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*Attorneys for Defendants*

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., LTBI, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p><b>FINDINGS OF FACT AND CONCLUSIONS OF LAW</b></p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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Defendants RaPower-3, LLC, International Automated Systems, Inc., LTBI, LLC, R. Gregory Shepard, Neldon Johnson, and Roger Freeborn, through undersigned counsel, hereby submit the following proposed Findings of Fact and Conclusions of Law:

The matter before the court largely turns on whether the any of the defendants (1) made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; and (2) knew or had reason to know that the statements were false or fraudulent. In

Counts I through XI, Plaintiffs have requested an injunction against all defendants under both 26 U.S.C. § 7402 and § 7408. Each count is addressed in turn.

**Count I: Injunction Under § 7402(a) Against RaPower-3, LLC**

1. [Section 7402\(a\)](#) authorizes an injunction as "necessary or appropriate for the enforcement of the internal revenue laws." There need not be a showing that a party has violated a particular Internal Revenue Code section in order for an injunction to issue. The language of [§ 7402\(a\)](#) encompasses a broad range of powers necessary to compel compliance with the tax laws. It has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute. *See United States v. Ekblad*, 732 F.2d 562 (7th Cir.1984). Courts may decline to exercise this authority if it finds that an injunction is not necessary for the enforcement of a particular Internal Revenue Code section. *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at \*33, 109 A.F.T.R.2d (RIA) 1346 (D. Utah Mar. 9, 2012) (declining to issue an injunction under 7402 absent evidence that defendant continued to disregard tax treatment of income after receiving notice from the court).

2. In this case, the Court finds that the government has failed to carry its burden that an injunction against RaPower-3 is necessary and appropriate for the enforcement of the internal revenue laws.

3. Specifically, the government has not shown that the actions of RaPower-3 in connection with the sale of Fresnel lenses violates any section of the internal revenue code.

4. Additionally, the court is persuaded by Mr. Johnson's offer to solar lens customers that he would at any time refund the person's money and let them out of the contract.<sup>1</sup>

5. In December 2010, Johnson promised to refund customers' money and void their Equipment Purchase Agreement, if they did not receive the tax benefits.

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<sup>1</sup> Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468.

6. 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.<sup>2</sup>

7. The Court is unpersuaded that an injunction is necessary here for the enforcement of the internal revenue code, particularly when, as here, it appears that Mr. Johnson was willing to refund any monies to allow solar lens customers to “pay the IRS and move in a different direction.”

8. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer’s payment of taxes to the I.R.S.

9. The government failed to present sufficient evidence that the purchasers of the Fresnel lenses were disallowed by any court to take a solar tax credit deduction in a manner that conformed with the tax code.

10. Additionally, the Court finds that purchase agreements between RaPower-3 and the purchasers all advised each purchaser to seek independent tax advice concerning the tax treatment of their respective lenses.

11. For the reasons stated above, the Court declines to issue an injunction under Section 7402 against Defendant RaPower-3.

### **Count II: Injunction Under § 7402(a) Against IAS**

12. Section 7402(a) authorizes an injunction as "necessary or appropriate for the enforcement of the internal revenue laws." There need not be a showing that a party has violated

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<sup>2</sup> Pl. Ex. 282.

a particular Internal Revenue Code section in order for an injunction to issue. The language of § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws. It has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute. *See United States v. Ekblad*, 732 F.2d 562 (7th Cir.1984). Courts may decline to exercise this authority if it finds that an injunction is not necessary for the enforcement of a particular Internal Revenue Code section. *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at \*33, 109 A.F.T.R.2d (RIA) 1346 (D. Utah Mar. 9, 2012) (declining to issue an injunction under 7402 absent evidence that defendant continued to disregard tax treatment of income after receiving notice from the court).

13. In this case, the Court finds that the government has failed to carry its burden that an injunction against Defendant IAS is necessary and appropriate for the enforcement of the internal revenue laws.

14. Specifically, the government has not shown that the actions of IAS in connection with the sale of Fresnel lenses violates any section of the internal revenue code.

15. Additionally, the court is persuaded by Mr. Johnson's offer to solar lens customers that he would at any time refund the person's money and let them out of the contract.<sup>3</sup>

16. In December 2010, Johnson promised to refund customers' money and void their Equipment Purchase Agreement, if they did not receive the tax benefits.

17. 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

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<sup>3</sup> Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468.

penalties. But, if you decide on the refund, then you would give up all bonuses and rental fees associated with those solar lenses.<sup>4</sup>

18. The Court is unpersuaded that an injunction is necessary here for the enforcement of the internal revenue code, particularly when, as here, it appears that Mr. Johnson was willing to refund any monies to allow solar lens customers to “pay the IRS and move in a different direction.”

19. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer’s payment of taxes to the I.R.S.

20. First, the government failed to present that the purchasers of the Fresnel lenses were disallowed by any court to take a solar tax credit deduction in a manner that conformed with the tax code.

21. Importantly, the Court is persuaded by the fact that the purchase agreements between RaPower-3 and the purchasers all advised each purchaser to seek independent tax advice concerning the tax treatment of their respective lenses.

22. For the reasons stated above, the Court declines to issue an injunction under Section 7402 against Defendant IAS.

**Count III: Injunction Under § 7402(a) Against LTB**

23. Section 7402(a) authorizes an injunction as "necessary or appropriate for the enforcement of the internal revenue laws." There need not be a showing that a party has violated a particular Internal Revenue Code section in order for an injunction to issue. The language of § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws. It has been used to enjoin interference with tax enforcement even when such interference

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<sup>4</sup> Pl. Ex. 282.

does not violate any particular tax statute. *See United States v. Ekblad*, 732 F.2d 562 (7th Cir.1984). Courts may decline to exercise this authority if it finds that an injunction is not necessary for the enforcement of a particular Internal Revenue Code section. *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at \*33, 109 A.F.T.R.2d (RIA) 1346 (D. Utah Mar. 9, 2012) (declining to issue an injunction under 7402 absent evidence that defendant continued to disregard tax treatment of income after receiving notice from the court). In this case, the Court finds that the government has failed to carry its burden that an injunction against RaPower-3 is necessary and appropriate for the enforcement of the internal revenue laws.

24. Specifically, the government has not shown that the actions of LTB in connection with the sale of Fresnel lenses violates any section of the internal revenue code.

25. First, the government failed to present that the purchasers of the Fresnel lenses were disallowed by any court to take a solar tax credit deduction in a manner that conformed with the tax code.

26. Additionally, the court is persuaded by Mr. Johnson's offer to solar lens customers that he would at any time refund the person's money and let them out of the contract.<sup>5</sup>

27. In December 2010, Johnson promised to refund customers' money and void their Equipment Purchase Agreement, if they did not receive the tax benefits.

28. 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.<sup>6</sup>

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<sup>5</sup> Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468.

<sup>6</sup> Pl. Ex. 282.

29. The Court is unpersuaded that an injunction is necessary here for the enforcement of the internal revenue code, particularly when, as here, it appears that Mr. Johnson was willing to refund any monies to allow solar lens customers to “pay the IRS and move in a different direction.”

30. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer’s payment of taxes to the I.R.S.

31. Additionally, the Court is persuaded by the fact that the purchase agreements between RaPower-3 and the purchasers contained language advising each purchaser to seek independent tax advice concerning the tax treatment of their respective lenses.

32. For the reasons stated above, the Court declines to issue an injunction under Section 7402 against Defendant LTB.

**Count IV: Injunction Under § 7402(a) Against Shepard**

33. Section 7402(a) authorizes an injunction as "necessary or appropriate for the enforcement of the internal revenue laws." There need not be a showing that a party has violated a particular Internal Revenue Code section in order for an injunction to issue. The language of § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws. It has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute. *See United States v. Ekblad*, 732 F.2d 562 (7th Cir.1984). Courts may decline to exercise this authority if it finds that an injunction is not necessary for the enforcement of a particular Internal Revenue Code section. *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at \*33, 109 A.F.T.R.2d (RIA)

1346 (D. Utah Mar. 9, 2012) (declining to issue an injunction under 7402 absent evidence that defendant continued to disregard tax treatment of income after receiving notice from the court).

34. Specifically, the government has not shown that the actions of Shepard in connection with the sale of Fresnel lenses violates any section of the internal revenue code.

35. First, the government failed to present that the purchasers of the Fresnel lenses were disallowed by any court to take a solar tax credit deduction in a manner that conformed with the tax code.

36. Additionally, the Court is persuaded by the fact that the purchase agreements between RaPower-3 and the purchasers contained language advising each purchaser to seek independent tax advice concerning the tax treatment of their respective lenses.

37. For the reasons stated above, the Court declines to issue an injunction under Section 7402 against Mr. Shepard.

**Count V: Injunction Under § 7402(a) Against Johnson**

38. Section 7402(a) authorizes an injunction as "necessary or appropriate for the enforcement of the internal revenue laws." There need not be a showing that a party has violated a particular Internal Revenue Code section in order for an injunction to issue. The language of § 7402(a) encompasses a broad range of powers necessary to compel compliance with the tax laws. It has been used to enjoin interference with tax enforcement even when such interference does not violate any particular tax statute. See *United States v. Ekblad*, 732 F.2d 562 (7th Cir.1984). Courts may decline to exercise this authority if it finds that an injunction is not necessary for the enforcement of a particular Internal Revenue Code section. *United States v. Hartshorn*, No. 2:10-CV-0638, 2012 U.S. Dist. LEXIS 32179, at \*33, 109 A.F.T.R.2d (RIA)



1346 (D. Utah Mar. 9, 2012) (declining to issue an injunction under 7402 absent evidence that defendant continued to disregard tax treatment of income after receiving notice from the court).

39. Specifically, the government has not shown that the actions of Mr. Johnson in connection with the sale of Fresnel lenses violates any section of the internal revenue code.

40. First, the government failed to present that the purchasers of the Fresnel lenses were disallowed by any court to take a solar tax credit deduction in a manner that conformed with the tax code.

41. Additionally, the court is persuaded by Mr. Johnson's offer to solar lens customers that he would at any time refund the person's money and let them out of the contract.<sup>7</sup>

42. In December 2010, Johnson promised to refund customers' money and void their Equipment Purchase Agreement, if they did not receive the tax benefits.

43. 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.<sup>8</sup>

44. The Court is unpersuaded that an injunction is necessary here for the enforcement of the internal revenue code, particularly when, as here, it appears that Mr. Johnson was willing to refund any monies to allow solar lens customers to "pay the IRS and move in a different direction."

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<sup>7</sup> Shepard Dep. 304:4-305:10; Pl. Ex. 282; Shepard Dep. 110:9-113:7; Pl. Ex. 468.

<sup>8</sup> Pl. Ex. 282.

45. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer's payment of taxes to the I.R.S.

46.

47. Additionally, the Court is persuaded by the fact that the purchase agreements between RaPower-3 and the purchasers contained language advising each purchaser to seek independent tax advice concerning the tax treatment of their respective lenses.

48. For the reasons stated above, the Court declines to issue an injunction under Section 7402 against Mr. Johnson.

**Count VI: Injunction Under § 7402(a) Against Freeborn**

49. Plaintiff stipulated to the dismissal of claims against Freeborn based on his death. Defendants filed a notice of Freeborn's death on December 17, 2017. [ECF No. 267.] Freeborn is dismissed as a defendant. Fed. R. Civ. P. 25(a)(1).

**Count VII: Injunction Under § 7408 Against RaPower-3**

50. For injunctive relief to be warranted under § 7408, the government was required to prove by a preponderance of the evidence that (1) Defendant organized an entity, plan, or arrangement; (2) he made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) he knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction was necessary to prevent recurrence of this conduct. *United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014).

51. At trial, Defendant RaPower-3 disputed that it made false or fraudulent statements concerning the tax benefits to be derived from the sale of Fresnel lenses to members of the

public. Additionally, RaPower-3 disputed that it knew or had reason to know that that any statements concerning the tax treatment of Fresnel lenses were false or fraudulent.

**Scienter under Section 6700**

52. Factors to determine requisite scienter to violate section 6700 include:

- a. Extent of defendant's reliance on knowledgeable professions;
- b. Defendant's level of sophistication and education; and
- c. Defendant's familiarity with tax matters.

53. Having considered the entirety of admissible evidence before it, the court finds at no time did Defendant RaPower-3 make false or fraudulent statements concerning tax benefits to be derived from the sale of its Fresnel lenses to purchasers.

54. Furthermore, the court finds that the statements RaPower-3 made at all times relevant were reasonable considering its reliance on the advice of legal counsel and accounting professionals.

55. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer's payment of taxes to the I.R.S.

**Advice of Counsel**

56. Defendants primarily rely on the affirmative defense that they relied on the advice of counsel concerning tax treatment of the Fresnel lenses that RaPower-3 sold to the public.

57. The elements of an advice of counsel defense require a showing of 1) a request for advice of counsel on the legality of a proposed action, 2) full disclosure of the relevant facts to counsel, 3) receipt of advice from counsel that the action to be taken will be legal, and 4)

reliance in good faith on counsel's advice. *CE Carlson, Inc. v. SEC*, 859 F. 2d 1429, 1436 (10th Cir. 1988).

58. In this case, the following facts support the finding that Defendant RaPower-3 carried its burden in establishing the affirmative defense of advice of counsel:

59. In September or October of 2010, Neldon Johnson and RaPower-3, 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.<sup>9</sup>

60. Todd Anderson and Jessica Anderson are husband and wife, and are both lawyers at Anderson Law Center. *Id.* at 19-20.

61. In October of 2010 and on or about November 15, 2010, the Anderson Law Center, PC, provided to Mr. Johnson and RaPower-3, LLC two letters explaining the tax benefits of purchasing energy equipment through RaPower-3.<sup>10</sup>

62. 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.<sup>11</sup>

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

64. 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. *Id.* at 183.

65. Mr. Anderson testified he believes that the letters are accurate summaries of general tax principles. *Id.* at 184.

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<sup>9</sup> Todd Anderson Depo p. 37; and Exhibit 5 hereto (Anderson 0074)]. The T. Anderson deposition excerpts are included here as Exhibit 4.

<sup>10</sup> Pl. Ex. 570 and Pl. Ex. 23.

<sup>11</sup> T. Anderson Depo p. 88 and 129.

66. The first letter (Ex. 570) was provided to Mr. Johnson and RaPower-3 as a final version. *Id.* at 185. While the second letter (Ex. 23) was provided as a “work in process.” *Id.*

67. 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. *Id.* at 188.

68. 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. *Id.*

69. In her deposition, Mrs. Anderson testified that the legal analysis in the letters provided to Mr. Johnson and RaPower-3 were accurate when drafted.<sup>12</sup>

70. Mrs. Anderson tried to be as accurate and honest and complete in her analysis of the tax issues. *Id.* at 142 (“I was thorough in that analysis on those broad topics”).

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

72. The Anderson Law Center was paid for the legal work it did for Mr. Johnson and RaPower-3. *Id.* at 143.

73. Mrs. Anderson testified that she had thoroughly researched and had an understanding to provide the tax analysis that she gave to Mr. Johnson and RaPower-3. *Id.* at 144.

74. 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.<sup>13</sup>

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<sup>12</sup> 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.

<sup>13</sup> Deposition of Kenneth W. Birrell, p. 168-169. Excerpts found at Exhibit 7 hereto.

75. On October 31, 2012, Kirton & McConkie provided Neldon Johnson a memorandum on the subject of “Tax Issues Relating to Purchase of Solar Lenses.” Id. at 220.<sup>14</sup>

76. The Kirton McConkie memorandum<sup>15</sup> 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.

77. 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.

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

79. 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.<sup>16</sup>

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<sup>14</sup> See also Pl. Ex. 362

<sup>15</sup> Pl. Ex. 370, p. 3 (Doc. 140-2).

<sup>16</sup> Birrell Deposition, pages 235-236. See Ex. 7 hereto.

80. 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. *Id.* at 239-240.

81. Mr. Birrell testified that the memorandum was accurate when he wrote it and that it was honest and complete. *Id.* 237.

82. 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. *Id.*

83. Defendants relied on the Anderson Letter and the Kirton McConkie memorandum in advocating the tax benefits of buying solar lenses from RaPower-3.<sup>17</sup>

#### **Count VIII: Injunction Under § 7408 Against IAS**

84. For injunctive relief to be warranted under § 7408, the government was required to prove by a preponderance of the evidence that (1) Defendant organized an entity, plan, or arrangement; (2) he made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) he knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction was necessary to prevent recurrence of this conduct. *United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014).

85. At trial, Defendant IAS disputed that it made false or fraudulent statements concerning the tax benefits to be derived from the sale of Fresnel lenses to members of the public. Additionally, IAS disputed that it knew or had reason to know that that any statements concerning the tax treatment of Fresnel lenses were false or fraudulent.

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<sup>17</sup> [www.rapower3.com](http://www.rapower3.com)

**Scienter under Section 6700**

86. Factors to determine requisite scienter to violate section 6700 include:

- a. Extent of defendant's reliance on knowledgeable professions;
- b. Defendant's level of sophistication and education; and
- c. Defendant's familiarity with tax matters.

87. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer's payment of taxes to the I.R.S.

88. Having considered the entirety of admissible evidence before it, the court finds at no time did Defendant IAS make false or fraudulent statements concerning tax benefits to be derived from the sale of its Fresnel lenses to purchasers.

89. Furthermore, the court finds that the statements IAS made at all times relevant were reasonable considering its reliance on the advice of legal counsel and accounting professionals.

**Advice of Counsel**

90. Defendant IAS primarily rely on the affirmative defense that they relied on the advice of counsel concerning tax treatment of the Fresnel lenses that RaPower-3 sold to the public.

91. The elements of an advice of counsel defense require a showing of 1) a request for advice of counsel on the legality of a proposed action, 2) full disclosure of the relevant facts to counsel, 3) receipt of advice from counsel that the action to be taken will be legal, and 4) reliance in good faith on counsel's advice. *CE Carlson, Inc. v. SEC*, 859 F. 2d 1429, 1436 (10th Cir. 1988).



92. In this case, the following facts support the finding that Defendant RaPower-3 carried its burden in establishing the affirmative defense of advice of counsel:

93. In September or October of 2010, Neldon Johnson and RaPower-3, 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.<sup>18</sup>

94. Todd Anderson and Jessica Anderson are husband and wife, and are both lawyers at Anderson Law Center. Id. at 19-20.

95. In October of 2010 and on or about November 15, 2010, the Anderson Law Center, PC, provided to Mr. Johnson and RaPower-3, LLC two letters explaining the tax benefits of purchasing energy equipment through RaPower-3.<sup>19</sup>

96. 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.<sup>20</sup>

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

98. 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. Id. at 183.

99. Mr. Anderson testified he believes that the letters are accurate summaries of general tax principles. Id. at 184.

100. The first letter (Ex. 570) was provided to Mr. Johnson and RaPower-3 as a final version. Id. at 185. While the second letter (Ex. 23) was provided as a "work in process." Id.

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<sup>18</sup> Todd Anderson Depo p. 37; and Exhibit 5 hereto (Anderson 0074)]. The T. Anderson deposition excerpts are included here as Exhibit 4.

<sup>19</sup> Pl. Ex. 570 and Pl. Ex. 23.

<sup>20</sup> T. Anderson Depo p. 88 and 129.

101. 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. *Id.* at 188.

102. 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. *Id.*

103. In her deposition, Mrs. Anderson testified that the legal analysis in the letters provided to Mr. Johnson and RaPower-3 were accurate when drafted.<sup>21</sup>

104. Mrs. Anderson tried to be as accurate and honest and complete in her analysis of the tax issues. *Id.* at 142 (“I was thorough in that analysis on those broad topics”).

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

106. The Anderson Law Center was paid for the legal work it did for Mr. Johnson and RaPower-3. *Id.* at 143.

107. Mrs. Anderson testified that she had thoroughly researched and had an understanding to provide the tax analysis that she gave to Mr. Johnson and RaPower-3. *Id.* at 144.

108. 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.<sup>22</sup>

109. On October 31, 2012, Kirton & McConkie provided Neldon Johnson a memorandum on the subject of “Tax Issues Relating to Purchase of Solar Lenses.” *Id.* at 220.<sup>23</sup>

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<sup>21</sup> 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.

<sup>22</sup> Deposition of Kenneth W. Birrell, p. 168-169. Excerpts found at Exhibit 7 hereto.

<sup>23</sup> See also Pl. Ex. 362

110. The Kirton McConkie memorandum<sup>24</sup> 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.

111. 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.

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

113. 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.<sup>25</sup>

114. 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.

Id. at 239-240.

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<sup>24</sup> Pl. Ex. 370, p. 3 (Doc. 140-2).

<sup>25</sup> Birrell Deposition, pages 235-236. See Ex. 7 hereto.

115. Mr. Birrell testified that the memorandum was accurate when he wrote it and that it was honest and complete. Id. 237.

116. 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. Id.

117. Defendants relied on the Anderson Letter and the Kirton McConkie memorandum in advocating the tax benefits of buying solar lenses from RaPower-3.<sup>26</sup>

### **Count IX: Injunction Under § 7408 Against Shepard**

118. For injunctive relief to be warranted under § 7408, the government was required to prove by a preponderance of the evidence that (1) Defendant organized an entity, plan, or arrangement; (2) he made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) he knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction was necessary to prevent recurrence of this conduct. *United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014).

119. At trial, Defendant R. Gregory Shepard disputed that he made false or fraudulent statements concerning the tax benefits to be derived from the sale of Fresnel lenses to members of the public. Additionally, Mr. Shepard disputed that he knew or had reason to know that that any statements concerning the tax treatment of Fresnel lenses were false or fraudulent.

### **Scienter under Section 6700**

120. Factors to determine requisite scienter to violate section 6700 include:

- a. Extent of defendant's reliance on knowledgeable professions;
- b. Defendant's level of sophistication and education; and

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<sup>26</sup> [www.rapower3.com](http://www.rapower3.com)

c. Defendant's familiarity with tax matters.

121. Having considered the entirety of admissible evidence before it, the court finds at no time did Defendant Mr. Shepard make false or fraudulent statements concerning tax benefits to be derived from the sale of its Fresnel lenses to purchasers.

122. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer's payment of taxes to the I.R.S.

123. Furthermore, the court finds that the statements Mr. Shepard made at all times relevant were reasonable considering his reliance on the advice of legal counsel and accounting professionals.

#### **Advice of Counsel**

124. Defendants primarily rely on the affirmative defense that they relied on the advice of counsel concerning tax treatment of the Fresnel lenses that RaPower-3 sold to the public.

125. The elements of an advice of counsel defense require a showing of 1) a request for advice of counsel on the legality of a proposed action, 2) full disclosure of the relevant facts to counsel, 3) receipt of advice from counsel that the action to be taken will be legal, and 4) reliance in good faith on counsel's advice. *CE Carlson, Inc. v. SEC*, 859 F. 2d 1429, 1436 (10th Cir. 1988).

126. In this case, the following facts support the finding that Defendant RaPower-3 carried its burden in establishing the affirmative defense of advice of counsel:

127. In September or October of 2010, Neldon Johnson and RaPower-3, 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.<sup>27</sup>

128. Todd Anderson and Jessica Anderson are husband and wife, and are both lawyers at Anderson Law Center. *Id.* at 19-20.

129. In October of 2010 and on or about November 15, 2010, the Anderson Law Center, PC, provided to Mr. Johnson and RaPower-3, LLC two letters explaining the tax benefits of purchasing energy equipment through RaPower-3.<sup>28</sup>

130. 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.<sup>29</sup>

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

132. 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. *Id.* at 183.

133. Mr. Anderson testified he believes that the letters are accurate summaries of general tax principles. *Id.* at 184.

134. The first letter (Ex. 570) was provided to Mr. Johnson and RaPower-3 as a final version. *Id.* at 185. While the second letter (Ex. 23) was provided as a "work in process." *Id.*

135. 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. *Id.* at 188.

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<sup>27</sup> Todd Anderson Depo p. 37; and Exhibit 5 hereto (Anderson 0074)]. The T. Anderson deposition excerpts are included here as Exhibit 4.

<sup>28</sup> Pl. Ex. 570 and Pl. Ex. 23.

<sup>29</sup> T. Anderson Depo p. 88 and 129.

136. 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. Id.

137. In her deposition, Mrs. Anderson testified that the legal analysis in the letters provided to Mr. Johnson and RaPower-3 were accurate when drafted.<sup>30</sup>

138. Mrs. Anderson tried to be as accurate and honest and complete in her analysis of the tax issues. Id. at 142 (“I was thorough in that analysis on those broad topics”).

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

140. The Anderson Law Center was paid for the legal work it did for Mr. Johnson and RaPower-3. Id. at 143.

141. Mrs. Anderson testified that she had thoroughly researched and had an understanding to provide the tax analysis that she gave to Mr. Johnson and RaPower-3. Id. at 144.

142. 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.<sup>31</sup>

143. On October 31, 2012, Kirton & McConkie provided Neldon Johnson a memorandum on the subject of “Tax Issues Relating to Purchase of Solar Lenses.” Id. at 220.<sup>32</sup>

144. The Kirton McConkie memorandum<sup>33</sup> states, as its intended purpose:

***EXECUTIVE SUMMARY***

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<sup>30</sup> 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.

<sup>31</sup> Deposition of Kenneth W. Birrell, p. 168-169. Excerpts found at Exhibit 7 hereto.

<sup>32</sup> See also Pl. Ex. 362

<sup>33</sup> Pl. Ex. 370, p. 3 (Doc. 140-2).

*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.

145. 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.

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

147. 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.<sup>34</sup>

148. 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. Id. at 239-240.

149. Mr. Birrell testified that the memorandum was accurate when he wrote it and that it was honest and complete. Id. 237.

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<sup>34</sup> Birrell Deposition, pages 235-236. See Ex. 7 hereto.



150. 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. *Id.*

151. Defendants relied on the Anderson Letter and the Kirton McConkie memorandum in advocating the tax benefits of buying solar lenses from RaPower-3.<sup>35</sup>

**Count X: Injunction Under § 7408 Against Johnson**

152. For injunctive relief to be warranted under § 7408, the government was required to prove by a preponderance of the evidence that (1) Defendant organized an entity, plan, or arrangement; (2) he made false or fraudulent statements concerning the tax benefits to be derived from the entity, plan, or arrangement; (3) he knew or had reason to know that the statements were false or fraudulent; (4) the false or fraudulent statements pertained to a material matter; and (5) an injunction was necessary to prevent recurrence of this conduct. *United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014).

153. At trial, Defendant Neldon Johnson disputed that he made false or fraudulent statements concerning the tax benefits to be derived from the sale of Fresnel lenses to members of the public. Additionally, Mr. Johnson disputed that he knew or had reason to know that that any statements concerning the tax treatment of Fresnel lenses were false or fraudulent.

**Scienter under Section 6700**

154. Factors to determine requisite scienter to violate section 6700 include:

- a. Extent of defendant's reliance on knowledgeable professions;
- b. Defendant's level of sophistication and education; and
- c. Defendant's familiarity with tax matters.

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<sup>35</sup> [www.rapower3.com](http://www.rapower3.com)

155. Having considered the entirety of admissible evidence before it, the court finds at no time did Defendant Mr. Johnson make false or fraudulent statements concerning tax benefits to be derived from the sale of its Fresnel lenses to purchasers.

156. Furthermore, the Court finds that parties cannot be engaged in a conspiracy to defraud the government of tax revenues, when the parties offer to return all purchase money to their customers to facilitate the customer's payment of taxes to the I.R.S.

157. Furthermore, the court finds that the statements Mr. Johnson made at all times relevant were reasonable considering his reliance on the advice of legal counsel and accounting professionals.

#### **Advice of Counsel**

158. Defendants primarily rely on the affirmative defense that they relied on the advice of counsel concerning tax treatment of the Fresnel lenses that RaPower-3 sold to the public.

159. The elements of an advice of counsel defense require a showing of 1) a request for advice of counsel on the legality of a proposed action, 2) full disclosure of the relevant facts to counsel, 3) receipt of advice from counsel that the action to be taken will be legal, and 4) reliance in good faith on counsel's advice. *CE Carlson, Inc. v. SEC*, 859 F.2d 1429, 1436 (10th Cir. 1988).

160. In this case, the following facts support the finding that Mr. Johnson carried his burden in establishing the affirmative defense of advice of counsel:

161. In September or October of 2010, Neldon Johnson and RaPower-3, 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.<sup>36</sup>

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<sup>36</sup> Todd Anderson Depo p. 37; and Exhibit 5 hereto (Anderson 0074)]. The T. Anderson deposition excerpts are included here as Exhibit 4.

162. Todd Anderson and Jessica Anderson are husband and wife, and are both lawyers at Anderson Law Center. *Id.* at 19-20.

163. In October of 2010 and on or about November 15, 2010, the Anderson Law Center, PC, provided to Mr. Johnson and RaPower-3, LLC two letters explaining the tax benefits of purchasing energy equipment through RaPower-3.<sup>37</sup>

164. 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.<sup>38</sup>

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

166. 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. *Id.* at 183.

167. Mr. Anderson testified he believes that the letters are accurate summaries of general tax principles. *Id.* at 184.

168. The first letter (Ex. 570) was provided to Mr. Johnson and RaPower-3 as a final version. *Id.* at 185. While the second letter (Ex. 23) was provided as a "work in process." *Id.*

169. 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. *Id.* at 188.

170. 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. *Id.*

171. In her deposition, Mrs. Anderson testified that the legal analysis in the letters provided to Mr. Johnson and RaPower-3 were accurate when drafted.<sup>39</sup>

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<sup>37</sup> Pl. Ex. 570 and Pl. Ex. 23.

<sup>38</sup> T. Anderson Depo p. 88 and 129.

172. Mrs. Anderson tried to be as accurate and honest and complete in her analysis of the tax issues. *Id.* at 142 (“I was thorough in that analysis on those broad topics”).

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

174. The Anderson Law Center was paid for the legal work it did for Mr. Johnson and RaPower-3. *Id.* at 143.

175. Mrs. Anderson testified that she had thoroughly researched and had an understanding to provide the tax analysis that she gave to Mr. Johnson and RaPower-3. *Id.* at 144.

176. 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.<sup>40</sup>

177. On October 31, 2012, Kirton & McConkie provided Neldon Johnson a memorandum on the subject of “Tax Issues Relating to Purchase of Solar Lenses.” *Id.* at 220.<sup>41</sup>

178. The Kirton McConkie memorandum<sup>42</sup> 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*

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<sup>39</sup> 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.

<sup>40</sup> Deposition of Kenneth W. Birrell, p. 168-169. Excerpts found at Exhibit 7 hereto.

<sup>41</sup> See also Pl. Ex. 362

<sup>42</sup> Pl. Ex. 370, p. 3 (Doc. 140-2).

*placed into service. The Solar Lenses will be eligible for depreciation under Code Section 168(a) as 5-year property.*

Id. at p. 1.

179. 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.

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

181. 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.<sup>43</sup>

182. 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. Id. at 239-240.

183. Mr. Birrell testified that the memorandum was accurate when he wrote it and that it was honest and complete. Id. 237.

184. 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. Id.

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<sup>43</sup> Birrell Deposition, pages 235-236. See Ex. 7 hereto.

185. Defendants relied on the Anderson Letter and the Kirton McConkie memorandum in advocating the tax benefits of buying solar lenses from RaPower-3.<sup>44</sup>

**Count XI: Injunction Under § 7408 Against Freeborn**

186. The government has asked its claims against Freeborn be dismissed because of his death on December 17, 2017. Plaintiff stipulated to the dismissal of claims against Freeborn based on his death. Defendants filed a notice of Freeborn's death on December 17, 2017. [ECF No. 267.] Freeborn is dismissed as a defendant. Fed. R. Civ. P. 25(a)(1).

**CONCLUSIONS OF LAW:**

Based upon the foregoing Findings, the Court reaches the following Conclusions:

1. The government has failed to prove any basis for issuing an injunction against Defendants and therefore the government's request is denied under either [26 U.S.C. §§ 7402\(a\)](#) or [7408](#).
2. The government has failed to prove it is entitled to any disgorgement under [26 U.S.C. §§ 7402\(a\)](#) in this case and therefore the government's request for disgorgement is denied.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 2018.

BY THE COURT

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David Nuffer  
*United States District Court Judge*

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<sup>44</sup> [www.rapower3.com](http://www.rapower3.com)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW** was sent to counsel for the United States in the manner described below.

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