

Denver C. Snuffer, Jr. (#3032) [denversnuffer@gmail.com](mailto:denversnuffer@gmail.com)

Steven R. Paul (#7423) [spaul@nsdplaw.com](mailto:spaul@nsdplaw.com)

Daniel B. Garriott (#9444) [dbgariott@msn.com](mailto:dbgariott@msn.com)

Joshua D. Egan (#15593) [Joshua.d.egan@gmail.com](mailto:Joshua.d.egan@gmail.com)

**NELSON, SNUFFER, DAHLE & POULSEN**

10885 South State Street

Sandy, Utah 84070

Telephone: (801) 576-1400

Facsimile: (801) 576-1960

*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., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p><b>DEFENDANTS' MOTION TO CERTIFY AND AMEND THE ORDER DENYING DEFENDANTS' MOTION TO REINSTATE TRIAL BY JURY [DOC. 336]</b></p> <p><b>AND</b></p> <p><b>REQUEST TO STAY PROCEEDINGS</b></p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
---	---

Pursuant to 28 U.S.C. § 1292(b), Defendants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC., R. Gregory Shepard, Neldon Johnson, and Roger Freeborn, (hereinafter collectively "the Defendants") respectfully submit this Motion to Certify and Amend the Order Denying Defendants' Motion to Reinstate Trial by Jury, entered on March 13, 2018.<sup>1</sup>

<sup>1</sup> [ECF Doc. 336](#).

Defendants further request that the Court stay these proceedings until their petition to appeal has been adjudicated by the Tenth Circuit Court of Appeals. However, in light of the Court's March 14<sup>th</sup> Order regarding Defendants' right "to depose JoAnna Perez and Amanda Reinken"<sup>2</sup> Defendants would not want the opportunity to take those depositions to be either hurried or lost and therefore would request that any stay permit those depositions to be taken during the pendency of the appeal.

### **I. Analysis.**

The collateral order doctrine accommodates a "small class" of rulings, not concluding the litigation, but conclusively resolving "claims of right separable from, and collateral to, rights asserted in the action."<sup>3</sup> These claims are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."<sup>4</sup> § 1292(b) states:

When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, that application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

The Supreme Court has held that three conditions must be met for a collateral order review. The order being appealed must: "(1) conclusively determine the disputed question, (2) resolve an

---

<sup>2</sup> ECF [Doc. 338](#).

<sup>3</sup> *Will v. Hallock*, 546 U.S. 345, 349, 126 S. Ct. 952, 957 (2006) (internal citations omitted).

<sup>4</sup> *Id.* (internal citation removed).

important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment."<sup>5</sup>

Defendants respectfully request that the Court certify its order denying Defendants' Motion to Reinstate Trial by Jury for immediate appellate review.<sup>6</sup> Resolving the issue of Defendants' right to a trial by jury materially advances the ultimate termination of litigation and involves a controlling question of law to which there is a substantial ground for difference of opinion.

Concerning the controlling question of law: Defendants' entitlement to a jury turns on whether the principles the United States Supreme Court applied in the 2017 case of *Kokesh v. SEC* to evaluate whether disgorgement is punitive or remedial can be applied to the issues raised in this case to determine whether disgorgement sought by Plaintiff is punitive or remedial. Prior to the Court's holding in *Kokesh*, there was significant disagreement on whether SEC disgorgement was punitive. The United States Supreme Court even overturned the 10th Circuit Court of Appeals' determination that SEC disgorgement is remedial.<sup>7</sup> While *Kokesh* was an SEC disgorgement case called upon to determine the applicability of federal limiting statute, the United States Supreme Court applied legal principles also articulated in non-SEC, non-statute-of-limitations cases.<sup>8</sup> And since the ruling, the 10th Circuit Court of Appeals has not been asked to determine whether these principles should be applied to disgorgement in a non-SEC setting. Defendants respectfully submit that this case provides the 10th Circuit with that opportunity.

Finally, since the underlying issue is Defendants' right to a jury in a case where it was originally requested and later removed, if that right is resolved in favor of the Defendants, review

---

<sup>5</sup> *Id.*

<sup>6</sup> Denial of a party's jury right is not "otherwise appealable under this section," therefore, immediate review turns on application of subsection (b) of section 1292.

<sup>7</sup> See *Kokesh*, 137 S. Ct. at 1645 (reversing *SEC v. Kokesh*, 834 F.3d 1158, 1167 (10th Cir. 2016));

<sup>8</sup> *Kokesh*, 137 S. Ct. at 1642 (citing *Huntington v. Attrill*, 146 U.S. 657, 667, 13 S.Ct. 224 (1892)).

would materially advance the ultimate resolution of this litigation. If the jury issue is only resolved later, post-trial, in Defendants' favor, then the entire case will require a retrial before a jury. That would unnecessarily consume the parties' and this Court's time and resources. Therefore, appellate review of Defendants' right to a jury is both ripe and conserves resources if resolved before any initial trial.

## **II. Conclusion.**

For the reasons stated, Defendants respectfully request the Court amend and certify its order denying Defendants' Motion to Reinstate Trial by Jury for interlocutory appellate review. Defendants further request if this Court permits an appeal, it also stay the proceedings pending determination of the Court of Appeals of the Tenth Circuit.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.  
Denver C. Snuffer, Jr.  
Steven R. Paul  
Daniel B. Garriott  
*Attorneys for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MOTION TO CERTIFY AND AMEND THE ORDER AND REQUEST TO STAY PROCEEDINGS** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher  
Erin R. Hines  
Christopher R. Moran  
US Dept. of Justice  
P.O. Box 7238  
Ben Franklin Station  
Washington, DC 20044  
*Attorneys for USA*

Sent via:  
 Mail  
 Hand Delivery  
 Email: [erin.healygallagher@usdoj.gov](mailto:erin.healygallagher@usdoj.gov)  
[erin.r.hines@usdoj.gov](mailto:erin.r.hines@usdoj.gov)  
[christopher.r.moran@usdoj.gov](mailto:christopher.r.moran@usdoj.gov)  
 Electronic Service via Utah Court's e-filing program

/s/ Denver C. Snuffer, Jr.  
*Attorneys for Defendants*