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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

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

Defendants.

Civil No. 2:15-cv-00828 DN

**UNITED STATES' REPLY TO
DEFENDANTS' OPPOSITION TO
MOTION IN LIMINE TO EXCLUDE
"EXPERT" TESTIMONY OF KURT
HAWES AND RICHARD JAMESON**

Judge David Nuffer
Magistrate Judge Brooke C. Wells

The United States moved to exclude “expert” testimony of Kurt Hawes and Richard Jameson because their testimony does not meet the standards under [Fed. R. Evid. 702](#).¹ Specifically, we contend Hawes and Jameson offer inadmissible legal opinions that are *per se* unhelpful to the Court. Even if legal opinions were helpful in this case, which they are not, Hawes and Jameson’s purported methodologies are unreliable. Their only function was to assume the veracity of Defendants’ self-serving statements, and apply the law in the manner the Defendants advocate, that violates basic professional standards. Finally, Hawes and Jameson lack the requisite “knowledge, skill, experience, training, or education” to qualify as “experts” here. The Court should exclude Hawes and Jameson as experts.

In their opposition, the Defendants fail to rebut our substantive arguments. They do not meet their burden of establishing the admissibility of their purported expert testimony under [Fed. R. Evid. 702](#).² Defendants insist that Hawes’ and Jameson’s minimal education, credentials and experience will “help” the Court determine whether a “reasonable person” in the Defendants’ subjective position would have known that their own statements were false or fraudulent.³ The Defendants ignore a critical fact: neither Hawes nor Jameson know what Defendants knew about the availability of tax benefits, or when they knew it. The Defendants handpicked the law and facts supporting their “experts” opinions. Thus, the “experts” offer only uninformed and

¹ [ECF Doc. No. 249](#).

² [United States v. Nacchio](#), 555 F.3d 1234, 1241 (10th Cir. 2009).

³ [ECF Doc. No. 264](#); 26 U.S.C. § 6700(a)(2).

impermissible legal opinions based on incomplete and self-serving facts. Simply being an attorney or enrolled agent does not entitle one to advocate “from the witness stand.”⁴

The Defendants fail to demonstrate that these “experts” satisfy the qualification or methodology requirements of [Fed. R. Evid. 702](#). This Court is fully capable of applying the Internal Revenue Code and Treasury Regulations to all the facts of this case; it does not need help from Hawes and Jameson.

I. Hawes and Jameson lack knowledge of the facts.

The Defendants claim they are offering Hawes and Jameson’s opinions to show that the Defendants did not know, or have reason to know, that their statements were false or fraudulent.⁵ The Defendants are correct that § 6700(a)(2)(A) requires a showing that “a reasonable person in [the Defendants’] *subjective* position would have discovered” the falsity of his representations.”⁶

But Defendants do not address the fatal flaw that undermines this proffered “expert” testimony: Hawes and Jameson simply lack critical information about what the Defendants knew or had reason to know *when* they made statements to customers about the availability of tax benefits as a result of buying in to the solar energy scheme.

Hawes first heard of this case in August 2017 when the Defendants asked him to offer expert testimony.⁷ He never advised the Defendants on the transaction, nor did he advise their

⁴ [NexMed Holdings, Inc. v. Beta Techs., Inc.](#), 2009 WL 2207180, at *1 (D. Utah July 21, 2009) (Nuffer, M.J.).

⁵ [ECF Doc. No. 264](#), pp. 2-5.

⁶ [United States v. Hartshorn](#), 751 F.3d 1194, 1202 (10th Cir. 2014) (emphasis added).

⁷ [ECF Doc. No. 249-30](#). Deposition of Kurt Hawes, (“Hawes Dep.”) 75:4-8.

customers.⁸ Johnson and Shepard have been making the statements at issue in this case for at least the last ten years.⁹ Hawes' legal opinions are patently uninformed as to what the Defendants knew, or had reason to know, *when* they made their statements.

Similarly, Jameson does not know what the Defendants knew about the veracity of their statements when they made them. Jameson's main role in the scheme was preparing tax returns for the Defendants' *customers*, which he has done since 2012.¹⁰ He also represents some of them before the IRS.¹¹ Jameson does not critically question the information that the Defendants provide to their customers because "[i]t is not [his] job to audit them."¹² Jameson met Greg Shepard in 2013¹³ and prepared some of Shepard's tax returns.¹⁴ Jameson never asked Shepard why the solar lenses are not generating income, nor is he concerned with whether the solar lenses are worth what the Defendants say they are.¹⁵ Jameson met Neldon Johnson, in or around 2014,¹⁶ and never felt the need to ask Johnson why his solar lenses do not generate income.¹⁷ When confronted with information that does not fit the Defendants' narrative, Jameson cannot support

⁸ [ECF Doc. No. 249-30](#), Hawes Dep. 133:21-134:6.

⁹ See generally, [ECF Doc. No. 251](#), United States' Motion for Partial Summary Judgment.

¹⁰ [ECF Doc. No. 249-27](#). Deposition of Richard Jameson ("Jameson Dep.") 67:18-21. This case involves only the persons and entities who promoted the scheme; their customers are not parties to this case.

¹¹ [ECF Doc. No. 249-27](#), Jameson Dep., 22:12-24:13; 96:13-97:12.

¹² [ECF Doc. No. 249-27](#), Jameson Dep., 90:15-24; 169:8.

¹³ [ECF Doc. NO. 249-27](#), Jameson Dep., 104:22-25.

¹⁴ [ECF Doc. No. 249-27](#), Jameson Dep., 194:5-22. Shepard's personal tax liabilities are not at issue in this case.

¹⁵ [ECF Doc. No. 249-27](#), Jameson Dep., 175:17-176:17.

¹⁶ [ECF Doc. No. 249-27](#), Jameson Dep., 78:12-23.

¹⁷ [ECF Doc. No. 249-27](#), Jameson Dep., 89:3-16; 175:11-14.

his position.¹⁸ This is because Jameson only knows the information the Defendants give him to prepare customers' tax returns or advocate before the IRS.

Neither Jameson nor Hawes know what the Defendants knew and when. Therefore, they cannot know, and cannot simply opine on whether a reasonable person in the Defendants' subjective, *i.e.*, their own,¹⁹ position had reason to know that their statements to customers about tax benefits from the solar energy scheme were false or fraudulent. None of the testimony that Hawes or Jameson proffer as expert witnesses make it more or less probable that the Defendants knew, or had reason to know, that their statements were false or fraudulent *when* the Defendants made their statements. Hawes' and Jameson's "expert" opinions have no "connection to the pertinent inquiry" and are therefore irrelevant and inadmissible under [Fed. R. Evid. 403](#) and [702](#).²⁰

The question of what the Defendants knew, or had reason to know, is inherently factual. Evidence on this topic should (and will) come from the Defendants and their *contemporaneous* advisors. Only these individuals, along with other contemporaneous evidence, can shed light on

¹⁸ See, e.g., [ECF Doc. No. 249-27](#), Jameson Dep., 90:25-92:6; 220:13-222:16 (discussing the fact that defendant LTB, LLC, which is purportedly operating and maintaining the lenses, does not actually do anything). Cf. United States' Motion for Partial Summary Judgment, [ECF Doc. No. 251](#), at p. 42, ¶¶ 211-231.

¹⁹ *United States v. Campbell*, 897 F.2d 1317, 1322 (5th Cir. 1990) ("reason to know standard [in a § 6700 case] allows imputation of knowledge so long as it is commensurate with the level of comprehension required by the speaker's role in the transaction."). See also *Judisch v. United States*, 755 F.2d 823, 829 (11th Cir. 1985) (Under [26 U.S.C. § 6694](#) (which contains the imposes a penalty on tax return preparers who take an unreasonable position on a tax return if the preparer "knew (or reasonably should have known)" the position was unreasonable, "[a]n income tax preparer's 'good faith' and the reasonableness of a position he takes must be judged *at the time the work is done*. Therefore, only the information available to and considered by the income tax preparer in preparing a tax return is relevant to this good faith issue.") (emphasis added).

²⁰ *Smith v. Terumo Cardiovascular Sys. Corp.*, 2017 WL 2985749, at *3-4 (D. Utah 2017) (Nuffer, J.) ("Expert testimony if subject to Federal Rule of Evidence 403."). See generally, *Daubert.*, 509 U.S., at 591-92 ("Rule 702's "helpfulness" standard requires a valid scientific connection to the pertinent inquiry" to be admissible).

what the Defendants actually knew, or had reason to know, and *when*.²¹ This uncomplicated issue does not require expert testimony.²² The Court, as factfinder, will compare what the Defendants themselves knew or had reason to know, with the actual statements the Defendants made, and decide whether the Defendants knew, or had reason to know their statements were false or fraudulent. This is a straightforward exercise in fact-finding.

To the extent that the fact-finding inquiry includes legal analysis, the Court has the required expertise.²³ Hawes' and Jameson's interpretation of the Internal Revenue Code and their legal opinions on this case are irrelevant. Admitting testimony on these matters would impermissibly tell the Court what result to reach²⁴ and invade the "exclusive province of the court" through "advocacy from the witness stand."²⁵

For all of these reasons, contrary to Defendants' unsupported assertions, Hawes and Jameson's legal opinions will not be "helpful" to the Court. Not only are their opinions irrelevant, Hawes' and Jameson's proffered testimony fails [Fed. R. Evid. 702](#) due to their unreliable methodologies and inadequate expertise.

²¹ Indeed, at trial the United States will offer testimony from the Defendants and their contemporaneous advisors including attorneys Ken Birrell, Todd Anderson, Jessica Anderson and CPA's Ken Oveson and Cody Buck.

²² See *Nagy v. United States*, 519 Fed. Appx. 137, 142 (4th Cir. 2013) (expert testimony on legal matters irrelevant to the question of whether § 6700 promoter knew or had reason to know statements were false or fraudulent.)

²³ *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.Cir.1997). In their brief, Defendants suggest that a jury will be the factfinder in this case. [ECF Doc. No. 264](#), p. 2. The Defendants are fully aware "there will be no jury at trial," [ECF Doc. No. 103](#), p. 2, because the Court struck their jury demand. [ECF Doc. No. 43](#).

²⁴ *Stobie Creek Investments, LLC v. United States*, 81 Fed. Cl. 358, 363 (2008).

²⁵ *NexMed Holdings, Inc. v. Beta Techs., Inc.*, 2009 WL 2207180, at *1 (D. Utah July 21, 2009) (Nuffer, M.J.).

II. Hawes’ and Jameson’s methodologies are unreliable.

Because expert witnesses are “permitted wide latitude to offer opinions,” Fed. R. Evid. 702 requires they “have a reliable basis in the knowledge and experience of [their] discipline”²⁶ In analyzing reliability, the focus is “whether the reasoning or methodology underlying the testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue.”²⁷ The proponent must show that the expert witness “employ[ed] in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”²⁸ When an expert fails to satisfy this requirement, they offer nothing more than “junk science.”²⁹

Analyzing the expert’s methodology is part of the Court’s gatekeeping role.³⁰ Among the factors to analyze are “the existence and maintenance of standards controlling the technique’s operation” and “whether the technique has achieved general acceptance in the relevant scientific or expert community.”³¹ “[S]ubjective belief or unsupported speculation” is not reliable.³²

In the United States’ opening brief, we demonstrated that Hawes’ and Jameson’s methodologies are unreliable because they offer *nothing but* unsupported speculation and fail to meet their respective professions’ standards: the Utah Rules of Professional Conduct for

²⁶ *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592 (1993).

²⁷ *Id.*, at 592–93.

²⁸ *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

²⁹ *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 153 (1997).

³⁰ *Hoffman v. Ford Motor Co.*, 493 Fed. Appx. 962, 975 (10th Cir. 2012); *United States v. Baines*, 573 F.3d 979, 985–86 (10th Cir. 2009) (citing *Daubert*).

³¹ *United States v. Baines*, 573 F.3d 979, 985 (10th Cir. 2009) (citing *Daubert*).

³² *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003) (citing *Daubert*).

attorneys (Hawes) and Treasury Regulations³³ (Jameson). In their opposition, Defendants do not even identify either set of standards (or any other standard they claim Hawes and Jameson used to perform their “analysis”). Defendants do not explain how Hawes and Jameson met the standards relevant to their respective professions, because Defendants cannot do so. According to the Defendants, it is sufficient that Hawes “reviewed the facts and law” including “transactional documents,” “opinion letters” and “applicable sections of the tax code and case law”³⁴ and Jameson provides citations to controlling laws and regulation [sic.] that apply facts necessary to form his opinions.”³⁵

These assertions fail to rebut, with fact or law, the United States’ showing that both Hawes and Jameson fail their professional standards because they uncritically accept the facts and law that the Defendants gave them, and cannot support their positions when presented with contrary facts or authority.³⁶ Hawes failed to exercise “independent professional judgment” and render the “independent professional judgment [and] candid advice,” “even if unpleasant,” that is required of all Utah attorneys.³⁷ Jameson failed to exercise any “due diligence” in determining the correctness and reasonableness of his representations, as IRS enrolled agents are required to do.³⁸

³³ Circular 230, which regulates practice before the Internal Revenue Service. See 31 C.F.R. § 10.33-34.

³⁴ [ECF Doc. No. 264](#), p. 6.

³⁵ [ECF Doc. No. 264](#), p. 7. In other words, Hawes and Jameson did exactly what the Court will do when it decides this case: apply the law to the facts. *Stobie Creek Investments, LLC v. United States*, 81 Fed. Cl. 358, 360 (2008). But unlike the Court, which *is* an the expert on the law, *Burkhart v. Wash. Metro. Area Transit Auth.*, 112 F.3d 1207, 1213 (D.C.Cir.1997), Hawes and Jameson make no effort to apply *all* the relevant facts and law.

³⁶ See [ECF Doc. No. 249](#), p. 10; [ECF Doc. No. 249-30](#), pp. 36-54 (Hawes Dep. 140:7-212:11) and [ECF Doc. No. 249-27](#), pp. 52-59 (Jameson Dep. 207:11-235:19).

³⁷ [ECF Doc. No. 249](#), p. 22.

³⁸ [ECF Doc. No. 249](#), p. 23.

In other words, both Hawes and Jameson offer nothing more than “subjective belief” and “unsupported speculation.”³⁹

Rather than substantively addressing this critical flaw in their purported experts’ qualifications to offer opinion testimony as substantive evidence in this Court, Defendants suggest we address “perceived weaknesses” through “vigorous cross-examination.” The Defendants miss the point of *Daubert* and its progeny entirely. Hawes’ and Jameson’s testimony is exactly the type of testimony that *Daubert* precludes: testimony that lacks the same level of intellectual rigor that characterizes the practice of an expert in the relevant field.”⁴⁰ It has no place as substantive evidence in a federal court.

III. Hawes and Jameson have no specialized experience.

Defendants insist that their experts have “sufficient knowledge, skill, experience, training and education” to offer their opinions.⁴¹ They cite to Hawes’ 14-year career practicing tax law as adequate to establish him as an expert. They argue that Jameson’s “masters in taxation,” 26 years of experience running an H&R Block franchise and the fact that he has been an enrolled agent since 1989 are adequate to make him an expert. In other words, the Defendants argue that because Hawes and Jameson have some generalized experience in tax, they must be qualified to offer expert opinions in this Court. The Defendants are wrong.

The test for admissibility is “not whether the expert has a general expertise in the relevant field, but whether the expert has sufficient specialized knowledge to assist [the factfinder] in

³⁹ *Dodge v. Cotter Corp.*, 328 F.3d 1212, 1222 (10th Cir. 2003).

⁴⁰ See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

⁴¹ [ECF Doc. No. 264](#), p. 10.

deciding the particular issues before the court.”⁴² As argued in our motion, and not refuted in the Defendants’ opposition, by his own admission Hawes brings no specialized expertise to this case beyond the general experience of a tax attorney who has been practicing for 12 or 13 years.⁴³ An attorney’s “time in service” in a particular legal field does not necessarily lead to expertise.⁴⁴ Similarly, Jameson is return preparer who has represented the defendant’s customers before the IRS. But he lacks the specialized knowledge to offer expert testimony on the legal issues in this case. Defendants’ opposition makes no showing that these witnesses have “specialized knowledge” about the “particular issues” of this case; their argument rests entirely on Hawes’ and Jameson’s generalized experience. This deficiency is especially relevant here, where the experts are offering legal opinions.⁴⁵

IV. Conclusion

“The dangers of allowing an invested advocate to testify on matters of law or fact far outweigh any potential benefit of such testimony.”⁴⁶ Accordingly, the Court should grant the United States’ motion *in limine* and exclude Hawes and Jameson for all the reasons enumerated in our opening brief, and unrebutted by the Defendants.

⁴² *Smith v. Terumo Cardiovascular Sys. Corp.*, 2017 WL 2985749, at *3 (D. Utah 2017) (Nuffer, J.) (citing to *Kumho*, 526 U.S. at 156) (emphasis added).

⁴³ [ECF Doc. No. 249](#), p. 20; [ECF Doc. No. 249-30](#), Hawes Dep. 74:4-75:3.

⁴⁴ *Cicero v. Borg-Warner Auto., Inc.*, 163 F. Supp. 2d 743, 749 (E.D. Mich. 2001).

⁴⁵ See [ECF Doc. No. 249](#), p. 17, n. 95 (discussing *United States v. Offill*, 666 F.3d 168, 175 (4th Cir. 2011) and *SCO Grp., Inc. v. Novell, Inc.*, 2010 WL 725573 (D. Utah Mar. 2, 2010)). In the rare instances that courts permit experts to opine on the law, their credentials are far superior to Hawes and Jameson.

⁴⁶ *NexMed Holdings, Inc. v. Beta Techs., Inc.*, 2009 WL 2207180, at *1 (D. Utah July 21, 2009) (Nuffer, M.J.).

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Respectfully submitted,

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***ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2018, the foregoing document was filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Christopher R. Moran
CHRISTOPHER R. MORAN
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