Poseley*, No. CV 06-2335-PHX-EHC, 2008 WL 4811174, at *2 (D. Ariz. Nov. 4, 2008) (“Although the Defendants attempted to disclaim liability as tax or legal experts in their marketing materials, Defendants held themselves out as tax experts to their customers and at promotional seminars. Defendants knew or had reason to know that their tax evasion schemes, including the creation of Pure Trusts, were unlawful and fraudulent.” (fact citations omitted)).

Internal Revenue Code allows a taxpayer engaged in a trade or business certain tax deductions for expenses the taxpayer incurs while generating income. One “business” deduction is for depreciation, the “wear and tear” on property either used in the taxpayer’s “trade or business” or held by the taxpayer “for the production of income.”³¹⁵ If a taxpayer is *not* in a trade or business, or is *not* holding property for the production of income, then the taxpayer is *not* eligible for a deduction for depreciation on that property.³¹⁶ And if depreciation is *not* allowed for a piece of tangible property, the taxpayer may *not* claim the solar energy tax credit under § 48.³¹⁷

The typical first step in the analysis of whether a taxpayer is in a “trade or business” is to determine whether the taxpayer has undertaken activity for that purported “trade or business” in good faith, with the primary purpose of the activity to make a profit – or, instead, has bought into an abusive tax scheme designed to create tax losses.³¹⁸ Here, the focus is on *Defendants’ statements* to their customers that their customers were in the trade or business of holding out

³¹⁵ 26 U.S.C. § 167(a). Depreciation is not the only business tax deduction Defendants promoted to their customers. For purposes of this motion, however, the United States limits itself to this deduction only.

³¹⁶ § 167(a). There are other reasons, not addressed herein, that (even if they were in a “trade or business” or were holding the solar lenses for the production of income, which they are not) Defendants’ customers do not qualify for depreciation.

³¹⁷ Under § 48, a taxpayer may be allowed an “energy credit” that reduces his income tax liability in a given year. §§ 48(a), 46(2), 38(a) & (b)(1). A taxpayer may be eligible for this energy credit if he “placed in service” certain “energy property” during the tax year for which the taxpayer claims the credit. § 48(a)(1). “[E]nergy property” means equipment *with respect to which depreciation is allowed*, and “which uses solar energy” in specific ways. § 48(a)(3)(A)(i) & (C) (emphasis added); *see also* 26 C.F.R. § 1.48-9(d)(1). There are other reasons, not addressed herein, that (even if they were in a “trade or business” or were holding the solar lenses for the production of income, which they are not) Defendants’ customers do not qualify for the § 48 credit.

³¹⁸ 26 U.S.C. §§ 162(a), 183, 7701(o)(1)(A) (for a transaction to be recognized for tax purposes, the transaction must “change in a meaningful way (apart from Federal income tax effects) the taxpayer’s economic position”); *Nickeson v. Comm’r*, 962 F.2d 973, 976-77 (10th Cir. 1992). Often, this question is before a court when an individual taxpayer claims to have a “trade or business” and therefore seeks business-related tax deductions and/or credits. *E.g.*, *Sala v. United States*, 613 F.3d 1249 (10th Cir. 2010), *as amended on reh’g in part* (Nov. 19, 2010); *Nickeson*, 962 F.2d at 976-77; *Keeler v. Comm’r*, 243 F.3d 1212, 1218-20 (10th Cir. 2001); *Jackson v. Comm’r*, 966 F.2d 598, 601 (10th Cir. 1992).

solar lenses for lease, and what Defendants knew or had reason to know about whether those statements were false or fraudulent. There are a number of red flags that alerted Defendants that the solar energy scheme is an abusive tax scheme rather than a bona fide trade or business for their customers. Those red flags include: 1) continued failure of a purported “business” to earn income; 2) control of the purported business remaining with the promoter, rather than the customer; 3) illusory contract documents with little cash outlay by the customer and substantial debt that the customer is unlikely to pay; and 4) a promoter’s heavy emphasis on greatly reducing or eliminating a customer’s tax liability by buying in to the plan.³¹⁹ Courts have rejected abusive tax schemes with these features.³²⁰ Here, Defendants knew, or had reason to know, that the solar energy scheme contains all of these red flags. Therefore, Defendants’ statements to customers that customers were in a bona fide trade or business were false or fraudulent.

1. Defendants knew, or had reason to know, that no customer earned or would earn income from buying solar lenses.

When the activity underlying a tax plan fails to perform, the plan’s promoters know, or have reason to know, that the plan is an abusive tax shelter and not a trade or business.³²¹ For

³¹⁹ *E.g.*, *Nickeson*, 962 F.2d at 976-77; *Music Masters*, 621 F. Supp. at 1049-50.

³²⁰ See *Rose v. Comm’r*, 88 T.C. 386, 413 (1987), *aff’d*, 868 F.2d 851 (6th Cir. 1989) (collecting cases); *United States v. Philatelic Leasing*, 794 F.2d 781, 782-85 (2d Cir. 1986); *United States v. Petrelli*, 704 F. Supp. 122, 124 (N.D. Ohio 1986) (concluding that defendants violated § 6700 when they “entered into lease agreements with investors who leased master photographs and plates from the defendants. Defendants advised the lessees of the master photographs and plates to claim investment tax credits and deductions for the leased art work and plates allegedly made therefrom, some of which never existed.”).

³²¹ *Blum v. Comm’r*, 737 F.3d 1303, 1312 (10th Cir. 2013) (“The probability of earning a profit must be reasonable, not a mere possibility.”); see *Sala*, 613 F.3d at 1254 (“The existence of some potential profit is ‘insufficient to impute substance into an otherwise sham transaction’ where a ‘common-sense examination of the evidence as a whole’ indicates the transaction lacked economic substance.”); *Keeler*, 243 F.3d at 1218 (“While it is true that

(continued...)

example, in *United States v. United Energy Corporation*, from 1982 through 1984, four defendants “sold ‘solar power modules’ which, according to advertising literature, would simultaneously produce electricity and thermal energy (hot water) from the sun’s rays.”³²² None of the modules actually worked as promised, however, and no module purchaser was ever paid by a third party for energy produced by a module.³²³ For this and other reasons, the district court concluded that the defendants made false or fraudulent statements in their “representations designed to mislead purchasers into believing that the solar farms were operational, that uses for hot water existed . . . and that their modules could and would be fully installed.”³²⁴ These false statements were contributing factors to the defendants’ “income projections based upon completely unsupportable energy production estimates.”³²⁵ Such false statements were “material to the issue of whether [that solar energy] enterprise is entered into with a profit-making motive.”³²⁶

(...continued)

investors routinely make decisions with an eye to decreasing tax liability, the deliberate incurrence of first-year losses may be an indication that a transaction lacks economic substance.”); *Jackson v. Comm’r*, 864 F.2d 1521, 1526 (10th Cir. 1989) (“Although the failure to make sales in a given period does not per se prevent a taxpayer from carrying on a business, the tax court’s finding that taxpayers ‘made [no] legitimate efforts to locate potential buyers for the [player/recorders]’ during 1978 is fatal to taxpayers’ case. Merely possessing the legal capability to sell player/recorders by obtaining a license from the inventor, without actual efforts to sell the products, is insufficient to constitute carrying on a trade or business for purposes of section 162.” (citations and footnote omitted)); see generally *Apperson v. Comm’r*, 908 F.2d 975, at *1-2 (7th Cir. 1990) (unpublished); *Music Masters*, 621 F. Supp. at 1056.

³²² *United Energy Corp.*, 1987 WL 4787, at *1.

³²³ *United Energy Corp.*, 1987 WL 4787, *2-5.

³²⁴ *United Energy Corp.*, 1987 WL 4787, *5.

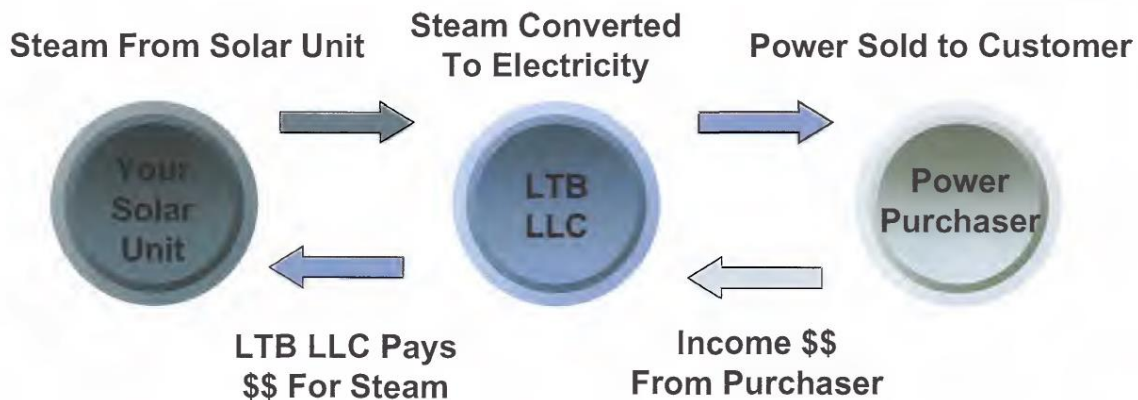
³²⁵ *United Energy Corp.*, 1987 WL 4787, *4.

³²⁶ *United Energy Corp.*, 1987 WL 4787, *9.

It is no excuse for making such false or fraudulent statements that a promoter-defendant “had intended to accomplish” things like installing and starting up solar energy equipment, “but had been thwarted.”³²⁷ “[A] statement that something non-existent currently exists is false irrespective of the most reasonable, good faith intentions that it will exist in the future. Even a statement that something will exist in the future, such as an income projection, can be false if there is no reasonable basis for the prediction.”³²⁸

a. Defendants knew or had reason to know that customers would not earn income from “leasing out” his lenses to LTB.

Johnson and Shepard have been promoting the solar energy scheme for more than *ten years*, and Freeborn promoted the scheme for at least four years. During that time, all made statements to customers creating the expectation that customers would earn income from “leasing out” their lenses to LTB according to Johnson’s 2006 vision³²⁹:



³²⁷ *United Energy Corp.*, 1987 WL 4787, *9.

³²⁸ *United Energy Corp.*, 1987 WL 4787, at *9.

³²⁹ IAS Dep. 162:1-165:9, 171:10-173:20; Pl. Ex. 532 at 6; *see also* Pl. Ex. 531.

But it is now late 2017 and no third-party power purchaser has ever paid LTB (or any other entity) for energy. LTB has never paid a customer for use of his lens.

Defendants have known that no customer was paid rental income generated by payments from a third-party purchaser throughout the time they have been promoting the solar energy scheme. Johnson, as the manager and director of all entities at issue in this case knew that no money was coming in from a third-party power purchaser. Shepard knew as early as 2006, and Freeborn knew as early as 2009 (and continuously through the years thereafter), that IAS had missed its target installation dates in their own contracts and their own lenses were not producing rental income. They knew that other customers were not being paid either. Shepard has never asked Johnson why.

Not only have Defendants known that no customer has ever been paid rental income generated by payments from a third-party purchaser, they knew or had reason to know that such rental income would not be paid. Defendants knew, or had reason to know, that Johnson's purported solar energy technology had not resulted, and would not result, in sales of energy to a third-party purchaser. Johnson knew that neither he, nor anyone affiliated with him, had ever installed, operated or maintained a solar energy production plant before. Running a solar energy power plant is not an endeavor for the inexperienced. Johnson also knew, all along, that LTB existed only on paper. He also knew that Neither Shepard nor Freeborn ever asked any questions about LTB or its experience in operating or maintaining solar energy equipment: not when they first signed an agreement purportedly to lease their lenses to LTB, and not in the intervening years.

Defendants' solar energy scheme is clearly a complete sham. Even when viewing all facts in the light most favorable to Defendants, it is clear that (at a minimum) Defendants knew it was not generating income for customers for *years*. Defendants have given self-serving and conflicting reasons for the lengthy delay in bringing Johnson's ideas to fruition, all of which show that they knew or had reason to know that their customers were not earning income from renting their lenses, and would not be earning such income in the near future. Johnson claims to have been able to put electricity on the grid since 2005. He has just made the "business decision" not to do it. But Johnson has also claimed, as have Shepard and Freeborn, that his process toward generating energy has taken more than ten years because his work is so cutting-edge. Every time he thinks he is finished and ready to connect to a third-party purchaser, he allegedly finds a problem, needs to create some new invention, or otherwise needs to make an improvement to his system. For example, Shepard testified that he told a customer in November 2012 that there were "150 towers ready to install" because (at that time) he thought that it "wouldn't take too long to put up 150 towers."³³⁰ But because Defendants were using "brand new technology," various components of the purported technology did not work.³³¹ So the towers were not erected at that time.³³² Now, five years later, new towers are *still* not up. As Freeborn testified, getting the "individual parts" of Johnson's purported technology to "work in concert . . . seems to be the hurdle."³³³

³³⁰ Shepard Dep. 172:9-179:17 and Pl. Ex. 141

³³¹ Shepard Dep. 172:9-179:17.

³³² Shepard Dep. 172:9-179:17.

³³³ Freeborn Dep. 95:3-13.

For this reason, Defendants knew or had reason to know that any “construction updates” they gave customers, suggesting that rental income was soon to arrive, were false or fraudulent. Shepard and Freeborn knew it each time they visited Millard County, Utah, because the only towers they ever saw were the 19 that went up in 2006. To date, they are *still* the only towers built. Defendants knew, or had reason to know, that the bulk of customers’ “lenses” are shrouded in plastic wrap on pallets in a warehouse, uncut, unframed, and not installed on any tower such that they could even have the possibility of providing heat to generate electricity.

And even if Defendants had built additional towers and installed hundreds or thousands of lenses to date (which they have not), Defendants knew, or had reason to know, that there has never been a contract for any third party to buy power generated through any system using the solar lenses. Johnson and Shepard know, or have reason to know, that there is no current, concrete plan to obtain one. As Shepard said, when discussing his efforts to enter a power purchase agreement *since 2010*: “Every time I got close, they wanted to see a power project up and running. . . . And we didn’t have that running yet.”³³⁴

In short, Defendants knew, or had reason to know, that their statements to customers that they would earn rental income from leasing out their solar lenses to LTB were false or fraudulent.³³⁵

³³⁴ Shepard Dep. 205:21-12; *see also* IAS Dep. 204:24-207:10.

³³⁵ *See United Energy Corp.*, 1987 WL 4787, at *9.

b. Defendants knew, or had reason to know, that no customer would earn a bonus payment.

Defendants told customers that, if they bought lenses and signed a bonus contract, they would earn a payout based on certain gross sales benchmarks for IAS. Defendants knew, or had reason to know, that no customer was paid a bonus, or would be paid a bonus.

The bonus payouts (of either \$6,000 or \$2,000 per lens) were keyed to IAS's first and second billion dollars in gross sales revenue. On their face, those sales numbers are astronomical to reach, based on what Shepard and Freeborn knew about the state of the purported solar lens technology. Shepard and Freeborn knew that since 2010, RaPower-3 *and not* IAS has been selling lenses – both Shepard and Freeborn were part of the transition from IAS to RaPower-3. This gave them reason to question why a customer should expect any payout on a bonus contract, much less “soon” as they both told customers. Shepard admitted that he would not know how to begin evaluating whether IAS was anywhere near its first (or second) billion dollars. Either Shepard or Freeborn could have asked Johnson about this at any time to learn exactly how far away customers (including Shepard and Freeborn themselves) are from receiving a bonus payment. Instead, Shepard was content simply not to know. In fact, Johnson testified that to date IAS has had *no* sales revenue. Nonetheless, Defendants told customers about how important the bonus contract was (when Johnson was offering bonus contracts) and why they should expect revenue from it.

2. Defendants knew, or had reason to know, that customers had no control over their purported “lens leasing” businesses.

When a promoter sells a plan in which the promoter, and not the customer, retain control over the customer’s purported trade or business, the promoter knows or has reason to know that he is selling an abusive tax scheme.³³⁶ Defendants know, or have reason to know, that Johnson controls the entire process, from start to finish, of their customers’ purported foray into the “solar lens leasing business.” Johnson controls all terms of the transaction. Defendants tell customers how little effort they will be required to expend in their “solar lens leasing business.”

Customers do not negotiate terms, including price. Defendants know, or have reason to know that customers have no reason to negotiate price because customers pay a mere \$105 per lens for the use of tax benefits calculated on the \$3,500 “purchase price” of a lens.³³⁷ Customers simply write a check to RaPower-3. Customers have not asked about LTB’s experience operating and maintaining solar energy equipment before signing the O&M. Customers do not take possession of their lenses. No customer has ever chosen to buy a lens, then lease it to an entity

³³⁶ *Blum*, 737 F.3d at 1314-15 (indicia of tax-avoidance motive are when a taxpayer fails to investigate a deal before signing up and does not understand the details of the plan); *Nickeson*, 962 F.2d at 977 (“failure of taxpayers to inquire into the potential profitability of the program” and “taxpayers’ lack of control over activities” are hallmarks of an abusive tax shelter); *Rose v. Comm’r*, 868 F.2d 851, 854 (6th Cir. 1989); *United Energy Corp.*, 1987 WL 4787, at *1-3; *Music Masters*, 621 F. Supp. at 1056 (“The investors were each told they were to be in the business of manufacturing and distributing records based on the partial interest(s) they leased in the masters, and that they would not have to pay more than the start-up distribution expenses, which could be as little as \$200.” But in fact “[t]he evidence [was] clear that *Defendants* [and not their customers] carried on the business of manufacturing and distributing the masters. The Defendants’ representations to the contrary are false and/or fraudulent.” (emphasis added)); see also *Van Scoten v. Comm’r*, 439 F.3d 1243, 1253 (10th Cir. 2006) (a taxpayer did not reasonably rely on a promoter’s assurances about purported tax benefits from entering a cattle partnership, in part because the taxpayer had no experience in the cattle industry).

³³⁷ See *Keeler*, 243 F.3d at 1219 (“The Tax Court also found that the prices of the items traded were not set by market forces, but by [the promoter]. Contrary to taxpayer’s assertion, any alleged negotiation between [the promoter] and its customers as to the prices of the legs falls short of demonstrating economic substance, because the importance of the instruments’ prices was dwarfed by their tax advantages.”).

other than LTB.³³⁸ Defendants do not have a way to track which lens belongs to which customer. It follows that there is no way for a customer to identify which lenses (whether among the many stacks of uncut plastic inside a warehouse or framed on one of the towers erected in 2006) belong to him. Defendants know, or have reason to know, that their customers are typically wage-earners in other full-time professions, and are not experienced in “leasing out” solar lenses.³³⁹

3. Defendants knew, or had reason to know, that the transaction documents were meaningless.

When transactions feature substantial deferred debt, backed by non-recourse promissory notes, which will purportedly be paid out of proceeds from the plan itself, a promoter knows or has reason to know that he is selling an abusive tax scheme.³⁴⁰

Starting in 2006, Johnson conditioned the customer’s obligation to pay the difference between the down payment and the “full purchase price” of a lens on that very lens being installed and producing revenue. From 2006 through 2009, that difference was \$21,000. From 2010 through at least mid-2016, that difference was \$2,450. Throughout the lifetime of the plan, Johnson has not charged any interest on these “financed amounts.” Customers borrow for free. According to the plain terms of the contracts, the only security for the customers’ promise to pay these outstanding amounts is the lens itself.

³³⁸ See *Jackson*, 864 F.2d at 1526.

³³⁹ See *Apperson*, 908 F.2d, at *1-2.

³⁴⁰ See *Nickeson*, 962 F.2d at 977 (one hallmark of an abusive tax scheme is nonrecourse indebtedness); *Philatelic Leasing*, 794 F.2d at 786; *United States v. Stover*, 731 F. Supp. 2d 887, 911-12 (W.D. Mo. 2010); see *Music Masters*, 621 F. Supp. at 1054.

Johnson has established the transaction terms to mean that no customer actually owes the remaining amount until five years *after* his lenses are “installed and producing revenue.” As described above, all Defendants know, or have reason to know, that that promise to pay is illusory (or at least is within Johnson’s entire control). If Johnson has never installed a customer’s lenses on towers that Johnson has, to date, failed to build, the customer will never be required to pay IAS or RaPower-3 the full purchase price of any lens.

All Defendants know this, or have reason to know it, based on the plain terms of the contracts they signed or sold.

Further, Defendants also know, or have reason to know, that Johnson does not actually enforce the full down payment amount of \$1,050. Johnson will refund a customer’s money if they simply no longer wish to own lenses, or if the IRS has disallowed the customer’s depreciation or solar energy tax credit.

As a result, Defendants knew, or had reason to know, that the contracts contain illusory promises from all parties. They are designed to create the appearance of substance where there is none. And Defendants knew, or had reason to know, that their statements to customers, relying on the form of these documents to assert that a customer was in a substantive trade or business were false or fraudulent.³⁴¹

³⁴¹ See *Twenty Mile Joint Venture, PND, Ltd. v. Comm’r*, 200 F.3d 1268, 1277 (10th Cir. 1999) (“the form chosen by the parties will be respected only if it comports with the reality of the transaction”).

4. Defendants knew that they promoted the solar energy scheme based on the tax benefits it would provide.

When a promoter sells a plan by focusing on the plan's ability to greatly reduce or eliminate a customer's income tax liability, the promoter knows or has reason to know that he is selling an abusive tax scheme, not trade or business.³⁴² As they sold the solar energy scheme to customers, Defendants made it very clear that the goal of buying solar lenses was to eliminate a customer's tax liability. They told people to calculate the number of lenses to buy based on their anticipated tax liability. According to Shepard's sample Form 1040, a customer should end up buying enough lenses so that the amount of their depreciation deduction would "get [their adjusted gross income] low enough for zero taxes."³⁴³ If that was not enough, Shepard told customers to claim solar energy tax credits "if needed" to reach the goal of "zero" taxable income.³⁴⁴ Freeborn explicitly coached his downline to sell lenses by waiting for people to complain about paying taxes and then telling them that, with RaPower-3, they could stop paying taxes.

³⁴² *Blum*, 737 F.3d at 1311 ("Evidence that a transaction was designed to 'produce a massive tax loss' indicates the transaction lacks economic substance."); *Stover*, 650 F.3d at 1110 (that money would "forever escape taxation" was a "key selling point" and an indicator of an abusive tax scheme). See also *Hartshorn*, 751 F.3d at 1204 ("Paying income taxes is a statutory duty; some also consider it a civic duty. Few gladly pay, but most faithfully do. Faithful compliance is tested, sometimes beyond elastic limits, by the siren's song of the unscrupulous — pay 10% of your income to the 'church' and completely avoid the much higher extractions demanded by the taxman AND do so without changing your life circumstances in any significant manner. Sounds great! To the unprincipled or the naïve, it is precisely what the doctor ordered. It is also illegal.") (O'Brien, J., concurring); *Nickeson*, 962 F.2d at 977 (one hallmark of an abusive tax scheme is "marketing on the basis of projected tax benefits"); *Keeler*, 243 F.3d at 1220 ("the fact that taxpayer's losses offset almost all of his income--100% and 97%, respectively, in 1981 and 1982--indicates his primary motivation was tax avoidance and not profit potential").

³⁴³ Pl. Ex. 40 at 10.

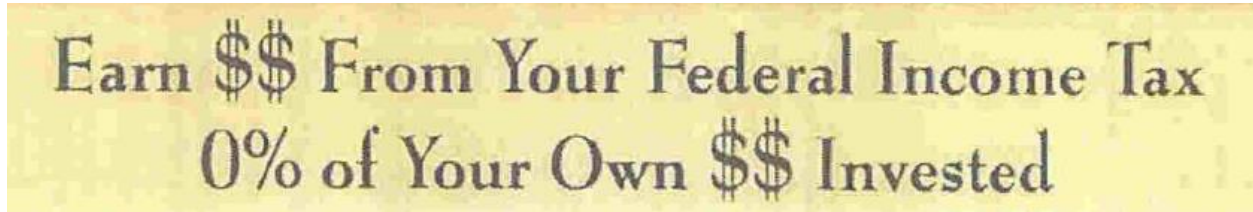
³⁴⁴ Pl. Ex. 40 at 10.

The system by which customers made payments (which all Defendants knew about) also shows that the purpose of the solar energy scheme was to reduce or eliminate a customer's tax liability. Johnson's system since 2010 allowed customers to pay RaPower-3 only \$105 of the \$3,500 purchase price per lens in the year they wish to "buy" the lenses and claim the associated tax benefits. Johnson allows customers to pay RaPower-3 the remaining down payment amount of \$945 in the *following year*, and only *after* a customer has claimed depreciation and the solar energy tax credit for the year of purchase. The customer has the cash-in-hand to pay RaPower-3 because he "zero[ed] out" his taxes.³⁴⁵ Instead of paying the United States Treasury his rightful tax liability, the customer pays RaPower-3 for "buying lenses."

Defendants knew, or had reason to know, that the price stated for each lens nearly equals the amount of tax benefits Defendants tell customers they are allowed. The amount of the down payment Johnson states is identical to the amount Defendants tell customers they may claim as a solar energy tax credit. From 2006 through 2009, both the down payment and the promoted credit were \$9,000. Since 2010, the total down payment and the promoted credit were \$1,050. The difference between the down payment and the "full" purchase price of a lens is almost exactly the same amount that Defendants claim customers may deduct in depreciation. In this

³⁴⁵ Pl. Ex. 48; Lunn Dep. 201:12-202:2; Aulds Dep. 156:11-21.

way, a customer never has to spend “his own money” to buy a lens. The United States Treasury pays for it, just as Johnson promised in 2006³⁴⁶:



D. This Court should enjoin Defendants from continuing to make false or fraudulent statements regarding these material matters.

Because § 7408 sets forth specific criteria for injunctive relief, namely that injunctive relief is appropriate to prevent recurrence of penalty conduct, the United States need only show that that criteria is met; it need not show that the traditional equitable factors are satisfied before an injunction may issue.³⁴⁷ Among the factors that courts use to evaluate the appropriateness of an injunction under § 7408(b) are: (1) the gravity of the harm caused by Defendants’ abusive conduct; (2) the extent of each Defendant’s participation; (3) the Defendants’ degree of scienter; (4) the isolated or recurrent nature of each Defendant’s abusive conduct; (5) the Defendants’ recognition (or non-recognition) of culpability; and (6) the likelihood that any Defendant’s occupation would put him “in a position where future violations could be anticipated.”³⁴⁸

³⁴⁶ Pl. Ex. 532 at 12.

³⁴⁷ *Buttorff*, 761 F.2d at 1063; *United States v. Buttorff*, 563 F. Supp. 450, 454 (N.D. Tex. 1983) (“The legislative process has already taken these [equitable] factors into consideration in its decision to address the promotion of abusive tax shelters”); accord *Stover*, 650 F.3d at 1106 (traditional equitable factors need not be discussed when an injunction is authorized by statute like § 7408 and the statutory elements have been satisfied); *Estate Pres. Servs.*, 202 F.3d at 1098; see also *Hartshorn*, 751 F.3d at 1198.

³⁴⁸ *Gleason*, 432 F.3d at 683 (quoting *Estate Pres. Servs.*, 202 F.3d at 1105).

The undisputed material facts herein show that Defendants promoted the solar energy scheme far and wide, to enrich themselves at the expense of the United States Treasury. They made false statements to sell lenses, which they knew or had reason to know were false or fraudulent. Their conduct resulted in customers claiming depreciation deductions and solar energy tax credits that were unlawful. Although the IRS has disallowed these unlawful claims, Defendants are undeterred from promoting the solar energy scheme. They will not stop without an order from this Court.

V. Conclusion

The foregoing undisputed facts and the law applicable to this case show that Defendants organized (or assisted in the organization of), the solar energy scheme and sold solar lenses to customers pursuant to that plan. As they did so, Defendants made or furnished (or caused others to make or furnish) statements that the buyer of a lens is in the “trade or business” of “leasing out” solar lenses, and is allowed a depreciation deduction and a solar energy tax credit. But Defendants knew, or had reason to know, that their statements were false or fraudulent as to material matters. In fact, Defendants know, or have reason to know, when a customer buys solar lenses and “leases them out” to LTB, nothing about the customer’s economic position changes – except that (according to them) the customer can “zero out” his tax liability.

For these reasons, the United States requests that this Court enter a partial summary judgment, consistent with the proposed order submitted with this motion, to declare that Defendants have engaged in conduct subject to penalty under § 6700(a)(2)(A) by making or furnishing (or causing others to make or furnish) the false or fraudulent statements that:

1. The purchaser of a solar lens is in a “trade or business” of “leasing out” the solar lens;
2. The purchaser of a solar lens may claim a depreciation deduction related to the solar lens; and
3. The purchaser of a solar lens may claim a solar energy tax credit related to the solar lens.

Because the undisputed facts show that injunctive relief is appropriate to prevent recurrence of this conduct, the United States also requests that this Court enter a limited injunction against Defendants under § 7408(b) enjoining them from making or furnishing (or causing others to make or furnish) the false or fraudulent statements that:

1. The purchaser of a solar lens is in a “trade or business” of “leasing out” the solar lens;
2. The purchaser of a solar lens may claim a depreciation deduction related to the solar lens; and
3. The purchaser of a solar lens may claim a solar energy tax credit related to the solar lens.

Further, the United States requests that the remaining issues in this case be resolved at trial. The full measure of equitable relief appropriate to Defendants’ abusive conduct will be clear when the parties can present additional facts to the Court.

Dated: November 17, 2017

Respectfully submitted,

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***ATTORNEYS FOR THE
UNITED STATES***

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2017, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney