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

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p>DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. 251)</p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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Defendants submit this memorandum in opposition to the government's Motion for Partial Summary Judgment.

I. Introduction.

Plaintiff's motion for partial summary judgment should be denied because Plaintiff cannot meet its burden to demonstrate no genuine issue of material fact is in dispute. In particular, the government cannot show any defendant "knows or has reason to know" the tax

benefits for purchases of solar lenses from RaPower3, LLC was or “is false or fraudulent as to any material matter.”

Even if Defendants conceded for purposes of this motion that the solar tax credit and associated depreciation deductions are not applicable for the RaPower3 solar lenses,¹ the question of disputed fact still remains as to whether Defendants knew or had reason to know their mention of those tax benefits was “false or fraudulent as to any material matter.”

Plaintiff is not entitled to judgment as a matter of law. With the present state of the record, it is undisputed that Defendants’ had the understanding and justified belief that the solar energy tax credit and depreciation deduction is (and has always been) appropriately available to taxpayers who purchase solar lenses from RaPower3. That belief is reasonable because Defendants obtained legal advice about the tax benefits from two different law firms, and relied on that legal advice. Further, Defendants have designated expert witnesses who are a CPA/Lawyer and an IRS Enrolled Agent, who have both prepared reports confirming the availability of favorable tax treatment for purchasers of RaPower3 solar lenses. Both of these will testify at the trial of this case that the purchasers of lenses from RaPower3 are entitled to claim tax deductions. Of equal or perhaps greater significance, no federal court has ruled against any taxpayer who purchased from RaPower3. There is no judicial finding the solar tax credit or the associated depreciation is improper.

It is true the IRS has taken the position the tax treatment is not allowed under its interpretation of the code. However, the IRS is not the final arbiter of what the revenue code means. It must follow the direction of the Tax Court and, so far, the Tax Court has not ruled against the tax benefits claimed by RaPower3 customers. Although it has not been made clear

¹ Defendants do not concede this, but merely accept it arguendo for purposes of this opposing memorandum.

by the government, it appears their strategy is to delay all of the Tax Court cases until after this case is first heard. Then, if they succeed here, to urge the Tax Court to follow this Court's decision in all their pending cases. But if they fail here, then they will press forward in the Tax Court seeking to disallow the deductions. It should be the specialized Tax Court that ought to be where the government first tests its novel theory of interpreting the Tax Code and – if it manages to succeed there – to later file an action here. Plaintiff is proceeding in reverse, in all probability because they suspect their chances in the Tax Court are not favorable.

For these reasons, Plaintiff's motion should be denied.

II. Response to Government's Statement of Facts:

Defendants hereby respond to the "Statement of Elements and Undisputed Material Facts" from Plaintiff, responding to each numbered paragraph as follows:

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.

1. Neldon Johnson is and has been the manager, and a direct and indirect owner of, RaPower3, LLC, International Automated Systems, Inc., and LTB1, LLC (among other entities). He is the sole decision-maker for each entity.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants deny that Johnson "claims" to have invented certain solar energy technology, but admit that Johnson has invented a significant number of solar energy technology devices which have resulted in the US Patent and Trademark Office issuing him patents for his inventions. In fact, Johnson holds 10 patents related to solar energy technology.²

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

² See Exhibit 1 hereto, a list of patents taken from Exhibit A to the expert report of Neldon Johnson.

RESPONSE: Defendants admit that several of Johnson’s solar energy technology inventions include solar thermal lenses placed in arrays on towers.³

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

RESPONSE: Admit that Mr. Johnson has developed a system to accomplish this task.

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.”

RESPONSE: Defendants admit the purpose of a Fresnel lens is to focus the sun’s rays to a specific focal point.⁴

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants admit that is one way the solar arrays have been designed to function. In addition, the solar image can also be directed to a series of concentrated photovoltaic cells which would convert the solar energy to electrical current at the point of the receiver, then with a patented IAS voltage control board, the electrical output from the receiver could be boosted to a larger electrical output and conveyed to a battery or conveyed to the electrical grid.⁵ Each has been used and each has specific advantages depending upon the desired application.

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

RESPONSE: Defendants admit that is one way the solar arrays have been designed to function, although not the only way the solar arrays can generate solar process energy or heat. See response to fact no. 7, above.

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

³ See Plaintiff’s Exhibit (Pl. Ex.) 2 ([Doc. 254-2](#)); Pl. Ex. 8A ([Doc. 254-3](#)).

⁴ Pl Ex. 491 p. 20-37 ([Doc. 255-41](#)); Deposition of Thomas R. Mancini, p. 135-136, excerpts attached at Ex. 2.

⁵ Pl. Ex. 504, p. 11 ([Doc. 256-2](#)); Ex. 441, p. 2 ([Doc. 255-26](#)).

RESPONSE: Defendants admit that is one way the solar arrays have been designed to function, although not the only way the solar arrays can generate solar process energy or heat. See response to fact no. 7, above.

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

RESPONSE: Defendants admit that is one way the solar arrays have been designed to function, although not the only way the solar arrays can generate solar process energy or heat. See response to fact no. 7, above.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

16. Johnson illustrated this idea as early as 2006 as follows:

[Image omitted]

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Denied.⁶

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Denied. Defendants have installed solar arrays consisting of approximately 23,000 lenses on approximately 175 units that are ready for installation onto towers. Defendants have approximately 200 bases to construct into solar towers.⁷

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Deny. The decision had nothing to do with strengths. He wanted to share the technology and build a solar energy production system. To do so, he began using independent sales representatives to sell solar lenses.

⁶ See Deposition of RaPower3, LLC p. 7-12, deposition excerpts at Exhibit 3 hereto.

⁷ See Declaration of Neldon Johnson in Support of Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment.

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.

RESPONSE: Deny. The bonus incentive program was meant to share the success of the solar energy business, based on the gross sales of revenue IAS, with people who helped grow the company in its infancy.⁸

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion. In addition, the exhibit referred to by Plaintiff herein expressly provided that IAS is not a tax professional and the material was not for the purpose of giving tax advice.⁹ The referenced exhibit expressly provides that individuals should seek advice based on that taxpayer’s particular circumstances from an independent tax advisor before relying on any information in the document. *Id.*

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

RESPONSE: Admit solely for purposes of this motion.

⁸ [Shepard Depo.](#) 76, 83-84, [N. Johnson Depo.](#), June 28, 2017, pp. 232-235.

⁹ [Pl. Ex. 531](#).

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

RESPONSE: Defendants admit solely for purposes of this motion. Generally, the commission paid to a sales person is 10 percent, but can be adjusted for various reasons.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants admit that Johnson relied on advice of attorneys he hired to provide tax advice as to the claim of the solar tax credit and deductibility of depreciation if lenses were sold to consumers.¹⁰

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.

RESPONSE: Deny. Shepard asked questions all along the way.¹¹

36. In 2010, Johnson created RaPower3, LLC. He is its manager and the sole decision-maker for the company.

RESPONSE: Defendants admit that RaPower3, LLC was formed in 2010 and that Johnson is its manager.

37. Once formed, RaPower3, not IAS, sold solar lenses to individuals.

RESPONSE: Admit solely for purposes of this motion.

¹⁰ See Defendants' Statement of Additional Facts ¶ 1-25, hereafter.

¹¹ [Pl. Ex. 685](#), deposition of G. Shepard, generally.

38. RaPower3's only business activity is selling solar lenses through a multi-level marketing (otherwise known as "network marketing") approach to increase sales.

RESPONSE: Admit solely for purposes of this motion.

39. If a person wants to sell solar lenses through RaPower3, that person need only sign up to become a "distributor."

RESPONSE: Admit solely for purposes of this motion.

40. RaPower3 encourages distributors to bring still more people in to the multi-level marketing system and build an extensive "downline."

RESPONSE: Admit solely for purposes of this motion.

41. RaPower3 pays its distributors as much as 10 percent commission on lens sales in each distributor's respective downline.

RESPONSE: Defendants admit that a distributor can earn commissions for sales in the distributor's downline. The amount of the commission can vary.

42. Johnson directed RaPower3 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).

RESPONSE: Admit solely for purposes of this motion.

43. Changing from a direct-sales model through IAS to an internet-ready, multi-level marketing model through RaPower3 led to "[h]undreds of people across the nation purchas[ing] solar lenses."

RESPONSE: Admit solely for purposes of this motion.

44. Selling lenses through RaPower3 gave Johnson "much needed revenue" to continue his operations.

RESPONSE: Admit solely for purposes of this motion.

45. When Johnson started RaPower3, Shepard transitioned from being an IAS salesperson to a RaPower3 distributor.

RESPONSE: Admit solely for purposes of this motion.

46. Shepard considers himself and other distributors in the RaPower3 system as "team members."

RESPONSE: Admit solely for purposes of this motion.

47. But Shepard, who gave himself the title “Chief Director of Operations” for RaPower3 to sell more lenses, is the team member “at the top.”

RESPONSE: Defendants admit that Mr. Shepard has said that.

48. Among other things, Shepard created the website www.RaPower3.com and moderates an online discussion board called “IAUS & RaPower[-]3 Forum.”

RESPONSE: Admit solely for purposes of this motion.

49. On the RaPower3 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.

RESPONSE: Admit solely for purposes of this motion. However, the website has a significant amount of information and statement of fact #49 is an extreme oversimplification of what is contained on the RaPower3.com website.

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

RESPONSE: Admit. However, in addition, the website is a source of information for people who are interested in the solar technology and history of RaPower 3.

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”).

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

53. When other RaPower3 distributors have issues or questions, they look to Shepard for guidance and advice, and to be the conduit to Johnson.

RESPONSE: Admit that is often the case, but not exclusively the case.

54. Shepard told Roger Freeborn about RaPower3, asked Freeborn if he wanted to buy lenses, and brought Freeborn into his multi-level marketing downline.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

57. When Freeborn started selling lenses for RaPower3, 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 RaPower3 solar lenses.

RESPONSE: Admit solely for purposes of this motion.

58. Freeborn was a prolific salesman for RaPower3, especially among the teachers and coaches that he reached through BFS’s customer list.

RESPONSE: Admit solely for purposes of this motion that Freeborn was successful and sold many solar lenses.

59. Freeborn called himself the “National Director” of RaPower3.

RESPONSE: Defendants admit that Mr. Freeborn has said that.

60. Freeborn’s information about IAS, RaPower3, 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.

RESPONSE: Defendants admit that Mr. Freeborn has said that.

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

RESPONSE: Admit solely for purposes of this motion.

62. Freeborn also organized webinars for people to hear from him and Shepard about RaPower3. He spoke at the 2012 “National Convention” that Shepard organized.

RESPONSE: Admit solely for purposes of this motion.

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 RaPower3.

RESPONSE: Defendants admit that Mr. Freeborn has said that.

64. At Johnson's direction, Shepard fired Freeborn from RaPower3 in June 2013.

RESPONSE: Defendants admit that Mr. Freeborn has not been associated with RaPower3 since approximately 2013.

65. Freeborn has continued, however, to collect commissions on solar lens sales through his downline through at least the end of 2016.

RESPONSE: Admit solely for purposes of this motion.

66. To date, IAS or RaPower3 have paid Freeborn more than \$230,000 in commissions for his sales of solar lenses and sales of solar lenses in his downline.

RESPONSE: Admit solely for purposes of this motion.

67. Freeborn has generated, through a "charitable foundation," approximately \$75,000 more in commissions for lens sales.¹² It follows from IAS's and RaPower3'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 RaPower3.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants admit that as many as 193 customers have been audited by the IRS for claiming the tax benefits Defendants promote.¹³ However, none of those cases

¹² [Freeborn Dep. 98:10-102:6.](#)

¹³ Declaration of Paul Jones ([Doc. 257-1](#)).

have been prosecuted in the US Tax court and no decision has been rendered in any district court.¹⁴

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

RESPONSE: Admit solely for purposes of this motion.

70. The United States filed this injunction case in November 2015.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

72. To date, Johnson, Shepard, IAS, and RaPower3 continue to organize sales of solar lenses, and participate (directly or indirectly) in the sale of solar lenses.

RESPONSE: Admit solely for purposes of this motion.

73. They have not changed their promotion in any appreciable way since 2005.

RESPONSE: Defendants admit they still mention the possible tax benefit of purchasing solar lenses from RaPower3. Defendants believe the tax benefit remains available until such time as a federal judge decides the tax treatment is not appropriate.¹⁵ RaPower3 recommends that each interested buyer should always consult a qualified tax advisor with questions regarding taxes and tax benefits.¹⁶

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.

RESPONSE: Admit that nothing has happened yet to demonstrate that the tax benefits established to encourage investment in solar energy development are unavailable for the research and development accomplished using the solar lenses sold by RaPower3. Despite more than 193 audits being appealed by taxpayers to the United States Tax

¹⁴ [Id. at ¶ 19-20.](#)

¹⁵ www.rapower3.com/tax-questions

¹⁶ [Id. \(Q.13\).](#)

Court, none of those cases has been scheduled for trial and none of those cases have been resolved in favor of the United States.¹⁷

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.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Defendants admit that if the customer meets the requirements of operating a trade or a business, those customers are eligible to claim a tax deduction for depreciation. Defendants admit that their belief, based on advice of legal tax counsel is that the purchase of lenses by a customer and then the lease of those lenses back to RaPower3 for purposes of research and development are a business activity for which depreciation on the solar lens is appropriate. See Defendants’ Statement of Additional Facts and Argument set forth hereafter.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

¹⁷ Declaration of Paul Jones, ([Doc. 257-1](#)), at ¶ 11-20.

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

RESPONSE: Admit solely for purposes of this motion.

80. Shepard leased lenses from IAS in 2005.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion, but Mr. Shepard can ask for his money back if he believes that did not happen and elects to do so.

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.

RESPONSE: Admit solely for purposes of this motion, but Mr. Shepard can ask for his money back if he believes that did not happen and elects to do so.

93. IAS continued to sell lenses with, generally, the same or similar transaction terms through 2009.

RESPONSE: Denied. All customers who purchased in 2009 have had their lenses repurchased by IAS.¹⁸

94. Freeborn bought his first lenses from IAS under these terms in August 2009.

RESPONSE: Admit solely for purposes of this motion.

95. With the transition to RaPower3 in 2010, Johnson changed the price of a lens to \$3,500.

¹⁸ See Declaration of Neldon Johnson in Support of Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment.

RESPONSE: Admit solely for purposes of this motion.

96. Customers also started purchasing lenses via the internet at RaPower3.net.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants admit this is generally true, however, there is no documentation or reason why a customer could not negotiate a different price or terms with RaPower3.

100. The Equipment Purchase Agreement states the number of lenses the customer purportedly purchases from RaPower3.

RESPONSE: Admit solely for purposes of this motion.

101. The contract states that RaPower3 will install and “startup” the lenses the “Installation Site,” which is “a site yet to be determined.”

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Denied. The installation site is Delta, Utah. The quoted language from Mr. Johnson’s deposition was taken out of context.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants admit that the Installation Date referenced in the EPA is the date when the solar arrays begin to produce marketable energy. However, the lenses have been installed and used by RaPower3 in research and development for many years.¹⁹

105. RaPower3 commits that each lens will sustain a specific “energy production rate” for the first five years from the “Installation Date.”

RESPONSE: Defendants admit that is their expectation.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit the O&M Agreement says that.

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.

RESPONSE: Admit the O&M Agreement says that.

¹⁹ Deposition of RaPower3, LLC pages 16, 135-137, Exhibit 3 hereto.

111. In a single year, the total rental payments to any customer for a single lens may not exceed \$150.

RESPONSE: Admit the O&M Agreement says that.

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

RESPONSE: Admit solely for purposes of this motion.

113. The Equipment Purchase Agreement states that the full price of a single lens is \$3,500.

RESPONSE: Admit the EPA says that.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

117. Second, he pays an additional \$945 on or before June 30 of the following year, for a total of \$1,050.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants admit that is the intention of the solar energy plan.

121. After the first five years, LTB will take the customer's \$150 annual rental payment and divide it between the customer and RaPower3: \$82 per year for RaPower3 to payoff the outstanding balance and \$68 for the customer/lens owner.

RESPONSE: Defendants admit that is the intention of the solar energy plan.

122. LTB will make these payments for 30 years.

RESPONSE: Admit solely for purposes of this motion.

123. RaPower3 provides nearly interest-free financing for the \$2,450 debt remaining on each lens.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Denied. Purchases were made in December and often when the purchaser determined they wanted to rescind a purchase they were allowed to do so until April 15th of the following year. They could rescind part of all of their purchase and return the lens.

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.

RESPONSE: Denied. In selective cases a refund has been offered, but it is not generally contemplated. Plaintiff cites to one occasion when a refund was offered. However, there is no contractual or other right to demand a refund simply because a buyer wants out of a contract.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Denied. The bonuses are paid up to \$1 billion in sales, not “only after” that.²⁰

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.

RESPONSE: Denied. The bonuses are paid up to \$1 billion in sales, not “only after” that.²¹

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.

RESPONSE: Denied. The bonuses are paid up to \$1 billion in sales, not “only after” that.²²

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.”

RESPONSE: Denied. It was to provide a revenue payment to customers on sales so they could participate in the R&D and benefit from those sales.²³

²⁰ See Declaration of Neldon Johnson in Support of Defendants' Opposition to Plaintiff's Motion for Partial Summary Judgment.

²¹ Id.

²² Id.

²³ Id.

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.”

RESPONSE: Admit solely for purposes of this motion.

134. But Johnson has not offered bonus contracts since July 2014.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit that Shepard made that statement in Exhibit 72 ([Doc. 254-19](#)). However, the deposition reference does not say anything like that quoted by the government.

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

RESPONSE: Admit Shepard wrote that.

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

RESPONSE: Admit Shepard wrote that.

146. Shepard told customers that “[t]hese fifteen towers will complete the first project. Probably in two weeks, the 2nd 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.”

RESPONSE: Admit Shepard wrote that.

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.”

RESPONSE: Admit Shepard wrote that.

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 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.”

RESPONSE: Admit Shepard wrote that.

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.”

RESPONSE: Defendants object to Plaintiff’s Exhibit 159 ([Doc. 254-37](#)) on hearsay grounds. FRE 802. There does not appear to be any recognized exception to admitting the statements of the declarant (Preston Olsen) in [Plaintiff’s Exhibit 159](#).

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.”

RESPONSE: Based on the hearsay nature of [Exhibit 159](#), Defendants object to the statements attributed to Mr. Shepard, without some basis or foundation.

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!”

RESPONSE: Defendants object to Plaintiff’s Exhibit 159 ([Doc. 254-37](#)) on hearsay grounds. FRE 802. There does not appear to be any recognized exception to admitting the statements of the declarant (Preston Olsen) in Plaintiff’s [Exhibit 159](#). In addition, based on the hearsay nature of [Exhibit 159](#), Defendants object to the statements attributed to Mr. Shepard, without some basis or foundation.

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

RESPONSE: Denied. The cited references does not say what the government represents. Nothing in either Pl. Ex. 157 ([Doc. 254-35](#)) or in Pl. Ex. 292 ([Doc. 255-10](#)) mentions contracts to sell power to a third party purchaser.

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.”

RESPONSE: Denied. The cited deposition reference does not say that, nor does Exhibit 267 say what the government quotes. Defendants admit Mr. Shepard expressed that progress was being made on the project and his personal hope that the solar energy would soon be sold on the open market.

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,” such that rental income from their lenses could start soon.

RESPONSE: Admit that Mr. Shepard wrote the quoted material, not the gratuitous add-on.

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

RESPONSE: Defendants admit Mr. Shepard and Mr. Freeborn expressed that progress was being made on the project and their personal hope that the solar energy would soon be sold on the energy market.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit. In addition, Mr. Johnson included a disclaimer in [Exhibit 531 \(Doc. 256-7\)](#) stating that “This material is not for the purpose of giving tax advice to individuals or any other entity. International Automated Systems, Inc. is not a tax professional and encourages every taxpayer to seek advice based on the taxpayer’s particular circumstances from an independent tax advisor before relying on any information given in this presentation.” ([Ex. 531](#), page 4 and repeated on pages 5-6).

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.

RESPONSE: Denied. The tax credit is based on the contractual down payment (\$3,500 per lens) not the full price of the lens (\$35,000). Ex. 24 ([Doc. 254-8](#)); [Ex. 43](#).

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.”

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

[Image omitted]

RESPONSE: Admit. Yet, at the same time, Johnson told people “This material is not for the purpose of giving tax advice to individuals or any other entity. International Automated Systems, Inc. is not a tax professional and encourages every taxpayer to seek advice based on the taxpayer’s particular circumstances from an independent tax advisor before relying on any information given in this presentation.” ([Ex. 531](#), page 4 and repeated on pages 5-6).

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.”

RESPONSE: Admit Mr. Shepard wrote that.

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

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit solely for purposes of this motion.

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

[Image omitted]

RESPONSE: Admit. However, Shepard also explained in the same document, “**Please Remember:** Some taxpayers may have varying circumstances such as 1099 forms, AMT considerations along with carryback options which could alter the depreciation schedule by making the election under section 179. Using a qualified and knowledgeable tax preparer can be vital in attaining the maximum benefits allowed.” and then he highlighted in blue “**Tax Law is extremely complex and each taxpayer has his/her own unique set of circumstances. Above, we have given general information we deem to be correct, but **YOU SHOULD ALWAYS RELY ON ADVICE FROM YOUR OWN TAX ATTORNEY OR CPA.**” Ex. 24 (254-8)(emphasis in original).

167. Shepard showed the financial bottom line for a prospective lens buyer: Money Details:

[Image omitted]

RESPONSE: Admit. However, Shepard also included in the same document, the same caution: **Tax Law is extremely complex and each taxpayer has his/her own unique set of circumstances. Above, we have given general information we deem to be correct, but **YOU SHOULD ALWAYS RELY ON ADVICE FROM YOUR OWN TAX ATTORNEY OR CPA.**” Ex. 20 (254-7)(emphasis in original).

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 liability:

[Image omitted]

RESPONSE: Deny. The documents relied on by Plaintiff should be excluded on grounds of hearsay without any recognized exception. Regarding any publication of the information in the documents, Shepard, always included the directive with any advice that customers consult with their tax professional. See Response to ¶ 166-167.

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

[Image omitted]

RESPONSE: Admit Mr. Freeborn wrote that.

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

[Image omitted]

RESPONSE: Admit Mr. Freeborn wrote that.

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

RESPONSE: Defendants deny that either Mr. Shepard or Mr. Freeborn ever assisted customers with preparing their federal income tax returns. Furthermore, the factual support offered in Plaintiff's footnotes does not support any of the allegations in paragraph 171. Defendants object to Ex. 674 ([Doc. 256-18](#)) as hearsay, not subject to any exception.

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

RESPONSE: Denied. In fact, Mr. Shepard wrote that "I am not a CPA or a tax advisor. So any info that I give to you must be received with that in mind. Please check with your own tax advisor . . ." Ex. 43 ([Doc. 254-13](#)).

173. As Shepard told other RaPower3 "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."

RESPONSE: Admit Mr. Shepard wrote that.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

176. RaPower3 has touted “success stories” on its website. None of the “success stories” involved the actual production of solar energy.

RESPONSE: Deny. Defendants object to Ex. 674 ([Doc. 256-18](#)) as hearsay, not subject to any exception.

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

RESPONSE: Deny. Defendants object to Ex. 674 ([Doc. 256-18](#)) as hearsay, not subject to any exception.

178. In mid-2016, after this lawsuit was filed, Johnson changed the way RaPower3 and Shepard promoted the tax benefits purportedly connected with solar lenses.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit. As stated in the government’s supporting references, it is up to the customer to determine the appropriate tax benefit. [Shepard Depo. 247:9](#) (“So you could do either one. You could take the depreciation or do the new program. It’s up to the RaPower3 client.”) and RaPower3 Depo 191:21²⁴ (“If they could depreciate it, that’s something they’ll have to figure out with their CPAs.”).

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

RESPONSE: Admit. As stated in the government’s supporting references, it is up to the customer to determine the appropriate tax benefit. [Shepard Depo. 247:9](#) (“So you could do either one. You could take the depreciation or do the new program. It’s up to the RaPower3 client.”) and RaPower3 Depo 191:21²⁵ (“If they could depreciate it, that’s something they’ll have to figure out with their CPAs.”).

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

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

²⁴ Excerpts attached hereto as Ex. 3.

²⁵ Excerpts attached hereto as Ex. 3.

customers were not allowed a depreciation deduction or a solar energy tax credit.

RESPONSE: Denied. Defendants believe the tax benefits promoted by them directly or indirectly are authorized under the United States Tax code.²⁶

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

- 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.**

RESPONSE: Denied.

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.”

RESPONSE: Admit. The government has already touted that the RaPower3 plan consists of three money-making strategies: (1) tax benefits; (2) revenue from solar energy business; and (3) bonus/commissions from sales of lenses of others. While tax benefits and commissions are the quickest routes to making money with RaPower3, the plans are in place to generate income from use of the solar lenses in power generation. Up to this time, the lenses have only been used for research and development. Defendants know and believe that the lenses will produce solar energy on the open market. See Argument section below.

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.

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

RESPONSE: Admit in part. See response to paragraph 182, above. Customers have also made money from commissions.

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.

²⁶ See Defendants’ Statement of Additional Facts ¶ 1-25, hereafter.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit in part, but denied in part. Each tower has an array with 4 solar wheels.²⁷ Each solar wheel has 17 lenses, which are in two pieces. A customer lens composes ½ of a lens installed in the solar wheel, therefore, there are 34 customer lenses in a single solar wheel and 4 wheels on an array. Therefore, there are 136 customer lenses on a solar array. There were 19 towers, requiring 2,574 lenses to be installed at the R&D site. However, many of those lenses have broken and been replaced over time.²⁸ Mr. Johnson estimates that as many as 10,000 lenses were used during the time period at the R&D site.²⁹ Thus the warehouse (Ex. 260) shows there are stockpiled thousands of customer lenses to be used in the future. Additional lenses have been installed in frames at the manufacturing facility.³⁰

187. According to Johnson, he owned the lenses that were originally installed in the towers in 2006.

RESPONSE: Admit in part, but denied in part. As explained in the deposition, lenses were installed on the solar arrays in the R&D site before many of those lenses were sold to customers, thus they were being held in IAS/RaPower3 inventory as they were being installed on the towers. As lenses sold, the ownership transferred to customers out of IAS or RaPower3 inventory between 2009 and 2017.³¹

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

RESPONSE: Admit. See response to paragraph 187, above.

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

RESPONSE: Admit solely for purposes of this motion.

²⁷ See Ex. 260, ([Doc. 255-5](#)).

²⁸ IAS Depo. p. 70-73. Excerpts from the IAS Depo can be found at Exhibit 8.

²⁹ RaPower3 Depo 139:9-11. Ex. 3 hereto.

³⁰ See Declaration of Neldon Johnson in Support of Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment.

³¹ IAS Depo 64-67. Ex. 8 hereto.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit in part. Employees of Cobblestone and/or RaPower3 and other members of the Johnson family have taken part in the testing of the solar fields and have seen the generation of electricity and/or solar process heat.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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. So he has never been finished.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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 purchaser and that “more research and development had to be done . . . to make the technology economically viable”.

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit that Shepard has been told that the solar towers and lenses have generated electricity for R&D purposes. Shepard Depo 131-139.

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

RESPONSE: Deny. The quoted statement is taken out of context. Defendants admit that the solar towers are not finished, but there has been substantial progress toward their completion including hundreds of solar arrays installed and ready to be assembled onto

towers, two hundred tower bases have been delivered to the RaPower3 manufacturing site and are ready to be assembled on land owned by Mr. Johnson. That is work in process and, while actively under construction, not yet finished.³²

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

RESPONSE: Admit but irrelevant.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

210. After 11 years of selling lenses, Johnson’s technology has never generated energy for which a third-party “power purchaser” has paid according to Johnson’s vision from 2006:

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

212. Shepard first heard about LTB when he obtained his first lenses in 2005.

RESPONSE: Admit but irrelevant.

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

³² See Declaration of Neldon Johnson in Support of Defendants’ Opposition to Plaintiff’s Motion for Partial Summary Judgment.

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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.”

RESPONSE: Admit that Shepard wrote that.

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.

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit solely for purposes of this motion.

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. Shepard claimed that, therefore, customers’ “rental payments began to accrue” in 2010. 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. This never happened.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit but irrelevant.

226. Freeborn never asked any questions about LTB, either before or after he agreed to “lease out” his lenses to LTB in 2009.

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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

RESPONSE: Admit but irrelevant.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Defendants admit there is not a “power purchase agreement” in place now to sell electricity on the open market. However, that is not the sole basis for customers claiming tax benefits. The tax code does not require revenue or even income from solar power generation. See Argument, section 3, hereafter.

231. Shepard testified that, since 2010, he has “tried to put his own projects together” to get a third-party purchaser. “But we just kept running into road blocks. . . . Never got that far. Every time I got close, they wanted to see a power project up and running. . . . And we didn’t have that running yet.”

RESPONSE: Admit Shepard said that.

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

RESPONSE: Admit in part and deny in part. Most of what Shepard knows about RaPower3's progress toward selling energy to outside purchasers comes from Johnson. Mr. Shepard himself has made inquiries and efforts to market the energy output to outside purchasers. [Shepard Depo. 189-190; 205-207.](#)

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.

RESPONSE: Admit in part and deny in part. RaPower3 is making additional strides to achieving marketable electricity. However, that is not the only goal of RaPower3. It is still working toward a solar energy system that is produced at a lower cost and higher output than other solar energy systems.³³ To that end, RaPower3 is working on more effective photovoltaic systems that rely on the Fresnel lens technology³⁴ and different heat exchangers that will work with the Johnson Turbine to create electrical power.³⁵ These advancements do not happen overnight. Advancement takes time. Neither does the tax code require revenue or even income from solar power generation. (See Argument, section 3).

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.

RESPONSE: Admit solely for purposes of this motion.

³³ www.rapower3.com/technology

³⁴ www.rapower3.com/solar discussing concentrated photovoltaic (CPV) technology.

³⁵ www.rapower3.com/heat-exchanger

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit that Mr. Shepard said that.

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

RESPONSE: Admit that Mr. Shepard said that.

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

RESPONSE: Admit solely for purposes of this motion.

240. No customer has been paid a bonus.

RESPONSE: Admit solely for purposes of this motion.

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,” and does not seem to even track which customers might be delinquent in paying their full down payment.

RESPONSE: Admit that Mr. Shepard said that. However, Mr. Shepard has also acknowledged that he is not affiliated with RaPower3 - beyond being an independent contract for sales and marketing. [Shepard Depo at pg. 98](#) (“I’m an independent contractor and I don’t have – I’m not an officer of any of those companies. I’m not on a board of directors. I’m not an employee. I don’t go to any meetings. I don’t know what’s going on. So you’re asking me to speculate on things and I don’t know the involvement of Neldon Johnson in that or the extent of direct or indirectly.”); [also pgs. 101, 123](#),

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

RESPONSE: Admit in part. In Mr. Shepard’s deposition he was asked, “And what happens if they don’t pay?” [Shepard Depo p. 112](#). To which he answered, “Then that’s

not my problem. I don't know what to do after that." Id. Then later he testified, "But normally I don't think he does anything with people when they don't pay. But I don't know." Id.

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.

RESPONSE: Defendants object to paragraph 243 as hearsay, not subject to any exception.

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.

RESPONSE: Defendants object to paragraph 244 as hearsay, not subject to any exception.

245. RaPower3 has not taken action to collect the remaining down payment.

RESPONSE: Defendants object to paragraph 245 as hearsay, not subject to any exception.

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.

RESPONSE: Defendants admit that such an offer has been made in the past, but is not an ongoing position taken by RaPower3. See Ex. 468 ([Doc. 255-33](#)).

247. Johnson "has always" offered this out.

RESPONSE: Denied. See response to paragraph 246.

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.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

250. Customers know that they are not liable to make any payments on the debt they purportedly owe to RaPower3 for the difference between their down payment and the remainder of the purchase price, at least until their lenses begin producing revenue.

RESPONSE: Admit. That is how the contracts were drafted.

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 RaPower3 customers do not exercise any control over their purported lens leasing business.

RESPONSE: Deny. On the contrary, the RaPower business model is based on an expectation that customers will take responsibility and control of their lens leasing business by keeping in contact with RaPower3, telling others about the business and opportunities, and learning more about the solar energy business.

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

RESPONSE: Admit, as far as defendants are aware. But irrelevant.

253. Customers never take possession of their lenses.

RESPONSE: Denied. Customers take constructive possession of their lenses when they complete an online purchase. Those lenses are placed in service by being used or available for use in the R&D site or the arrays being constructed at the manufacturing site.³⁶

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.

RESPONSE: Admit solely for purposes of this motion.

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

³⁶ Pl. Ex. 125 (placed in service letter) ([Doc. 254-33](#)).

RESPONSE: Admit solely for purposes of this motion.

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.”

RESPONSE: Admit the RaPower3.com website on March 2, 2015 said that. Ex. 19 ([Doc. 254-6](#)).

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 2014:

[Image omitted]

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

260. For example, in early 2014, one long-time RaPower3 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.”

RESPONSE: Denied. Defendants object to [Ex. 77](#) on grounds of hearsay, not subject to any exception.

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.”

RESPONSE: Denied. Defendants object to [Ex. 77](#) on grounds of hearsay, not subject to any exception.

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.”

RESPONSE: Denied. Defendants object to [Ex. 77](#) on grounds of hearsay, not subject to any exception.

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 RaPower3.

RESPONSE: Admit solely for purposes of this motion.

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.

RESPONSE: Admit solely for purposes of this motion.

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

RESPONSE: Admit. However, that is not the standard to be met. The question is whether the defendants knew or had reason to know the tax benefits they advocated were available were false or fraudulent. On the contrary, defendants obtained legal advice on the tax plan and availability of tax benefits. Furthermore, they recommended that each customer consult with tax professionals to advise them. Defendants believed at the time and still hold the belief that the tax benefits under section 48 are available to purchasers of their solar lenses.

III. DEFENDANTS STATEMENT OF ADDITIONAL MATERIAL FACTS:

Defendants submit the following additional facts relevant to the issues raised by Plaintiff in its motion for partial summary judgment.

1. In September or October of 2010, Neldon Johnson and RaPower3, LLC retained the services of Anderson Law Center, PC in Delta, Utah, to obtain legal advice as to the availability of tax benefits associated with the sale of the Fresnel lenses.³⁷

2. Todd Anderson and Jessica Anderson are husband and wife, and are both lawyers at Anderson Law Center.³⁸

3. In October of 2010 and on or about November 15, 2010, the Anderson Law Center, PC, provided to Mr. Johnson and RaPower3, LLC two letters explaining the tax benefits of purchasing energy equipment through RaPower3.³⁹

4. In his deposition, Mr. Anderson testified that Anderson Law Center, PC was hired by Mr. Johnson and RaPower 3 to provide a general analysis of tax principles based on information that it had at the time.⁴⁰

5. The two letters are the result of Anderson Law Center's research and analysis. *Id.*

6. Mr. Anderson testified that he believed Anderson Law Center had sufficient time to undertake the legal research that was required to provide the analysis and opinions that are in that two letters.⁴¹

³⁷ Todd Anderson Depo p. 37; and Exhibit 5 hereto (Anderson 0074)]. The T. Anderson deposition excerpts are attached hereto as Exhibit 4.

³⁸ *Id.* at 19-20.

³⁹ [Pl. Ex. 570](#) and [Pl. Ex. 23](#).

⁴⁰ T. Anderson Depo p. 88 and 129, attached hereto as Exhibit 4.

⁴¹ *Id.* at 183.

7. Mr. Anderson testified he believes that the letters are accurate summaries of general tax principles.⁴²

8. The first letter ([Ex. 570](#)) was provided to Mr. Johnson and RaPower3 as a final version.⁴³ While the second letter ([Ex. 23](#)) was provided as a “work in process.”⁴⁴

9. Mr. Anderson testified he believes as far as the questions that were presented to Anderson Law Center, PC and the answer it provided is an appropriate legal analysis.⁴⁵

10. In each of its letters, Anderson Law Center, PC recommends that anybody that intends to rely on the information in the letters seek independent professional tax advice.⁴⁶

11. In her deposition, Mrs. Anderson testified that the legal analysis in the letters provided to Mr. Johnson and RaPower3 were accurate when drafted.⁴⁷

12. Mrs. Anderson tried to be as accurate and honest and complete in her analysis of the tax issues.⁴⁸

13. There isn’t anything that Mrs. Anderson has come across since 2010 that would change what she did back in 2010.⁴⁹

14. The Anderson Law Center was paid for the legal work it did for Mr. Johnson and RaPower3.⁵⁰

⁴² Id. at 184.

⁴³ Id. at 185.

⁴⁴ Id.

⁴⁵ Id. at 188.

⁴⁶ Id.

⁴⁷ Jessica Anderson Depo p. 141 (“I believed that the - the legal information, the information regarding those tax principles was correct, yes.”). Excerpts found at Ex. 6 hereto.

⁴⁸ Id. at 142 (“I was thorough in that analysis on those broad topics”).

⁴⁹ Id.

⁵⁰ Id. at 143.

15. Mrs. Anderson testified that she had thoroughly researched and had an understanding to provide the tax analysis that she gave to Mr. Johnson and RaPower3.⁵¹

16. In about August of 2012, the law firm of Kirton & McConkie was retained to provide a general summary of the requirements to be able to claim an energy tax credit, how the tax credit was calculated and to review and revise some form transaction documents for buyers of solar lenses.⁵²

17. On October 31, 2012, Kirton & McConkie provided Neldon Johnson a memorandum on the subject of “Tax Issues Relating to Purchase of Solar Lenses.”⁵³

18. The Kirton McConkie memorandum⁵⁴ states, as its intended purpose:

EXECUTIVE SUMMARY

The solar lenses that Buyers purchase from Seller (the “Solar Lenses”) will qualify as “energy property” that is eligible for the energy tax credit under Code Section 48. For purposes of calculation the energy credit, the basis of each Solar Lens will be the Three Thousand Five Hundred Dollars (\$3,500) and the energy percentage will be thirty percent (30%) so long as the energy credit is claimed prior to January 1, 2017 (and will be ten percent (10%) if claimed after that date). Buyers will be able to claim the energy credit in the year that the Solar Lenses are placed into service. The Solar Lenses will be eligible for depreciation under Code Section 168(a) as 5-year property.

Id. at p. 1.

19. The Kirton McConkie memorandum is 12 pages long and concludes with a “Circular 230 Disclosure” meant to inform people who may read the memorandum that it cannot be used by any taxpayer for the purpose of avoiding United States federal tax that may be imposed on the taxpayer. Id. at p. 12.

⁵¹ Id. at 144.

⁵² Deposition of Kenneth W. Birrell, p. 168-169. Excerpts found at Exhibit 7 hereto.

⁵³ Id. at 220.

⁵⁴ Pl. Ex. 370, p. 3 ([Doc. 140-2](#)).

20. The Kirton McConkie memorandum recommends that each taxpayer should seek advice based on the taxpayer's particular circumstances from an independent tax advisor. *Id.*

21. In preparing the memorandum, Mr. Kenneth Birrell, the author of the memorandum, reviewed the applicable provision in the Internal Revenue code, the Treasury regulations, performed research on case law and IRS rulings and reviewed materials available through his firms electronic research system, BNA Tax management Portfolios and CCH descriptions of the energy tax credit and so forth.⁵⁵

22. Mr. Birrell testified that at the time of drafting the Kirton McConkie memorandum he had enough information to draft the memorandum, which was meant to be a general overview of the tax benefits associated with the solar business as described in the memo.⁵⁶

23. Mr. Birrell testified that the memorandum was accurate when he wrote it and that it was honest and complete.⁵⁷

24. Then Mr. Birrell testified that he was not aware of anything else that would change the legal analysis of the memorandum -- only the factual assumptions and representations that he felt were omitted.⁵⁸

25. Defendants relied on the Anderson Letter and the Kirton McConkie memorandum in advocating the tax benefits of buying solar lenses from RaPower3.⁵⁹

III. ARGUMENT

⁵⁵ Birrell Deposition, pages 235-236. See Ex. 7 hereto.

⁵⁶ *Id.* at 239-240.

⁵⁷ *Id.* 237.

⁵⁸ *Id.*

⁵⁹ www.rapower3.com

Plaintiff's motion for partial summary judgment must be denied because there remain genuine issues of material fact on the critical point of whether any Defendant "knows or has reason to know" the tax benefits promoted by RaPower3 "is false or fraudulent as to any material matter." Defendants believe, and have always believed, that the tax benefits to the solar energy business they promote are allowed under the tax code.

Even if Defendants were to concede for purposes of this motion that the solar tax credit and associated depreciation deductions are not applicable to the RaPower3 solar lenses, the question remains whether Defendants knew or had reason to know mentioning those tax benefits was "false or fraudulent as to any material matter" or any other violation of IRC 6700 at the time RaPower3 sold lenses.

The facts here demonstrate Defendants had (and still maintain) a genuine belief that the tax treatment has always been (and remains to this day) available to taxpayers who purchase solar lenses from RaPower3. Furthermore, that belief is reasonable considering Defendants obtained legal advice about the availability of the tax benefits and relied on that advice. And, of equal or even greater significance, no court has ruled against any taxpayer, finding that the solar tax credit or the associated depreciation cannot be taken by a qualified taxpayer. It is true the IRS has taken the position in taxpayer audits that the tax treatment is not allowed under its interpretation of the code. However, the IRS is not the final arbiter of what the revenue code means. It must follow the direction of the legislature that sets the rules and the tax court that interprets those rules. And so far, a reasonable review of the tax code allows the tax treatment as understood by Defendants and the Tax Court has not decided any case involving tax benefits against any RaPower3 customer.

The argument that Defendants are guilty of a "gross valuation overstatement as to any material matter" as relates to the stated value of the solar lenses is a red herring. The argument

has nothing to do with the tax treatment at issue herein. Lastly, the government's efforts in its motion and in this case rest on the position that the solar energy technology being developed by RaPower3 has not yet resulted in the sale of energy on the open market. However, nothing in the Internal Revenue Code requires that sale of solar energy to qualify for the tax benefits. Further, electrical energy has been demonstrated, produced, used and paid for in a commercial application.

A. DEFENDANTS ARE NOT PROMOTING AN ABUSIVE TAX SHELTER FOR WHICH AN INJUNCTION IS AN APPROPRIATE REMEDY.

Plaintiff asserts that injunctive relief is justified in this case because under [IRC § 6700](#) the government can penalize and shut down a person or organization that promotes a tax avoidance scheme that the person promoting the scheme knows or have reason to know is false or fraudulent as to any material matter. The deficiency of the government's case is two-fold: first, there is no authority (other than Plaintiff itself) suggesting that tax benefits allegedly promoted by these Defendants is false or fraudulent in any material matter, and second, there is no evidence that any Defendant knew or should have known that the tax benefits were not available as described by RaPower3 in its sales of solar lenses.

1. SECTION 48 OF THE INTERNAL REVENUE CODE ALLOWS FOR A TAX CREDIT FOR ENERGY PROPERTY PLACED IN SERVICE DURING THE TAXABLE YEAR FOR WHICH THE CREDIT IS CLAIMED.

In order to assert a [§ 6700](#) penalty, a determination must be made as to whether the promoter⁶⁰ knew or had reason to know that the statements the promoter made or furnished regarding the excludability of income were false or fraudulent. Whether a promoter knew or had

⁶⁰ Defendants do not agree they are "promoters" under the code, however for purposes of this Opposition they do not dispute that characterization. At trial, however, they will challenge that claim.

reason to know statements contained in sales literature or on the RaPower3 website were false or fraudulent depends on the promoter's role.

Here, given greater the promoter's background knowledge about the project and the marketing strategies, the more likely it is the promoter expected the product would qualify for the solar tax credit or depreciation. They would have access to the opinion letters of the two law firms, and would also know the extraordinary development efforts undertaken to make abundant solar energy usable for generating electricity. Solar energy provides a negligible amount of power in the United States (.04%). The purpose of having tax incentives is to stimulate risk taking to develop a solution to harnessing the potential of solar energy.

To make a determination of knowingly promoting a false tax incentive, courts often look at three factors to determine whether a person had the requisite knowledge to violate § 6700:

1. The extent of the person's reliance on knowledgeable professionals;
2. The person's level of sophistication and education; and,
3. The person's familiarity with tax matters.⁶¹

Proof of actual knowledge is not required. Rather it is appropriate to rely on objective evidence of the promoter's knowledge of the transaction.⁶²

The solar energy credit under [IRC § 48](#) is part of the business investment credit found at [IRC § 46](#) and made deductible against a taxpayer's tax obligation under [IRC § 38](#). The energy credit is calculated based on "the energy percentage of the basis of each energy property placed in service during such taxable year."⁶³ Energy property is defined in [section 48](#) as "equipment which uses solar energy to generate electricity, to heat or cool (or provide hot water for use in) a

⁶¹ [United States v. Estate Pres. Servs., 202 F.3d 1093, 1103 \(9th Cir. 2000\).](#)

⁶² [United States v. Campbell, 897 F.2d 1317, 1321-22 \(5th Cir. 1990\).](#)

⁶³ [See IRC § 48\(1\).](#)

structure, or to provide **solar process heat**, excepting property used to generate energy for the purposes of heating a swimming pool”.⁶⁴ (Emphasis added.)

RaPower3 sells solar lenses that are based on the historical “Fresnel” style lens that focuses the sun’s rays with the intention to generate electricity or to provide solar process heat.⁶⁵ That solar process heat is designed to be used within a solar energy system to create electricity by heating a liquid that will react with a turbine, in turn causing the turbine to rotate a shaft within a coil to generate electricity. *Id.* at p. 4. But even more fundamental, the generation of solar process heat with the solar lenses sold by RaPower3 qualifies the lenses as “energy equipment” under IRC § 48. Even Plaintiff’s expert, Dr. Mancini concedes that the lenses erected by Defendants in Delta, Utah, generate solar process heat. Specifically, Dr. Mancini testified, “if you were doing an R&D project and you – as part of that process you had some excess heat that you could heat water with maybe and use for – for – maybe it’s your lavatory on-site or something, I’d consider that a process heat application and perfectly acceptable during an R&D project. I have no problem with that.”⁶⁶

Section 48 has a “placed in service” requirement for the energy equipment to qualify for a tax benefit in the taxable year.⁶⁷ In this case, the solar lenses purchased by RaPower3 customers are placed in service at the time of purchase because the lenses were manufactured and stored in a warehouse before most people purchased lenses. For purposes of the tax code, energy property is placed in service when “placed in a condition or state of readiness and

⁶⁴ [See IRC § 48\(3\)\(A\)\(i\).](#)

⁶⁵ [Pl. Ex. 2.](#)

⁶⁶ T. Mancini Depo p. 156 (152-156), excerpts from the Manici deposition are attached as Exhibit 2, hereto.

⁶⁷

availability for a specifically assigned function.”⁶⁸ Thus, when lenses are on site and ready to be used either for installation into a solar array or to be used as replacement in the event of damage or broken lenses, Defendants believe the IRS’s published regulations allow the lenses to be considered as placed in service.

RaPower3 sends buyers of lenses a “placed in service” letter after a lens purchase which provides that the lens(es) purchased have been placed in service.⁶⁹ Defendants have consistently relied on the tax court decision in [Cooper v. Comm’r, 88 T.C. 84 \(1987\)](#) for the proposition that a lessor of solar energy property is deemed to have placed the property in service when it is first held out for leasing to others in a profit-motivated leasing venture. *Id.* at 114. [Waddell v. Comm’r, 86 T.C. 848 \(1986\)](#) provides that “it is not necessary that the property actually be used during the taxable year in the taxpayer’s profit-motivated venture. It is sufficient that the property be available for use.” *Id.* at 897.

Defendants studied the tax code before promoting the tax benefits of owning and leasing solar lenses. Furthermore, in 2010 RaPower3 obtained legal advice that the tax treatment was available as they understood it and as they promoted it.⁷⁰ Then confirmed this position in a tax memorandum from Kirton & McConkie in 2012.⁷¹

⁶⁸ [Reg. § 1.46-3\(d\)\(1\)\(ii\)](#). The IRS Regs use the example of when parts are “placed in service” as when they are set aside for use as replacements for a particular machine (or machines) in order to avoid operational time loss. *Id.* at [1.46-3\(d\)\(2\)\(i\)](#).

⁶⁹ Pl. Ex. 125 (Doc. 254-33); Ex. 466.

⁷⁰ [See Pl. Ex. 23](#).

⁷¹ See Pl. Ex. 363 at Bates numbers KM196-208, attached hereto as Ex. 10

Taxpayers have been audited by the IRS for taking the tax credit and depreciation after buying solar lenses from RaPower3. In all of those audits, the IRS denies the tax treatment. Once an audit is complete, the IRS issues a notice of deficiency to the taxpayer.⁷²

After the IRS issues a notice of deficiency, the taxpayer has the right to litigate the correctness of the tax deficiency in the Tax Court.⁷³ At present, at least 193 cases are being litigated on behalf of taxpayers who received notices of deficiency in the United States Tax Court.⁷⁴ There are presently more cases in audit that, it is anticipated, those taxpayers will likewise appeal to the Tax Court for a determination of the deficiency determined by the IRS. Each of the cases that goes to appeal are assigned to Judge Albert Lauber of the Tax Court and are subject to a standing order staying the progress of the appeal.⁷⁵ As of this date, the solar equipment cases are still pending in the Tax Court and no trial has been scheduled in any of the pending cases.⁷⁶ And defendants are not aware of any solar equipment case involving RaPower3 that has been tried on the merits in the Tax Court, U.S. District Court, or the U.S. Court of Federal Claims.⁷⁷

Based on that history, Defendants believe the tax treatment that is promoted by RaPower3 is not an abusive tax shelter, but is an available tax benefit program designed to *“reach a level of research and development we haven’t seen since the Space Race We’ll invest in biomedical research, information technology, and especially clean energy technology – an investment that will strengthen our security, protect our planet, and create countless new jobs*

⁷² See [Doc. 257-1](#), Declaration of Paul Jones, at ¶ 7.

⁷³ [Id. at 9](#).

⁷⁴ [Id. at 11](#).

⁷⁵ [Id. at 13-18](#).

⁷⁶ [Id. at 19](#).

⁷⁷ [Id. at 20](#).

*for our people. . . . Already we're seeing the promise of renewable energy. . . . We need to get behind this innovation. And to help pay for it, I'm asking Congress to eliminate the billions in taxpayers dollars we currently give to oil companies. . . . So instead of subsidizing yesterday's energy, let's invest in tomorrow's."*⁷⁸

2. EVEN ASSUMING THE SECTION 48 TAX CREDIT IS NOT AVAILABLE TO PURCHASERS OF RAPOWER3 LENSES, THERE EXIST GENUINE ISSUES OF MATERIAL FACT WHETHER ANY DEFENDANT KNEW OR SHOULD HAVE KNOW THAT THE POSITION TAKEN IN PROMOTING THE TAX BENEFITS WAS FALSE OR FRAUDULENT.

The main defect in Plaintiff's summary judgment motion is Plaintiff's presumption that Defendants were intentionally misleading purchasers to make tax decisions that were unlawfully claimed. There is nothing in the record that the government can point to as a "smoking gun" that suggests Defendants were participating in a scheme to defraud the government out of taxpayer dollars. Defendants have a genuine belief that the tax benefits of being part of RaPower3 are legitimately claimed and available to individuals who want to be involved with clean energy. Before promoting the tax benefits of purchasing RaPower3 lenses, defendants obtained and relied on the advice of counsel.

a. Nothing in the Record before the Court Indicates that Defendants Do Not Hold a Genuine Belief that the Tax Treatment Promoted by RaPower3 was legally available to RaPower3 customers.

The government cannot point to any document in the record that discredits Defendants' legitimate belief that the solar tax credit and depreciation deduction are available to buyers of RaPower3 solar lenses.⁷⁹ Thousands of pages of defendants' emails and webpages from

⁷⁸ [Barack Obama, State of the Union, January 25, 2011.](#)

⁷⁹ The government's case is largely based on slandering Defendants in their Complaint and motion, which they have had repeated in news media reports. They are seeking to destroy Defendants' ability to continue with development.

RaPower3's website have been produced in discovery in this case and nowhere has the government been able to demonstrate that defendants have shown any mal intent or contradiction to the proposition that the solar tax benefits promoted are available to taxpayers.

Quite to the contrary, Defendants continue to maintain that the tax treatment is available to taxpayers who buy solar lenses. They believe in this position so much that Mr. Johnson continues to put his money behind his belief and pay for the audits and appeals for affected taxpayers. He does this because he believes he is right. The same is true for Mr. Shepard and was true for Mr. Freeborn.⁸⁰

Missing from this case is the allegation found in many tax scheme cases where the promoters are guilty of living a lavish lifestyle, spending money injudiciously, hiding assets or other badges of fraud. Unlike those schemes, Defendants live modestly, have used their own money to further the solar technology, and have invested their own time, money, sweat and effort to make this technology a reality.

b. Defendants Relied on the Advice of Legal Counsel When They Promoted the Tax Benefits of Purchasing Solar Lenses from RaPower3.

Very early in the history of this case Mr. Johnson contacted legal counsel to discuss the applicability of the proposed tax benefits to buyers of RaPower3 lenses. In about October of 2010, Mr. Johnson retained the services of Anderson Law Center, PC, in Delta, Utah, to obtain legal advice as to the availability of tax benefits associated with the sale of the Fresnel lenses. As a result of that consultation, Anderson Law Center provided Mr. Johnson two letters that confirmed that the solar tax credit and depreciation deduction were available to lens purchasers. In the November 9, 2010 letter to "Potential RaPower3 Customer[s]" the Anderson Law Center

Having failed to do so with defamatory statements, they are now seeking to have a Receiver appointed to close down Defendants' continuing research and development.

⁸⁰ Mr. Freeborn passed away on December 4, 2017.

explained there are four possible ways to reduce tax liability: energy credits, depreciation, § 179 costs, and deductions and expenses.⁸¹ The letter expressly provides that while all four approaches may apply to the RaPower3 customer, the letter is intended to be used to “review with your own tax professional and determine the applicability to your own unique financial situation.” Id.

The four-page Anderson letter concludes by pointing out that the US government is enacting programs geared to foster and encourage development of energy sources. RaPower3’s equipment could allow buyers to enter the energy market and capitalize on those government incentives. Then a disclaimer is added that “Although we have tried to ensure our information is accurate and useful, we are not acting as your attorney and the above is offered to you for informational purposes only. We recommend that you consult your own lawyer and tax professional for particularized assurance that the information applies to your situation.” Id. p.4.

The Andersons both testified they believe the research and analysis that went into the letters given to RaPower3 were true and accurate at the time given.

In August of 2012, the Salt Lake City law firm of Kirton & McConkie was hired to provide a general summary of the necessary requirements to claim an energy tax credit, how the tax credit was calculated and to review and revise some for transaction documents for buyers of solar lenses. As a result of that engagement, on October 31, 2012, Kirton & McConkie provided Mr. Johnson a memorandum on the subject of “Tax Issues Relating to Purchase of Solar Lenses.”⁸² The Kirton & McConkie memorandum is 12 pages long and goes into significant detail about how solar lenses that buyers purchase from RaPower3 qualify as “energy property”

⁸¹ [Pl. Ex. 23](#).

⁸² Pl. Ex. 362.

that is eligible for the energy tax credit under IRC Section 48. The memorandum provides that buyers of solar lenses will be able to claim the energy credit in the year that the solar lenses are placed into service. The memorandum also concludes that the solar lenses will be eligible for depreciation under IRC Section 168(a) as 5-year property.⁸³

The Kirton McConkie memorandum contains a “circular 230 disclosure” which was included to inform people who may read the memorandum that it cannot be used by any taxpayer for the purpose of avoiding United States federal tax that may be imposed on the taxpayer. *Id.* at p. 12.

The Kirton McConkie memorandum recommends that each taxpayer seek advice based on the taxpayer’s particular circumstances from an independent tax advisor. Mr. Birrell, the author of the Kirton McConkie memorandum acknowledged during his deposition that to prepare the memorandum, he reviewed the applicable provisions in the Internal Revenue Code, the Treasury regulations, performed research on case law and IRS rulings and reviewed materials available through his firm’s electronic research system, BNA Tax management Portfolios and CCH descriptions of the energy tax credit and so forth.⁸⁴

Mr. Birrell further testified that while drafting the Kirton McConkie memorandum he had enough information to draft the memorandum, which was meant to be a general overview of the tax benefits associated with the solar business as described in the memo. Mr. Birrell testified that the memorandum was accurate when he wrote it and that it was honest and complete.

⁸³ *Id.* at “Executive Summary” and as explained throughout the 12-page memorandum.

⁸⁴ Birrell Depo pp. 235-236, excerpts attached hereto as Ex. 7.

Then Mr. Birrell testified that he was not aware of anything else that would change the legal analysis of the memorandum -- only the factual assumptions and representations that he felt were omitted.

Defendants relied on the Anderson Letter and the Kirton/McConkie memorandum in advocating the tax benefits of buying solar lenses from RaPower3. Their reliance was reasonable and in good faith.

3. THE TAX CODE DOES NOT REQUIRE REVENUE OR EVEN INCOME FROM SOLAR POWER GENERATION.

Nothing in the tax code requires the generation of electricity as a prerequisite for availability of the solar tax credit. Section 48 provides many different uses of “energy equipment” that qualify for the tax credit apart from the generation of electricity. In particular, energy equipment includes equipment that uses solar energy to heat, cool, or provide hot water for use in a structure, or to provide solar process heat.⁸⁵ Treasury Reg. 1.48-9, 26 CFR 1.48-9, defines energy property. It expressly includes “solar or wind energy property.”⁸⁶ Solar energy property is defined at 26 CFR 1.48-9(d) and includes equipment and materials, as well as parts related to the function of that equipment, that use solar energy directly to perform these functions, generally through the “use of equipment such as collectors (to absorb sunlight and create hot liquids or air), storage tanks (to store hot liquids), rockbeds (to store hot air), thermostats (to activate pumps or fans which circulate the hot liquids or air), and heat exchangers (to utilize hot liquids or air to create hot air or water).”⁸⁷ “Solar energy property includes equipment that uses solar energy to generate electricity, and includes storage devices, power

⁸⁵ [I.R.C. § 48\(1\)](#).

⁸⁶ [Treas. Reg. § 1.48-9\(a\)\(1\)](#).

⁸⁷ [Treas. Reg. § 1.48-9\(d\)\(1\)](#).

conditioning equipment, transfer equipment, and parts related to the functioning of those items. In general, this process involves the transformation of sunlight into electricity through the use of such devices as solar cells or other collectors. However, solar energy property used to generate electricity includes only equipment up to (but not including) the stage that transmits or uses electricity.”⁸⁸

The U.S. Tax Court has ruled that a completely functional solar electrical generation system is not necessary before equipment may qualify as solar energy property.⁸⁹ The fact that the solar energy equipment is used in research and development of a functional solar energy generation system is enough to qualify them as solar energy property. *Id.*

Even if the court accepts for purposes of this summary judgment that the solar arrays have not yet generated electricity sufficient to be sold on the open market, there is a genuine issue of material fact as to whether the solar arrays have and do generate solar process heat. Even Plaintiff’s expert concedes that -- at a minimum the solar lenses provide solar process heat through concentrating the sun’s energy for use in the research and development stage of generating electricity.⁹⁰ The statute requires only one or the other, and therefore producing solar process heat is enough to qualify the RaPower3 Solar Lenses as solar energy property.

Because there are genuine disputes as to the material facts in this case, summary judgment is not available to Plaintiff. Accordingly, the motion for partial summary judgment should be denied.

B. The argument that Defendants are guilty of a “gross valuation overstatement as to any material matter” as relates to the stated value of the solar lenses is a red herring. The argument has nothing to do with the tax treatment at issue herein.

⁸⁸ [Treas. Reg. § 1.48-9\(d\)\(3\).](#)

⁸⁹ [Cooper v. Comm’r, 88 T.C. 84 \(1987\).](#)

⁹⁰ T. Mancini Depo p. 156, excerpts attached hereto as Ex. 2.

Plaintiff makes the argument that IRC § 6700 is implicated independent of any tax shelter or scheme if there is a gross valuation overstatement as to the value of any property or services. That issue is a red herring in this case because the tax benefit claimed is not based on any value associated with the solar lenses, but is based on the actual payment made by buyers for the purchase of the solar lenses, which, in most cases is \$3500.

Considering all of the time, effort and expense that has gone into the development of the RaPower3 Fresnel lens, the price is not a gross valuation overstatement. Nothing in Plaintiff's motion has put forth discoverable evidence as to the actual value of the lenses as installed in the solar arrays and towers. Therefore, the claim of gross valuation overstatement should be disregarded for purposes of this summary judgment motion.

IV. CONCLUSION

Based on the foregoing, Plaintiff's motion for partial summary judgment should be denied.

Dated this 17th day of December, 2017.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (Doc. 251)** was sent to counsel for the United States in the manner described below.

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