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

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,<br><br>Defendants. | Civil No. 2:15-cv-00828-DN-EJF<br><br>**DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF KURT HAWES AND RICHARD JAMESON (Doc. 249)**<br><br>Judge David Nuffer<br>Magistrate Judge Evelyn J. Furse |

Defendants submit this memorandum in opposition to the government's motion to exclude the expert testimony of Defendant's experts Kurt Hawes and Richard Jameson. For the reasons stated herein, the expert reports and anticipated testimony from Mr. Hawes and Mr. Jameson will be helpful to the Court in the determination of whether the government can meet its burden of showing a violation of IRC 6700. In particular, whether the government can show that any Defendant knew or should have known that any statements made by a Defendant were false

or fraudulent concerning an alleged abusive tax shelter.[1] Additionally, Plaintiff's attack on the experts' methodologies is better suited through "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof" rather than wholesale exclusion under Rule 702.[2]

## I. The Expert Testimony of Kurt Hawes and Richard Jameson is Helpful to the Jury.

The touchstone of Fed. R. Evid. 702 is the helpfulness of the expert testimony, "i.e. whether it 'will assist the trier of fact to understand the evidence or to determine a fact in issue.'"[3] The Court therefore must determine whether the proffered evidence would be helpful to the trier of fact, although doubts should be resolved in favor of admissibility.[4] The requirement that expert testimony "assist the trier of fact" is a condition that goes primarily to relevance.[5] Specific subject areas of proposed expert testimony must therefore be examined to ascertain whether each is sufficiently tied to the facts of the particular case that they will be helpful to the trier of fact.[6]

To prevail on a claim that a Defendant violated 26 USC § 6700, Plaintiff must show, inter alia, ***defendants knew or should have known*** that that Defendants' representations about tax

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[1] See 26 U.S.C. § 6700.

[2] *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ;*G.E. v. Joiner*, 522 U.S. 136, 154 n.9 (1997) (J. Stevens, dissenting).

[3] *See Biocore, Inc. v. Khosrowshahi*, 183 F.R.D. 695, 699 (D. Kan. 1998) (quoting *United States v. Downing*, 753 F.2d 1224, 1235 (3d Cir. 1985)).

[4] *In re "Agent Orange" Product Liability Litigation*, 611 F. Supp. 1223, 1241(E.D.N.Y. 1985); *In re Japanese Electronic Products Antitrust Litigation*, 723 F.2d 238, 279 (3d Cir. 1983); *see also Kline v. Ford Motor Co., Inc.*, 523 F.2d 1067, 1070 (9th Cir. 1975) (within discretion of trial judge to determine whether expert opinion on causal connection between defects in steering column and auto accident was helpful).

[5] *See Bicore*, 611 F.Supp. at 1241 (quoting *Miller v. Heaven*, 922 F. Supp. 495, 501 (D. Kan. 1996)).

[6] *See United States v. Norwood*, 939 F. Supp. 1132, 1136 (D. N.J. 1996).

benefits were false or fraudulent. Plaintiff may satisfy this requirement by showing "what a reasonable person in the [defendant's] . . . subjective position would have discovered."[7]

**A. Kurt Hawes' Proffered Testimony Will Assist the Factfinder in Deciding What a Reasonable Person in the Defendants' Position Would Have Discovered Concerning the Tax Treatment at Issue.**

Mr. Hawes' opinions are relevant in demonstrating what Defendants knew or should have known concerning the representations at issue in this case. His opinions are:

> OPINION #1: I would recommend to my clients that Solar Lenses purchased from RaPower and subsequently leased for use in an Alternative Energy System qualify as "energy property" as defined in Section 48 of the Internal Revenue Code ("IRC")1 and entitle any purchaser to the energy tax credit under Section 48.
>
> OPINION #2: I would recommend to my clients that credits taken for Solar Lenses purchased be taken in the year that they are leased, as the Solar Lenses are placed in service in the year the Solar Lenses are held out for lease, which for most purchasers is the same year the Solar Lenses are purchased.

Plaintiff's criticism ignores the usefulness of the above testimony in determining whether the Defendants knew or should have known concerning the tax treatment at issue. Because the test is what a reasonable person in Defendant's subjective position would have discovered, the opinion relating to hypothetical clients that are the subject of Mr. Hawes' report is entirely relevant. The opinion is not a legal one: rather what he would recommend to a hypothetical client based on the information available at the time.[8]

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[7] *See United States v. Hartshorn*, 2012 U.S. Dist. Lexis 32179 at *27 (D. Utah Mar. 9, 2012) (citing *United States v. Estate Preservation Servs.*, 202 F.3d 1093, 1098, 1103 (9th Cir.).

[8] This information is listed ECF Doc. 249-24 in Schedule A of Mr. Hawes' report. They include RaPower-3 Equipment Purchase Agreements, Operation and Maintenance Agreements, Placed in Service Letter, Anderson Law Center Tax Opinion Letter, August 8, 2012; Kirton & McConkie Tax Opinion Memorandum, October 31. 2012; Bloomberg Law Tax Practice Series, ¶ 3140.03.B. *Energy Property*; Holy Grail of Solar Energy, Neldon Johnson; *New Solar Breakthrough May Compete with Gas*; statutes, rules, cases, IRS publications, etc.

Plaintiff also ignores that it is well established that experts may offer opinions based on hypothetical questions,[9] which is precisely what Mr. Hawes provided here. Such testimony would be admissible "even though the hypothetical questioned mirrored the defendant's conduct."[10]

In sum, unless what Defendants "knew or should have known" is no longer an essential element for an injunction to issue, testimony that aids the factfinder on this element is helpful. Mr. Hawes' expert report provides that support.

**B. Richard Jameson's Proffered Testimony will assist the factfinder in deciding what a reasonable person in the defendants' position would have discovered concerning the tax treatment at issue.**

Mr. Jameson's opinions are equally helpful to assist the factfinder in determining what Defendants should have known of the tax treatment of the lenses at issue in this matter. His opinions are:

> QUESTION 1: Do the solar lenses purchased by individuals or business entities from RaPower-3, LLC qualify under section 48 of the Internal Revenue Code as energy equipment" and for tax reporting purposes, can those people claim the energy credit for the year their lens(es) are placed in service?
> ANSWER: For the reasons explained and stated herein, yes.
>
> QUESTION 2: Do buyers of solar lenses from RaPower-3, LLC qualify to deduct depreciation on their federal tax returns?
> ANSWER: For the reasons explained and stated herein, yes.[11]

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[9] *See United States v. Offill*, 666 F.3d 168, 177 (4th Cir. 2011) (citing Fed. R. Evid. 703; *United States v. Mann*, 712 F.2d 941 (4th Cir. 1983) (per curiam).

[10] *See Offill*, 666 F.3d at 177 (citing *United States v. Bilzerian*, 926 F.2d 1285, 1294 (2nd Cir. 1991)); *United States v. Watson*, 171 F.3d 695, 703 (D.C. Cir. 1999).

[11] See ECF Doc 249-26, Expert Report of Richard Jameson at pg. 2.

Again, the test for injunctive relief under § 6700 is satisfied "if the defendant had reason to know his statements were false or fraudulent."[12] This turns on whether a "reasonable person in [his] subjective position would have discovered" the falsity of his representations.[13]

In answering these questions, Mr. Jameson sheds light on the available evidence and how it relates to what the defendants should have known at the time statements were made concerning the tax treatment of lenses at issue. It involves the interplay of (1) the facts available to Defendants and (2) statutes, IRS publications, caselaw, treasury regulations. His conclusions, in turn, relate to what a reasonable person would have discovered. For this reason alone, his testimony is useful.

Additionally, his testimony is not objectionable even if it goes to the "ultimate issue." Under Rule 704 of the Federal Rules of Evidence, "An opinion is not objectionable just because it embraces an ultimate issue." Here, however, the proffered testimony of Mr. Jameson merely provides insight into whether a reasonable person in Defendants' position, which the factfinder in turn can consider in determining the reasonableness of Defendants' actions.[14] It does not usurp the judge's role in determining the ultimate issue.[15]

## II. The Methodology employed by both experts is sufficient to withstand 702 reliability scrutiny.

In considering the reliability of an expert's testimony, the court's inquiry must be based "solely on principles and methodology, not on the conclusions that they

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[12] *United States v. Hartshorn*, 751 F.3d 1194, 1202 (10th Cir. 2014) (citing 26 § 6700; *Estate Preservation Servs.*, 202 F.3d at 1103 (9th Cir.)).

[13] Id.

[14] *See* EFC Doc. 249-26 Deposition of Kurt O. Hawes, at pgs. 164:23-25 – 165:1-19.

[15] *See Nielson v. United States*, 976 F.2d 951, 956 (5th Cir. 1992) ("Therefore, any assistance that expert testimony and circumstantial evidence will provide should be welcomed at the trial court level. Certainly the trial court did not commit legal error in utilizing testimony to establish intent.")

generate."[16] However, an expert's testimony need not be flawless for it to be reliable and admissible.[17] Instead, the proponent of the expert testimony must show that the method employed by the expert in reaching the conclusion is technically sound and that the opinion is based on facts which sufficiently satisfy Rule 702's reliability requirements.[18]

Furthermore, the court's role as a gatekeeper "is not intended to serve as a replacement for the adversary system."[19] As the Supreme Court noted in *Daubert*, "vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence."[20]

**A. Hawes' Methodology is sufficient to withstand 702 scrutiny.**

As a tax attorney, Mr. Hawes employed acceptable methodology to arrive at his conclusions concerning the hypothetical clients. A review of his report shows that he reviewed the facts and law necessary to form his conclusions concerning the hypothetical client. He reviewed the transactional documents (i.e., RaPower-3 Equipment Purchase Agreements, Operation and Maintenance Agreements, Placed in Service Letter), the opinion letters upon which Defendants relied, and applicable sections of the tax code and case law. He visited the site and saw individuals installing lenses at issue on arrays engineered by Neldon Johnson.[21] When presented during his deposition with *Nickeson v. Commissioner*,[22] a Tenth Circuit case concerning deductions of research and development expenses claimed under I.R.C. 174(a), Mr.

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[16] *Daubert*, 509 U.S. at 595.

[17] *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999) ("The plaintiff need not prove that the expert is undisputably correct or that the expert's theory is "generally accepted" in the scientific community.")

[18] Id.

[19] Fed. R. Evid. 702, advisory committee's note.

[20] Daubert, 509 U.S. at 596.

[21] EFC Doc. 249-26 Hawes Deposition at pg. 90:14-21.

[22] 962 F.2d 973, 975 (10th Cir. 1992)

Hawes testified that it did not alter his opinion.[23] He provided a reasonable explanation of the valuation of the lenses, citing the value of maintenance, upkeep, and a 35 year warranty on lenses under the contracts.[24] He noted that *Nickeson* stated that an independent appraisal of the property at issue is a consideration, but not the only consideration.[25] In sum, Hawes' methodology is reliable because he reviewed the facts and law necessary to render his opinions.

**B. Jameson's Methodology is sufficient to withstand 702 scrutiny.**

Plaintiff seeks to exclude Mr. Jameson's opinion on the basis that his methodology is unreliable.[26] However, Plaintiff admits that "[b]ecause the United States has not yet deposed Jameson specifically about his report, it has not fully tested Jameson's legal research and its sources." Without more, Plaintiff's challenge is not well taken.

Mr. Jameson's methodology is also sufficient under Rule 702. Throughout his report, he provides citations to controlling laws and regulation that apply to facts necessary to form his opinions. He provides authority for depreciation on sale / leaseback transactions,[27] considerations of when leased property is placed in service,[28] law and code that provide for taking the investment tax credit under IRC § 48,[29] necessary factors for equipment to qualify as energy property,[30] activities that indicate a "profit motive,"[31] amount of energy credit under IRC

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[23] Hawes Deposition at pgs. 147:15-25 – 148:1-5 ("I think this is a very fact specific scenario")

[24] Id. at pgs. 149:10-25 – 150 - 151:1-17; 154:13-18.

[25] Id. at pg. 156:15-22.

[26] EFC 249 at pgs. 24-25.

[27] EFC 249-26 Jameson Report at pgs. 2-3

[28] Id. at pg. 3.

[29] Id.at pg. 4.

[30] Id. at pgs. 5-8

[31] Id. at pg. 5.

§ 48 applicable to each RaPower lens,[32] analysis of whether the Purchase Agreement and Operating and Maintenance Agreement applicable to each lens transaction qualifies under § 48,[33] whether the taxpayer is actively or passively participating in the business.[34] Merely labeling him a "long-time advocate" of Defendants' positions without providing examples of the flaws in his methodology is insufficient under Rule 702, although it is consistent with the government's pattern of shrill, unsupported, denigrating statements aimed at Defendants and those assisting them. The government's case is largely based on such rhetoric.

**C. The Experts' opinions do not define the law of the case or direct the judge's understanding of the legal standards upon which the factfinder's verdict must be based.**

Generally, an expert is not allowed to provide legal opinions.[35] However, the prohibition against legal opinion testimony is narrow.[36] Legal opinion testimony is excludable "when the purpose of testimony is to direct the jury's understanding of the legal standards upon which their verdict must be based."[37] In such situations, "the testimony cannot be allowed" because "[i]n no instance can a witness be permitted to define the law of the case."[38]

In this case, however, neither expert is proffering a legal opinion to the ultimate issue of whether Defendants' conduct is subject to Section 6700 sanctions. Mr. Hawes testified that his opinion "would be to help [the judge] understand the issues that surround – or at least a couple of

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[32] Id. at pgs. 8-9.

[33] Id. at pgs. 9-12

[34] Id. at pgs. 14-22.

[35] See *Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir. 1988) ("We must also consider, however, whether the expert encroached upon the trial court's authority to instruct the jury on the applicable law, for it is axiomatic that the judge is the sole arbiter of the law and its applicability.")

[36] Id. at 809 ("We do not exclude all testimony regarding legal issues. We recognize that a witness may refer to the law in expressing an opinion without that reference rendering the testimony inadmissible.")

[37] Id. at 810.

[38] Id.

the issues that surround this ultimate issue" and that he is not offering an opinion on Section 6700.[39] Mr. Jameson's opinions relate solely to whether the solar lenses purchased from RaPower3 qualify as energy equipment under Section 48 of the IRC and whether buyers qualify to deduct depreciation on their returns. His opinions do not go to the ultimate issue or define the law of the case because the factfinder is not asked to determine whether lenses qualify as energy equipment or whether buyers qualify to deduct depreciation on their returns. They do not simply tell the factfinder what result it should reach without "providing any explanation of the criteria on which that opinion is based."[40] Rather, the information both experts provide will aid the court in determining whether Defendants had *reason to believe* the truth of any statements related to the purchase of lenses.

**D. Cross-examination, not wholesale exclusion of expert testimony, is appropriate here.**

The Tenth Circuit recognizes that, "In our system, the goal is to admit all relevant, reliable, and useful evidence. The judicial process reflects this goal -- our rules of evidence have a 'liberal thrust.'"[41] The rules on expert testimony are "notably liberal."[42] When Fed. R. Evid. 702 was amended to account for the Supreme Court's decision in *Daubert*, the Advisory Committee emphasized that "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system."[43] Instead, "[v]igorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and

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[39] ECF Doc. 249-30 Hawes Dep. at pg 165:9-25.

[40] See *United States v. Dazey*, 403 F.3d 1147, 1171 (10th Cir. 2005).

[41] *See United States v. Nacchio*, 555 F.3d 1234, 1280 (10th Cir. 2009) (quoting *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 169 (1988)).

[42] Id. (quoting *Krist v. Eli Lilly & Co.*, 897 F.2d 293, 298 (7th Cir. 1990)).

[43] Fed. R. Evid. 702 advisory committee's note (citing *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi*, 80 F.3d 1074, 1078 (5th Cir. 1996)).

appropriate means of attacking shaky but admissible evidence."[44] Thus, under Fed. R. Evid. 702's codification of *Daubert*, the general rule of liberal admission of proper evidence is retained.[45]

Where an opposing party asserts perceived weaknesses in an expert's opinion, the testimony is nevertheless admissible and should instead be the subject of cross-examination.[46] In such cases, "the burden is on opposing counsel through cross-examination to explore and expose any weaknesses in the underpinnings of the expert's opinion."[47]

In this case, Plaintiff's attacks against the Defendants' experts more appropriately to weight rather than admissibility. As demonstrated above, both experts' methodology is sufficient to withstand the trials court's gatekeeping function. Consequently, any perceived deficiencies in the approach of either expert can be borne out appropriately on cross-examination.

## III. Both Mr. Hawes and Mr. Jameson have sufficient experience and education to qualify as experts under Rule 702.

In determining whether expert testimony is admissible, the district court generally must first determine whether the expert is qualified "by knowledge, skill, experience, training, or education" to render an opinion.[48] In this, both experts have sufficient knowledge, skill, experience, training and education to render opinions.

Mr. Hawes is a licensed attorney in Utah who has practiced tax law throughout his 14 year career and is admitted to the federal tax court. He obtained his J.D. and M.B.A. from

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[44] Id. (citing *Daubert*, 509 U.S. at 595).

[45] *Specht*, 853 F.2d at 810.

[46] *Hertz Corporation v. Gaddis-Walker Electric., Inc.*, 1997 U.S. App. LEXIS 27138, 1997 WL 606800 (10th Cir. 1997) (citing *Firestone Tire & Rubber Co. v. Pearson*, 769 F.2d 1471, 1482-83 (10th Cir. 1985)).

[47] *See Robinson v. Missouri Pacific RR Co.*, 16 F.3d 1083, 1090 (10th Cir. 1994).

[48] *See United States v. Nacchio*, 555 F.3d 1234, 1241 (10th Cir. 2009)

Brigham Young University in 2003.[49] He clerked for Judge Benson for 19 months which included work performed on tax cases.[50] After his clerkship, he joined the tax group at a Utah firm whose majority of work was "tax controversy" work, which involved assisting clients through the audit process.[51] He worked as lead counsel on state tax issues.[52] He gained experience in federal taxation practice while working for Clyde, Snow, & Sessions in 2011 to take over the practice of their senior tax lawyer, where 75% of his practice was devoted to tax law.[53] His experience includes assisting as counsel for a renewable energy company that bought and sold biodiesel fuel.[54] Given the foregoing, Plaintiff's contention that Mr. Hawes is unqualified under 702 clearly lacks merit.

Mr. Jameson is also qualified to render an opinion on his designated subject matter. He received his master's in taxation from William Howard Taft University in 1990 and is currently working towards a Ph.D in taxation.[55] He has run an H & R Block franchise for 26 years.[56] In 1989 he became an IRS Enrolled Agent as a fellow of NPTI, which training involves a three-year course teaching advanced representation before the I.R.S.[57] The agent designation requires him to have 72 continuing education credits in a three-year period.[58] His designation has never been

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[49] ECF Doc. 249-30 Hawes Deposition at pgs. 13:24-25; 14:1; 16:2-4.

[50] Id. at pgs. 17:18-20; 18:3-7.

[51] Id. at 18:14-25; 19.

[52] Id. at pg. 20:14-22.

[53] *Id*. at pgs. 27:9-19; 28:9-16; 33:9-13.

[54] Id. at pgs. 34:9-24; 35:8-24.

[55] ECF Doc. 249-27 Jameson Deposition at pg. 13:2-13.

[56] Id. at pg. 15:16-22.

[57] Id. at pg. 29:8-22.

[58] Id. at pg. 37:1-4.

revoked or lapsed since 1989.[59] In the mid 1990's, Mr. Jameson obtained his Master Graduate of Federal Examination from the National Association of Enrolled Agents, which involved three years of classes, and a written exam related to solving a tax problem.[60] He has also represented 55 people before the IRS related to solar lenses.[61] Given the foregoing, Mr. Jameson's training and experience sufficiently qualifies him to render an opinion on the subject matter Defendants have designated him to address.

## I. Conclusion

For the reasons stated above, both Mr. Hawes and Mr. Jameson should be allowed to testify as experts in this matter. They are both qualified within the meaning of 702(a). Their testimony is helpful, and methodology reliable. Any perceived shortcomings should be subject to cross-examination not wholesale exclusion.

Dated this 17th day of November, 2017.

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[59] Id. at pg. 37:8-13

[60] Id. at pg. 44:8-25, 45:1-14

[61] Id. at pg. 96:13-21.

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY OF KURT HAWES AND RICHARD JAMESON (Doc. 249)** was sent to counsel for the United States in the manner described below.

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