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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>RAPOWER-3, 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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE EXPERT REPORT OF THOMAS MANCINI AND EXCLUDE TESTIMONY AT TRIAL</p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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Defendants, through undersigned counsel, hereby submit this Reply Memorandum in Support of Defendants' Motion to Strike the Expert Report of Thomas Mancini and Exclude Testimony at Trial.

I. Plaintiff's opposition ignores the flawed methodology underlining Mancini's conclusions.

A. Plaintiff offers no credible explanation for Mancini's failure to take accurate measurements to form his opinion.

Admissibility of an opinion under [Rule 702\(b\)-\(d\)](#) hinges on the sufficiency of facts and reliability of an expert's methodology. Glaringly absent from Plaintiff's opposition is any explanation (much less justification) for why Mancini decided to provide 'eyeball estimates' of measurements involving critical components, rather than employ acceptable measurement practices. Instead, Plaintiff states that its expert could not provide measurements because Defendants provided none and because the conditions during the site visits prevented any measurement taking.¹ These excuses ignore both common sense and the contract between Plaintiff and its expert.

Defendants justifiably criticized Mancini's decision to use only a video clip to measure the size of a solar image. Mancini failed to use the two accepted methods of determining solar image size (i.e., measuring the solar flux distribution in the receiver plane, or using a calorimeter).² Instead, he used only his unreliable approximations taken from watching a "video clip Solar Lens Test from the RaPower Website" "because he saw no test data for the lens in the documents [he] reviewed." However, Mancini had twice visited both the construction and research and development sites.³ While he was there, despite the opportunity it afforded him, he took no measurements using either of the accepted scientific methods he identified as normally used to gather reliable data by the scientific community. Moreover, common sense dictates that taking a measurement is always more reliable than an 'eyeball estimate' from watching a video.

¹ [ECF Doc. 263](#) at pg. 21.

² See [ECF Doc. 253-1](#) (Mancini Report) at ¶ 87.

³ *Id.*

The same criticism applies to Mancini's rough estimate of the dimensions of the receiver. Rather than take a measurement on site of the dimensions of the receiver aperture, Mancini relied on a "photograph of the tubular receiver.... taken during [his] tour of the Manufacturing Facility to estimate the dimensions of the receiver aperture at 60 cm by 50 cm."⁴ In its opposition, Plaintiff provides no explanation why Mancini could not have measured the receiver at the site with a reliable measurement tool, rather than take a measurement *from a photograph that he took*. There is no attempt to show the photo estimate is reliable, scientific, reproduceable, or an acceptable practice. Nor is there any proof Mancini has expertise in such guesstimates or has ever been able to make reliable estimates from watching on-line videos or examining photographs in the past. That kind of forensic expertise is entirely lacking in Mancini's background, education and experience.

In its opposition, Plaintiff makes no specific effort to justify Mancini's approach to guessing at measurements. Instead, Plaintiff excuses Mancini's failure to use accepted measurement approaches by stating that the site conditions were "dirty and disorganized."⁵ This explanation is not a reason, but an excuse. Solar energy sites are always outside, generally in desert locations, and therefore typically "dirty." Likewise, when a site has active construction, research and development underway, there are invariably construction materials and equipment at the site that appears "disorganized" to laymen (like Plaintiff's counsel and Mancini). To a construction manager, however, such conditions are essential, ordered and an organized staging area for equipment and materials. Using two disparaging adjectives about the site are neither a justification nor a convincing argument to excuse Mancini's neglect.

⁴ [Id.](#) at ¶ 91.

⁵ [ECF Doc 263](#) at pg. 15.

Mancini did not take measurements or test the solar technology because as Mancini stated: “My contract doesn’t involve doing any testing or measurement.”⁶ In his own words, his failure to test or take measurements had nothing to do with the “dirty and disorganized” condition of the site. Rather, he refused to test or take measurements because Plaintiff did not contract him to take measurements or tests of the solar technology at issue. They hired him for a ‘barnyard opinion’ and that is what he offers. It is clearly not a qualified scientific analysis. He offers only to regurgitate insults and derision Plaintiff hired him to spout, and faithfully accomplishes only that. One would think that for \$96,000.00 he could be troubled to provide reliable measurements.⁷

Plaintiff also suggests Mancini’s approach is justified because Defendants have not provided him the data or materials he expected to see.⁸ However, once again, this explanation ignores the fact the Mancini says he was not retained to measure or test the equipment. Mancini did not take measurements or undergo any tests because that was not required of him under his contract with the United States to do either. His failure to take measurements or test had nothing to do with the availability of data. It is Plaintiff’s burden to offer a reliable expert if they intend to have him testify. Qualifying that expert may impose upon Plaintiff the inconvenience of either providing him, or requiring him, to do sufficient work to allow their expert to offer an opinion that will be scientifically based and reliable. Plaintiff failed to do that and their expert likewise failed to do so. Defendants should not be blamed for Plaintiff’s inadequacies. Defendants should not be blamed for the Plaintiff’s expert’s failure. Plaintiff apparently doesn’t want to take the trouble to provide any proof in this case. Plaintiff is of the mistaken belief that invective and insults directed at Defendants will be enough to incite the Court to rule in its favor. It is an insufficient retort to

⁶ [ECF Doc 253-2](#) (Mancini Depo.) at pg. 67:19-24

⁷ Pl. Ex. 1004 (Mancini Statement of Work), a copy of which is attached hereto as Exhibit 1.

⁸ [ECF Doc 263](#) at pg. 4.

argue that Plaintiff's expert could not do his job because Defendants did not do enough to help him with his work.

B. Defendants' objection under Rule 702 to Mancini's report and testimony focuses on Mancini's methodology, not his conclusions.

Plaintiff asks the Court to permit these failures to go to the weight of Mancini's testimony rather than admissibility.⁹ However, that approach ignores the appropriate scrutiny under [Rule 702](#). Admissibility of an opinion under [Rule 702\(b\)-\(d\)](#) hinges on the sufficiency of facts and reliability of an expert's methodology.

As Plaintiff correctly notes, the Court should generally focus on an expert's methodology rather than the conclusion it generates.¹⁰ In this case, Mancini's failures do not relate to his ultimate conclusions, as shallow and unjustified as they are. But the failures are in the methodology employed to arrive at those faulty and unreliable conclusions. As explained above, Mancini refused to apply acceptable measurement approaches and instead provided guesstimates from videos and photos. Plaintiff offers nothing but "the Mancini guess method" to substitute for scientifically recognized methods of measuring solar flux distribution in the receiver plane or using a calorimeter. The Mancini guess method is not a recognized and acceptable method to measure and, therefore, is not an acceptable application of the methodology underlining his conclusions. Any failure that renders Mancini's analysis unreliable renders his testimony inadmissible.¹¹

Mancini has no qualification in optics and he did not run any optical tests.¹² He has no qualification or background that would render his guesses to have enough respect to be admitted as evidence in this case.

⁹ [ECF Doc. 263](#) at pg. 21.

¹⁰ [ECF Doc. 263](#) at pg. 18.

¹¹ [See Mitchell v. Gencorp Inc.](#), 165 F.3d 778, 782 (10th Cir. 1999) ("Under Daubert, 'any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. This is true whether the step completely changes a reliable methodology or merely misapplies that methodology.'") (citing [In re R.R. Paoli R.R. Yard PCB Litigation](#), 35 F.3d 717, 745 (3d Cir. 1994)).

¹² [ECF Doc. 253-2](#) at 124:4-18.

While these shortcomings would be excellent fodder for cross-examination, that would be a waste of time and resources. For the reasons stated above, Mancini's failures require the Court to employ its gatekeeper responsibility under [Rule 702](#) and prevent this unreliable testimony from being admitted.¹³ The shortcomings in Mancini's methodology cannot be ignored. Just because the failures can also serve the entertaining purpose of attacking Mancini's credibility during a trial, that does not mean his unqualified and conjectural rant should be allowed to be presented and waste time in the courtroom.

Finally, Mancini's opinion does not address any of the issues involved here. He admitted he was not offering an opinion related in any way to the application of any portion of the tax code at issue in this case.¹⁴ The scope of Mancini's opinion is entirely confined to an area this Court determined to be irrelevant, or at best a tertiary concern.¹⁵ Consequently, since Mancini's report relates solely to an irrelevant evaluation of the IAS technology and not any of the tax sections at issue, his testimony would not "help the trier of fact to understand the evidence or to determine a fact in issue." [See Rule 702\(a\)](#). Nor does he confine his report to the single component involved in public sales of solar lenses. The Fresnel lenses developed and implemented by RaPower-3, LLC, are clearly able to concentrate solar energy to produce solar process heat. There is no technical, scientific or engineering basis to criticize the lenses. The government provides no basis to allow Mancini to testify. This Court should strike his report and exclude his testimony at trial.

II. Conclusion

Plaintiff has failed to sufficiently justify the shortcomings raised in Defendants' motion to exclude Plaintiff's expert under [Rule 702](#) grounds. Therefore, Defendants' motion should be granted excluding Mancini's expert report and testimony at trial.

¹³ [Id.](#)

¹⁴ [See EFC 253-2](#) (Mancini Deposition at pgs. 9:24-25, 10:1-22)

¹⁵ [See ECF 158 at pg. 5.](#)

Dated this 12th day of January, 2018.

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' REPLY MEMORANDUM IN SUPPORT OF MOTION TO STRIKE EXPERT REPORT OF THOMAS MANCINI AND EXCLUDE TESTIMONY AT TRIAL** was sent to counsel for the United States in the manner described below.

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