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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 IN SUPPORT OF ITS MOTION FOR PARTIAL SUMMARY JUDGMENT** Judge David Nuffer Magistrate Judge Evelyn J. Furse

I. Introduction

Defendants Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc. ("IAS"), R. Gregory Shepard, and Roger Freeborn have promoted an abusive tax scheme centered on purported solar energy technology featuring "solar lenses" (the "solar energy scheme") to customers across the United States. In its motion for partial summary judgment, the United States showed that there are no genuine disputes of material fact on whether they have repeatedly engaged in conduct subject to penalty under 26 U.S.C. § 6700[1] because:

- the solar energy scheme is a "plan" under § 6700;[2]
- Defendants organized, or assisted in organizing the scheme, and sold the scheme to customers either directly or through other people;[3]
- Defendants told customers, while promoting the solar energy scheme, that by buying a solar lens and signing Defendants' transaction documents, a customer was in the "trade or business" of leasing solar lenses. As a result of being in that "trade or business," Defendants told customers they would be allowed a tax deduction for depreciation on the lens and the solar energy tax credit;[4]
- Defendants' statements were false or fraudulent as to material matters;[5] and
- Defendants knew or had reason to know that their statements were false or fraudulent.[6]

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[1] *See* ECF No. 2 Counts VII-XI.

[2] ECF No. 251 at 4-15, 54-55.

[3] ECF No. 251 at 4-15, 54-55.

[4] ECF No. 251 at 16, 56.

[5] ECF No. 251 at 16-52, 56-73.

[6] ECF No. 251 at 16-52, 56-73.

In their opposition brief, Defendants attempt to contest only the last two issues.[7] In doing so, they fail to address (or adequately dispute) the facts and the relevant legal authority on these issues. Defendants' irrelevant arguments do not create disputed issues for trial. For these reasons, this Court should enter partial summary judgment consistent with the proposed order submitted by the United States, and enjoin Defendants from making false or fraudulent statements.[8]

II. Response to Defendants' Statement of Additional Material Facts.

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.

UNITED STATES' RESPONSE: Denied that Johnson initially sought "legal advice as to the availability of tax benefits associated with the sale of the Fresnel lenses." Defendants' cited materials do not support this portion of the fact. Instead, Johnson approached Todd Anderson, of the Anderson Law Center with some questions about principles of tax law in October 2010.[9] Todd Anderson referred the questions to his wife and partner in the Anderson Law Center, Jessica Anderson.[10]

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[7] ECF No. 265 at 47-58. Defendants argue that summary judgment should not be granted on the United States' claims under § 6700(a)(2)(B), that Defendants made or furnished, or caused another to make or furnish, gross valuation overstatements while promoting the solar energy scheme. ECF No. 265 at 58-59. The United States did not move for summary judgment on this aspect of its claims for relief. ECF No. 251 at 3 n.7.

[8] 26 U.S.C. §§ 7402(a), 7408(b). Even if this Court finds that there is a genuine dispute of material fact as to any of the five issues presented in the United States' motion for partial summary judgment, this Court should nonetheless issue findings of fact on any other issue as to which there is no dispute, such that those issues may be established for trial in this case. *See* Fed. R. Civ. P. 56(g).

[9] Pl. Ex. 580, Deposition of Todd Anderson ("T. Anderson Dep."), Aug. 4, 2017, 55:1-56:4, 63:16-66:12; Pl. Ex. 570, ECF No. 213-3.

[10] T. Anderson Dep. 68:16-23.

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.

UNITED STATES' RESPONSE: Denied that the Anderson Law Center provided two "letters." Jessica Anderson delivered a letter to Johnson in or about October 2010 with her summary of the three general principles of tax law he had asked about, including "material participation," which goes to whether a customer's activity in a trade or business is substantial enough such that business deductions may be claimed against other active income or must be claimed against passive income and the requirements to claim depreciation.[11] Johnson was unhappy with the October 2010 letter.[12] He wanted something more akin to marketing materials.[13] Jessica Anderson and Todd Anderson revised the October 2010 letter.[14] In November 2010, they gave Johnson their revisions in a working draft.[15]

Denied that the Anderson Law Center writings "explain[ed] the tax benefits of purchasing energy equipment through RaPower[-]3." Defendants' cited materials do not support this portion of the fact. The October 2010 letter and the November 2010 draft provide a general

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[11] Pl. Ex. 570; Pl. Ex. 703, Deposition of Jessica Anderson, ("J. Anderson Dep."), Sept. 18, 2017, 21:15-24:21, 51:15-52:22, 76:8-80:7, 81:14-22.

[12] J. Anderson Dep. 38:7-21, 102:1-103:25, 104:13-105:15.

[13] J. Anderson Dep. 38:7-40:6, 102:1-103:25, 104:13-105:15.

[14] J. Anderson Dep. 105:14-106:10.

[15] Pl. Ex. 23A; J. Anderson Dep. 106:11-107:16; Pl. Ex. 23, ECF No. 265-5; J. Anderson Dep. 112:23-113:17, 115:4-116:19; T. Anderson Dep. 111:9-16, 116:11-117:5, 123:13-124:19, 149:18-152:21, 155:9-156:10.

summary of what the law is.[16] They do not include specific facts about the transactions, purported energy property, or people or entities at issue in the solar energy scheme.[17] Neither the October 2010 letter nor the November 2010 draft state that purchasers of solar lenses are in a "trade or business" with respect to the solar lenses or are holding the lenses to generate income, or that any person who purchases solar lenses through RaPower-3 may lawfully claim the tax benefits Defendants promote.[18]

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

UNITED STATES' RESPONSE: Denied in part. Defendants' cited materials do not support this statement. Jessica Anderson researched the law applicable to general tax principles and summarized it.[19] Defendants' use of "analysis" suggests that Jessica Anderson applied that law to specific facts, which she did not do. Only *after* Johnson received the November 2010 draft did he give the Andersons specific facts of the transactions he proposed for RaPower-3 customers.[20] Johnson wanted a letter saying that, on those facts, RaPower-3 customers could claim a depreciation deduction and solar energy tax credit on the energy equipment.[21]

Johnson was trying to find a way to generate tax benefits (a depreciation deduction and a solar energy tax credit) for lens purchasers before his purported solar energy equipment ever

[16] *E.g.*, T. Anderson Dep. 187:3-188:20; Pl. Exs. 570 & 23.

[17] Pl. Exs. 570 & 23; T. Anderson Dep. 48:22-51:15, 187:3-188:20; J. Anderson Dep. 21:15-40:25; 57:23-59:12.

[18] *See generally* Pl. Ex. 570 at 6-7 (To be depreciable, property "must be used in your business or income-producing activity."); Pl. Ex. 23 at 2 ("To be depreciable, the property must meet all of the following requirements: . . . it must be used in your business or income-producing activity . . . .").

[19] *E.g.*, T. Anderson Dep. 187:3-188:20; Pl. Ex. 570; Pl. Ex. 23.

[20] J. Anderson Dep. 83:25-88:17, 116:5-119:8.

[21] J. Anderson Dep. 51:15-52:22, 116:5-119:8.

produced energy.[22] Johnson admitted to Jessica Anderson that it was "not likely" that the customers would be running a solar energy power plant and it was "not likely" that the customers would be involved in the day-to-day operations of running the energy equipment.[23]

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.

UNITED STATES' RESPONSE: Denied in part. Todd Anderson testified that he did *not* believe that the November 2010 letter provided an appropriate legal analysis.[24]

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

UNITED STATES' RESPONSE: Denied in part. Jessica Anderson was careful to testify that the "legal information, the information regarding [broad] tax principles" in the October 2010 letter was correct.[25] Defendants' use of "legal analysis" suggests that Jessica Anderson applied facts to law, which she did not do.[26] Further, Defendants' cited materials do not show that Jessica Anderson testified that "the legal analysis in the [November 2010 draft] provided to Mr. Johnson and RaPower3 [was] accurate when drafted."

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

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[22] J. Anderson Dep. 37:17-39:16, 51:15-55:22, 116:5-119:8, 127:14-128:6.

[23] J. Anderson Dep. 118:21-121:12.

[24] T. Anderson Dep. 187:3-188:20; Pl. Ex. 23.

[25] J. Anderson Dep. 141:3-142:9.

[26] *E.g.*, J. Anderson Dep. 144:4-22; *supra* U.S. Resp. to Defs' Fact Nos. 1, 3, 5.

UNITED STATES' RESPONSE: Denied in part. Defendants' use of "analysis" suggests that Jessica Anderson applied facts to law, which she did not do.[27]

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.

UNITED STATES' RESPONSE: Denied in part. Defendants' use of "tax analysis" suggests that Jessica Anderson applied facts to law, which she did not do.[28]

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.

UNITED STATES' RESPONSE: Denied in part. Defendants' cited materials do not support this statement. Neldon Johnson retained Kirton McConkie, through its partner Kenneth Birrell, on behalf of his entity or entities XSun Energy, SOLCO I, and/or International Automated Systems, Inc.[29]

18. The Kirton McConkie memorandum states, as its intended purpose: EXECUTIVE SUMMARY [excerpt omitted].

UNITED STATES' RESPONSE: Denied in part. The Executive Summary is not the memorandum's "intended purpose." The memorandum was "meant to be a general overview of

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[27] *E.g.*, J. Anderson Dep. 144:4-22; *supra* U.S. Resp. to Defs' Fact Nos. 1, 3, 5.

[28] *E.g.*, J. Anderson Dep. 144:4-22; *supra* U.S. Resp. to Defs' Fact Nos. 1, 3, 5.

[29] Pl. Ex. 409, ECF No. 140-3, Deposition of Kenneth Birrell, vol. 1 ("Birrell Dep., vol. 1"), 18:24-23:1, 106:19-110:3; Pl. Ex. 364 at 2; Pl. Ex. 704, Deposition of Kenneth Birrell, vol. 2, ("Birrell Dep., vol. 2"), 163:14-165:20, 169:21-172:15, 175:12-178:9, 184:21-187:16, 196:20-198:3; Pl. Exs. 355, 358.

the tax benefits associated with the solar business that was described" in the memorandum.[30] It summarizes "certain tax consequences for the buyers . . . of solar lenses from SOLCO I, LLC . . . based on factual circumstances that are substantially similar in all material respects" to the facts set forth in the memorandum.[31]

Among the facts stated or assumed in the memorandum is that the solar lens buyer is an entity taxed as a C corporation.[32] The memorandum does not address a solar lens buyer that is an individual or a pass-through entity like a partnership or an S corporation.[33] The memorandum does not address whether an individual (or owner of a pass-through entity) could be considered to be in a "trade or business" or holding the lenses to generate income.[34] The memorandum also assumes that the purported solar energy technology actually works as a system to generate electricity from solar radiation.[35]

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.

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[30] Birrell Dep., vol. 2, 240:2-6.

[31] Pl. Ex. 363, ECF No. 265-10, at 33 ("Introduction").

[32] Pl. Ex. 363 at 33 ("Factual Backround"); Birrell Dep, vol. 1, 84:15-91:7; Pl. Ex. 361 at 2-5; Pl. Ex. 362 at 1 ("Please note that this analysis is limited to C corporations – there would be different issues for an individual, partnership or S corporation purchaser."); Birrell Dep., vol. 1, 94:22-97:1; Birrell Dep., vol. 2, 213:12-214:8.

[33] Pl. Ex. 363 at 33, 45; Birrell Dep., vol. 1, 84:15-91:7; Pl. Ex. 361 at 2-5; Pl. Ex. 362 at 1; Birrell Dep., vol. 1, 94:2-97:1; Birrell Dep., vol. 2, 213:12-214:8.

[34] *See generally* Pl. Ex. 363 at 33-45; Pl. Ex. 370, ECF No. 162-6, at 1-2; Birrell Dep., vol. 2, 164:17-165:2; Pl. Ex. 362 at 1; Birrell Dep., vol. 1, 94:22-96:11.

[35] Pl. Ex. 363 at 33-34, 37; Birrell Dep., vol. 2, 211:8-213:11, 215:1-216:3, 244:17-24.

UNITED STATES' RESPONSE: Denied in part. Birrell testified that he was "now aware of different factual assumptions and representations upon which [he] relied that [he] no longer believe[s] are accurate."[36] For example, he has no understanding of what RaPower-3 does or how it may fit in to the transaction that he evaluated for SOLCO.[37] And if Birrell had known "that there was no system that would work using the lenses to convert solar radiation to any sort of energy," he would not have written the memorandum because the lenses would not be eligible for the solar energy tax credit.[38]

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

UNITED STATES' RESPONSE: Denied. None of the writings at issue state that a person who buys lenses through RaPower-3 will qualify for any of the tax benefits Defendants promote.[39] None of the writings at issue state that individual or pass-through entity purchasers of solar lenses are in a "trade or business" with respect to the solar lenses or are holding the lenses for the production of income.[40]

Further, when she learned of the specific facts that Johnson proposed for the solar energy scheme (*after* she wrote the November 2010 draft), Jessica Anderson told Johnson that she could

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[36] Birrell Dep., vol. 2, 237:18-23.

[37] Birrell Dep., vol. 1, 52:20-53:9.

[38] Birrell Dep., vol. 2, 211:8-213:11; *see also* Birrell Dep., vol. 2, 178:10-182:4.

[39] *See generally* Pl. Exs. 570, 23, 363 at 33-45.

[40] *See generally* Pl. Ex. 570 at 6-7 (To be depreciable, property "must be used in your business or income-producing activity."); Pl. Ex. 23 at 2 ("To be depreciable, the property must meet all of the following requirements: . . . it must be used in your business or income-producing activity . . . ."); Pl. Ex. 363 at 33 (buyers of solar lenses will be taxed as C corporations).

not provide an opinion letter stating that RaPower-3 customers could lawfully claim a depreciation deduction and solar energy tax credit with respect to Johnson's purported energy equipment.[41] Johnson got "aggressive" and "pushy."[42] Jessica Anderson felt that he was "trying to bully [her] into a position that [she did not] feel comfortable taking."[43] So Jessica Anderson fired Johnson as a client of the Anderson Law Center in December 2010 or January 2011.[44]

In 2013, the Andersons learned that Johnson was using their November 2010 draft to encourage people to buy solar lenses, and take a depreciation deduction and solar energy tax credit on their tax returns.[45] In or around July 2013, the Andersons retained an attorney to send a cease-and-desist letter to Johnson and RaPower-3, stating that the November 2010 draft was "only in the 'rough draft' stage and was intended to solicit additional information" and was not a final product.[46]

Similarly, Birrell learned that the Kirton McConkie memorandum was on the RaPower-3 website.[47] On or about January 10, 2014, Birrell sent a cease-and-desist letter to Johnson.[48] Birrell told Johnson that: 1) the memorandum is a general summary of tax principles regarding an energy tax credit and is not an opinion letter; 2) the memorandum is written with the

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[41] J. Anderson Dep. 87:18-89:2, 91:24-96:16, 97:13-98:5, 116:20-126:16; T. Anderson Dep. 130:2-131:9.

[42] J. Anderson Dep. 91:24-96:16, 97:13-98:5, 116:20-126:16; T. Anderson Dep. 130:2-131:9.

[43] J. Anderson Dep. 91:24-94:21.

[44] J. Anderson Dep. 91:24-93:17, 128:24:133:2; Pl. Ex. 582, ECF No. 213-13.

[45] J. Anderson Dep. 134:5-20; T. Anderson Dep. 166:22-169:8.

[46] Pl. Ex. 480, ECF No. 213-2, at 1; T. Anderson Dep. 166:22-169:8, 172:11-24, 174:14-23.

[47] Birrell Dep., vol. 1, 58:5-59:11.

[48] Pl. Ex. 370; Birrell Dep., vol. 1, 146:20-149:1; Birrell Dep., vol. 2, 234:1-14; Pl. Ex. 579, ECF No. 256-14, Deposition of Neldon Johnson, vol. 1, June 28, 2017, 277:18-279:3.

assumption that the taxpayer claiming the credit is "taxed as a subchapter C corporation[] for federal income tax purposes," and is not an individual or subchapter S corporation; and 3) the analysis in the memorandum is only valid if the solar lens transactions are completed on the terms and conditions of the transaction documents Birrell drafted and attached to the memorandum.[49]

Shepard received both the Anderson November 2010 draft and the Kirton McConkie memorandum from Johnson.[50] Shepard learned, soon after the Kirton McConkie memorandum was issued, that Birrell said that the memorandum could not be used to support the solar energy scheme.[51] Yet Shepard expressly told customers that Shepard "believe[d] that the vast majority, if not all, of the references and information contained therein also applies to sole proprietor."[52]

The Andersons' November 2010 draft and the Kirton McConkie memorandum remain on RaPower-3's website today to promote sales of solar lenses.[53]

III. Argument

A district court may enjoin any person from engaging in conduct subject to penalty under 26 U.S.C. § 6700 if injunctive relief is appropriate to prevent recurrence of that conduct or any

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[49] Pl. Ex. 370 at 1-2; *accord* Pl. Ex. 363 at 34-45 (general principles described), 33 (purchaser taxed as C corporation), 33-34 and 2-32 (transactions completed per transaction documents supplied).

[50] Pl. Ex. 685, ECF No. 256-27, Deposition of R. Gregory Shepard ("Shepard Dep.), May 22, 2017 280:24-281:18; Pl. Ex. 682, ECF No. 256-25, Deposition of RaPower-3, LLC ("RaPower-3 Dep."), June 30, 2017, 172:24-173:5.

[51] Shepard Dep. 276:8-22.

[52] Pl. Ex. 479 at 3; *see also generally id.* at 1-4; Shepard Dep. 270:7-271:4, 279:10-280:21.

[53] "Home," www.rapower3.com, *last accessed* Jan. 11, 2018 (scroll to bottom of page under "Tax Documents"; select the Adobe PDF icons named "Tax Opinion (Anderson)" and "Tax Letter (K&M)"); *see also* RaPower-3 Dep. 125:2-129:6; T. Anderson Dep. 158:19-159:25; Pl. Ex. 548; Birrell Dep., vol. 1, 56:13-57:4.

other activity subject to penalty under the Internal Revenue Code.[54] In its opening brief, the United States set forth the undisputed facts and legal authority showing that Defendants engaged in penalty conduct under § 6700(a)(2)(A). That section creates a penalty for a person who 1) organizes or sells any plan or arrangement involving taxes and 2) makes or furnishes, or causes another to make or furnish, a statement connecting the allowability of a tax benefit with participating in the plan or arrangement, which statement the person knows or has reason to know is false or fraudulent as to any material matter.[55]

Defendants conceded, by failing to contest: 1) that they organized and sold the solar energy scheme, which is a plan or arrangement involving taxes, and 2) in the course of doing so, they made statements concerning the allowability of both a depreciation deduction and a solar energy tax credit to solar lens customers.[56] Instead of disputing the United States' remaining facts or contesting the case law showing that Defendants knew, or had reason to know, that their statements were false or fraudulent, Defendants argue that their statements were not false or fraudulent, and even if they were, Defendants "had the understanding and justified belief" that the tax benefits they promote are lawfully allowed to solar lens customers.[57] Defendants point to their own interpretation of the internal revenue laws; information they received from attorneys; and the absence of a federal court decision denying their solar lens customers' depreciation deductions and solar energy tax credits.

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[54] 26 U.S.C. § 7408(b).

[55] 26 U.S.C. § 6700(a)(2)(A).

[56] *See generally* ECF No. 265.

[57] ECF No. 265 at 1-2.

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

Under the proper circumstances, the Internal Revenue Code allows a taxpayer engaged in a trade or business certain tax deductions for expenses the taxpayer incurs while generating income. One "business" deduction is for depreciation, the "wear and tear" on property either used in the taxpayer's "trade or business" or held by the taxpayer "for the production of income."[58] If a taxpayer is *not* in a trade or business, or is *not* holding property for the production of income, then the taxpayer is *not* eligible for a deduction for depreciation on that property.[59] And if depreciation is *not* allowed for a piece of tangible property, the taxpayer may *not* claim the solar energy tax credit for that property under § 48.[60] If a customer is not in a trade or business with respect to a solar lens, or is not holding the lens for the production of income, the § 48 analysis is over.[61] The customer cannot claim the § 48 solar energy tax credit.

Defendants do not squarely address or dispute this statement of the law. Defendants do not offer admissible evidence sufficient to show that their customers were in a trade or business with respect to the solar lenses, or were holding the lenses to generate income, such that depreciation might be allowed. Defendants skip past the black-letter law that requires property to be depreciable before it can be the basis for a solar energy tax credit.

[58] 26 U.S.C. § 167(a).

[59] § 167(a). There additional reasons, not addressed herein, that solar lens customers do not qualify for depreciation.

[60] 26 U.S.C. § 48(a)(3)(C). There additional reasons, not addressed herein, that solar lens customers do not qualify for the § 48 credit.

[61] § 48(a)(3)(C); *Johnson v. United States*, 32 Fed. Cl. 709, 716 (Fed. Cl. Feb. 15, 1995).

Instead, Defendants attempt to distract attention from this fatal flaw of their solar energy scheme by claiming – without factual support – that their solar lenses meet *other* requirements of § 48, including that they are "placed in service" according to Defendants' interpretation of that phrase[62] and that they "generate solar process heat," also according to Defendants' interpretation of that phrase[63]. Even if these claims were true and supported by admissible evidence – which they are not – it would not matter. The United States identified, and supported with record evidence, numerous facts showing that Defendants knew, or had reason to know, that their customers were not in a trade or business with respect to the solar lenses, and were not holding the lenses for the production of income because Defendants knew that: 1) customers' purported "businesses" continually failed to earn income; 2) control of the customer's purported business remained with Johnson and not the customers; 3) Defendants promoted illusory contract documents with little cash outlay by the customer and substantial debt that the customer is unlikely to pay; and 4) Defendants' emphasized greatly reducing or eliminating a customer's tax liability by buying in to the plan.[64] For all of these reasons, Defendants' customers are not

[62] ECF No. 265 at 50-51. Defendants' citations in support of the assertion that customers' solar lenses are "placed in service" are inapposite to proving that their customers are in a trade or business with respect to the solar lenses or are holding lenses for the production of income. In both cited cases, the Tax Court first decided that the taxpayer-petitioner was in a trade or business or was in an income-producing enterprise. *Cooper v. Comm'r*, 88 T.C. 84, 109 (1987); *Waddell v. Comm'r*, 86 T.C. 848, 894 (1986). Only then did the Tax Court turn to the "placed in service" question. *Cooper*, 88 T.C. at 114; *Waddell*, 86 T.C. at 897-98.

[63] ECF No. 265 at 49-50, 57-58. Defendants offer no proper factual support for the assertion that their lenses generate solar process heat. *Id.* Contrary to Defendants' bald assertion, Dr. Thomas Mancini, the United States' expert witness on solar energy technology did not "conced[e] that the lenses . . . generate solar process heat." *Id.* at 50. Dr. Mancini testified that "solar process heat" means using heat from the sun to accomplish some function or application. ECF No. 253-2, Deposition of Dr. Thomas Mancini, Oct. 23, 2017, 152:9-155:16. Defendants' assertion regarding Dr. Mancini's testimony approaches misrepresentation. *Compare id. with* ECF No. 265 at 50.

allowed a depreciation deduction for the lenses. Because depreciation is not allowed, neither is the § 48 solar energy credit.[65] Defendants knew, or had reason to know, these things because they are charged with knowledge of the internal revenue laws governing the scheme they promote.[66]

Defendants admitted the vast majority of the United States' undisputed material facts showing that they knew, or had reason to know, that their statements were false or fraudulent.[67] Although Defendants attempted to inject disputes with respect to a limited number of the United States' facts, they failed to create any *genuine* dispute as to any material fact.[68] A party asserting that a fact is genuinely disputed must support the assertion by citing to evidence that refutes the fact.[69] Unsupported denials, or assertions without citations, are not enough to place a fact in dispute.[70] Throughout their responses to the United States' statement of undisputed material

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(…continued)

[64] *E.g.*, *Nickeson v. Comm'r*, 962 F.2d 973, 976-77 (10th Cir. 1992); *United States v. Music Masters, Ltd.*, 621 F. Supp. 1046, 1049-50 (W.D.N.C. 1985); *Rose v. Comm'r*, 88 T.C. 386, 413 (1987), aff'd, 868 F.2d 851 (6th Cir. 1989) (collecting cases); *United States v. Philatelic Leasing*, 794 F.2d 781, 782-85 (2d Cir. 1986); *United States v. Petrelli*, 704 F. Supp. 122, 124 (N.D. Ohio 1986) (concluding that defendants violated § 6700 when they "entered into lease agreements with investors who leased master photographs and plates from the defendants. Defendants advised the lessees of the master photographs and plates to claim investment tax credits and deductions for the leased art work and plates allegedly made therefrom, some of which never existed."); *United States v. United Energy Corp.*, No. C-85-3655-RFP (CW), 1987 WL 4787, at *8-9 (N.D. Cal. Feb. 25, 1987); ECF No. 251 at 16-52, 56-72.

[65] 26 U.S.C. § 48(a)(3)(C); *Johnson*, 32 Fed. Cl. at 716.

[66] *E.g.*, *United States v. Campbell*, 704 F. Supp. 715, 725 (N.D. Tex. 1988); *Music Masters,* 621 F. Supp. at 1055.

[67] ECF No. 265 at 3-42.

[68] *See* Fed. R. Civ. P. 56(a). Defendants' groundless objections to certain facts and the evidentiary support for them are addressed in a separate filing pursuant to DUCivR 7-1(b)(1)(B).

[69] Fed. R. Civ. P. 56(c); DUCivR 56-1(c)(3).

[70] Fed. R. Civ. P. 56(c); DUCivR 56-1(c)(3).

facts, Defendants make both denials and assertions that are not adequately supported by a citation.[71] Because their denials and assertions are not cited to record evidence, and/or do not show the facts stated by the United States are false or have no support in the record,[72] this Court should deem such facts admitted[73].

Even if a fact is disputed by admissible evidence, it may have no impact on the outcome of the suit under governing law.[74] Here, Defendants do not explain why their factual disputes are material to the ultimate issues to be decided. For example, Defendants claim that "the lenses have been installed and used by RaPower[-]3 in research and development for many years."[75] But this is irrelevant to the question of whether Defendants knew, or had reason to know, that their customers had no trade or business related to owning a solar lens because Defendants *knew* that no customer was paid rental income for "research and development" using his lenses.[76] Similarly, it makes no difference that Defendants put a slightly different gloss on why Johnson

[71] *E.g.*, ECF No. 265 ¶¶ 7-10, 24, 31, 53, 93, 102, 125-126, 132, 152-153, 171-172, 186-187, 197, 205, 230, 233, 251, 253, 265.

[72] *E.g.*, *compare* document cited in support of ECF No. 251 ¶ 153 ("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. This will soon be put on power poles going into Rocky Mountain Power which is Utah's largest utility company." Pl. Ex. 72, ECF No. 254-19, at 1.) *with* Defendants' assertion in ECF No. 265 ¶ 153.

[73] Fed. R. Civ. P. 56(e)(2) & (3). Further, in attempting to dispute some of the United States' facts, Defendants frequently cite to their own documents. *E.g.*, ECF No. 265 ¶ 7 n.5; ¶ 73 n.15-16; ¶ 233 n. 33-35; ¶ 253 n.36; *id.* at 50-51, nn. 65, 69. "When [a] defendant seeks to introduce his own prior statement for the truth of the matter asserted, it is hearsay, and it is not admissible" to contest the United States' facts. *United States v. Marin*, 669 F.2d 73, 84 (2d Cir. 1982); *see* Fed. R. Evid. 801(c). When the United States uses these documents for the truth of the matters asserted, they are not hearsay, because they are an opposing party's statement. *See* Fed. R. Evid. 801(d)(2). There is no exclusion from or exception to the rule against hearsay that renders these documents admissible evidence for Defendants' purposes. *See* Fed. R. Evid. 801(d), 802, 803, 804.

[74] *Stone v. Autoliv ASP, Inc.*, 210 F.3d 1132, 1136 (10th Cir. 2000).

[75] ECF No. 265 ¶ 104.

[76] ECF No. 265 ¶¶ 183-184, 229-230; RaPower-3 Dep. 83:20-83:4; *see* ECF No. 251 at 58-65.

created the bonus program[77] or how the bonus is purportedly calculated,[78] when Defendants know that no customer has ever been *paid* a bonus[79].

B. Defendants had reason to know that their statements were false or fraudulent regardless of their additional proposed facts.

Defendants argue that they "had the understanding and justified belief" that the tax benefits they promote are lawfully allowed to solar lens customers.[80] But the standard for whether a promoter has engaged in penalty conduct under § 6700 does not turn on whether the promoter believed his own hype. Defendants' additional facts do not negate the uncontested red flags that gave Defendants "reason to know" that their statements were false or fraudulent as to material matters.

1. Defendants had reason to know that their statements were false or fraudulent in spite of the Anderson and Kirton McConkie writings.

Defendants claim that they relied on three writings they received from attorneys while they were promoting the solar energy scheme, to support their assertions that customers could lawfully claim a depreciation deduction and a solar energy tax credit from buying solar lenses and signing the transaction documents that Defendants provided.[81] But these writings, and the facts and circumstances surrounding them, cannot support the heavy weight of Defendants'

[77] *Compare* ECF No. 251 ¶ 25 *with* ECF No. 265 ¶ 25.

[78] *Compare* ECF No. 251 ¶¶ 129-131 *with* ECF No. 265 ¶¶ 129-131.

[79] ECF No. 265 ¶¶ 234-240.

[80] ECF No. 265 at 2.

[81] ECF No. 265 at 54-57.

purported reliance – especially because Defendants knew facts about the solar energy scheme that the attorneys did not know.[82]

When an advisor's opinion depends on facts that do not match the reality of a transaction, a promoter's claimed reliance is not in good faith.[83] The Anderson writings offer no genuine basis for Defendants' purported reliance because they are general summaries of the law, unconnected to the specific facts and circumstances of the transactions Defendants promoted. The October 2010 letter and the November 2010 draft say as much: they withhold any decisive opinion on the lawfulness of any tax treatment because they do not have specific facts and circumstances about the transactions. They each state that the availability of the tax benefits summarized will depend on facts and circumstances that do not appear in either document. The Kirton McConkie memorandum, on its face, applies only to lens buyers that are C corporations (among other factual assumptions and preconditions stated in the memorandum). Birrell was careful to repeat this because of the differences in tax treatment for C corporations versus individuals and pass-through entities. Johnson and Shepard knew that RaPower-3 sold solar lenses to individuals or pass-throughs, not to C corporations.[84]

A promoter's claimed reliance on advice of counsel is "disingenuous" when the promoter ignores warnings from independent attorneys that his interpretation of the internal revenue code

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[82] *United Energy Corp.*, 1987 WL 4787, at *11 ("The important point here, however, is not what defendants or their tax attorney believed the law to be. The point is that the module purchasers were entitled to truthful information on which to base their own decisions, regardless of defendants' interpretation of the law. Thus, even if defendants, knowing all the facts, reasonably believed their legal interpretation was correct, still their misstatements of the underlying material facts to purchasers are actionable.").

[83] *United States v. Zanfei*, No. 04 C 2703, 2006 WL 2861051, at *3, 13 (N.D. Ill. Sept. 29, 2006).

[84] *E.g.*, ECF No. 256 ¶¶ 36-37; Pl. Ex. 479 at 3.

is wrong.[85] Here, both attorneys upon whom Johnson purports to rely told him in no uncertain terms that their writings did not support his solar energy scheme. Shepard knew, too, that Birrell said that the memorandum could not be used as RaPower-3 was using it.

Shepard's purported reliance on these writings was also unreasonable because he did not personally consult with or receive advice from the Anderson Law Center or Kirton McConkie. He got the November 2010 Anderson draft and the Kirton McConkie memorandum from Johnson. Shepard knows that Johnson is the originator of the solar energy scheme and Johnson's entity collects all the money from the solar energy scheme. It is not reasonable for a person to rely on opinion letters delivered to him by a financially conflicted promoter.[86]

In short, the Anderson and Kirton McConkie writings do not negate Defendants' reason to know that they made false or fraudulent statements to customers. If anything, the circumstances surrounding the writings, and the attorneys' outraged response to learning that Defendants were using their writings to promote the solar energy scheme, bolster Defendants' reason to know that their statements were false or fraudulent.

2. Defendants had reason to know that their statements were false or fraudulent as to material matters without a federal adjudication of their customers' tax liabilities.

Defendants claim that they "believe the tax treatment that is promoted by RaPower[3] is not an abusive tax shelter" because no customer's tax liability has "been tried on the merits" in a

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[85] *Campbell*, 704 F. Supp. at 730-31; *see also United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1103 (9th Cir. 2000).

[86] *Van Scoten v. Comm'r*, 439 F.3d 1243, 1253 (10th Cir. 2006); *Anderson v. IRS*, 442 F. Supp. 2d 365, 372 (E.D. Tex. 2006).

federal court.[87] Defendants have known the facts pointing to the abusive nature of the solar energy scheme since they stared promoting it.[88] That no customer's tax liability has been finally adjudicated in federal court does not change those facts.[89]

Further, Defendants fail to inform this Court that there have been three decisions issued by the Oregon Tax Court, Magistrate Division, which disallowed the tax benefits Defendants promote.[90] The first of these decisions came out in October 2014.[91] These three decisions follow federal law in evaluating the allowability of the customers' claimed depreciation deduction and solar energy tax credit because Oregon state tax law is intended to be "identical in effect to the [internal revenue code] for the purpose of determining [Oregon state] taxable income of individuals."[92] All three cases concluded, based on the customers' conduct and a comprehensive analysis of the relevant provisions of the internal revenue code, that the customers did not have a trade or business involving the solar lenses.[93] This argument, too, provides Defendants no cover: they knew, or had reason to know, that their statements to customers were false or fraudulent.

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[87] ECF No. 265 at 52.

[88] *See generally* ECF No. 251 at 16-52, 56-72.

[89] *See* ECF No. 262 at 7-12.

[90] *Kevin Gregg v. Dep't of Revenue*, No. TC-MD 160068R, 2017 WL 5900999, at *10 (Or. T.C. Nov. 30, 2017); *Orth v. Dep't of Revenue*, No. TC-MD 160075R, 2017 WL 5904611, at *10 (Or. T.C. Nov. 30, 2017); *Peter Gregg v. Dep't of Revenue*, No. TC-MD 140043C, 2014 WL 5112762, at *6 (Or. T.C. Oct. 13, 2014). Former counsel for Defendants, Justin Heideman, represented the taxpayers in the two most recent cases. *K. Gregg*, 2017 WL 5900999, at *1; *Orth*, 2017 WL 5904611, at *1.

[91] *P. Gregg*, 2014 WL 5112762, at *1.

[92] *K. Gregg*, 2017 WL 5900999, at *2 (citing ORS § 316.007); *P. Gregg*, 2014 WL 5112762, at *4 (same).

[93] *K. Gregg*, 2017 WL 5900999, at *5; *Orth*, 2017 WL 5904611, at *5; *P. Gregg*, 2014 WL 5112762, at *4.

IV. Conclusion

The undisputed facts and the law applicable to this case show that Defendants organized (or assisted in the organization of), the solar energy scheme and sold solar lenses to customers pursuant to that plan. As they did, Defendants made or furnished (or caused others to make or furnish) statements that the buyer of a lens is in the "trade or business" of "leasing out" solar lenses, and is allowed a depreciation deduction and a solar energy tax credit. But Defendants knew, or had reason to know, that their statements were false or fraudulent as to material matters because Defendants *actually knew* the facts showing that their customers were not in a trade or business. For these reasons, the United States requests that this Court enter a partial summary judgment, pursuant to § 7408 and/or § 7402(a),[94] consistent with the proposed order submitted with its motion, enjoining Defendants from making these false or fraudulent statements:

1. The purchaser of a solar lens is in a "trade or business" of "leasing out" the solar lens;

2. The purchaser of a solar lens may claim a depreciation deduction related to the solar lens; and

3. The purchaser of a solar lens may claim a solar energy tax credit related to the solar lens.

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[94] Even if this Court were to find that there is a genuine dispute of material fact as to whether Defendants knew or had reason to know their statements were false or fraudulent (and therefore violated § 6700(a)(2)(A)), this Court should nonetheless enjoin Defendants from continuing to make such false or fraudulent statements under § 7402(a) because such an injunction is "necessary or appropriate for the enforcement of the internal revenue laws." The United States need not show that a Defendant "has violated a particular Internal Revenue Code section in order for an injunction to issue" under § 7402(a). *United States v. Ernst & Whinney*, 735 F.2d 1296, 1300 (11th Cir. 1984); United States v. Elsass, 978 F. Supp. 2d 901, 941 (S.D. Ohio 2013). An injunction prohibiting them from making false or fraudulent statements is "necessary or appropriate for the enforcement of the internal revenue laws" because they will not stop without a court order. 26 U.S.C. § 7402(a); *Brody v. United States*, 243 F.2d 378, 384 (1st Cir. 1957); *compare* ECF No. 251 ¶¶ 68-74, 178-80 *with* ECF No. 265 ¶¶ 68-74, 178-80.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

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

/s/ Erin Healy Gallagher
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Trial Attorney