

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

DOCKETING STATEMENT

Case Name: UNITED STATES v. RAPOWER-3, LLC, et al.

Appeal No.: 18-4150

Court/Agency Appealing From: District of Utah, Central Division

Court/Agency Docket No.: 2:15-cv-00828-DN District Judge: David Nuffer

Party or Parties Filing Notice of Appeal/Petition: RaPower-3, LLC, International
Automated Systems, Inc., LTB1, LLC, R. Gregory Shepard, Neldon Johnson

I. TIMELINESS OF APPEAL OR PETITION FOR REVIEW

A. APPEAL FROM DISTRICT COURT

1. Date notice of appeal filed: October 10, 2018
 - a. Was a motion filed for an extension of time to file the notice of appeal? If so, give the filing date of the motion, the date of any order disposing of the motion, and the deadline for filing notice of appeal: **No.**
 - b. Is the United States or an officer or an agency of the United States a party to this appeal? **Yes.**

2. Authority fixing time limit for filing notice of appeal:

Fed. R. App. 4 (a)(1)(A) <u> X </u>	Fed. R. App. 4(a)(6) <u> </u>
Fed. R. App. 4 (a)(1)(B) <u> </u>	Fed. R. App. 4(b)(1) <u> </u>
Fed. R. App. 4 (a)(2) <u> </u>	Fed. R. App. 4(b)(3) <u> </u>
Fed. R. App. 4 (a)(3) <u> </u>	Fed. R. App. 4(b)(4) <u> </u>
Fed. R. App. 4 (a)(4) <u> </u>	Fed. R. App. 4(c) <u> </u>

Fed. R. App. 4 (a)(5) _____

Other: _____

3. Date final judgment or order to be reviewed was **entered** on the district court docket: **October 4, 2018 (ECF Doc. No. 467, 468).**
4. Does the judgment or order to be reviewed dispose of **all** claims by and against **all** parties? *See* Fed. R. Civ. P. 54(b). **YES.**

(If your answer to Question 4 above is no, please answer the following questions in this section.)

- a. If not, did district court direct entry of judgment in accordance with Fed. R. Civ. P. 54(b)? When was this done?
n/a
 - b. If the judgment or order is not a final disposition, is it appealable under 28 U.S.C. § 1292(a)?
n/a
 - c. If none of the above applies, what is the **specific** statutory basis for determining that the judgment or order is appealable?
n/a
5. Tolling Motions. *See* Fed. R. App. P. 4(a)(4)(A); 4(b)(3)(A).
 - a. Give the filing date of any motion that tolls the time to appeal pursuant to Fed. R. App. P. 4(a)(4)(A) or 4(b)(3)(A): n/a
 - b. Has an order been entered by the district court disposing of any such motion, and, if so, when?_n/a
 6. Cross Appeals. [Not a cross appeal.]
 - a. If this is a cross appeal, what relief do you seek beyond preserving the judgment below? *See United Fire & Cas. Co. v. Boulder Plaza Residential, LLC*, 633 F.3d 951, 958 (10th Cir. 2011)(addressing jurisdictional validity of conditional cross appeals).

- b. If you do not seek relief beyond an alternative basis for affirmance, what is the jurisdictional basis for your appeal? *See Breakthrough Mgt. Group, Inc. v. Chukchansi Gold Casino and Resort*, 629 F.3d 1173, 1196-98 and n. 18 (10th Cir. 2010)(discussing protective or conditional cross appeals).
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B. REVIEW OF AGENCY ORDER (To be completed only in connection with petitions for review or applications for enforcement filed directly with the court of appeals.)

1. Date petition for review was filed: _____
2. Date of the order to be reviewed: ___n/a___
3. Specify the statute or other authority granting the court of appeals jurisdiction to review the order: ___n/a___
4. Specify the time limit for filing the petition (cite specific statutory section or other authority): ___n/a___

C. APPEAL OF TAX COURT DECISION

1. Date notice of appeal was filed: ___n/a___
(If notice was filed by mail, attach proof of postmark.)
2. Time limit for filing notice of appeal: ___n/a___
3. Date of entry of decision appealed: ___n/a___
4. Was a timely motion to vacate or revise a decision made under the Tax Court's Rules of Practice, and if so, when? *See* Fed. R. App. P. 13(a) ___n/a___

II. LIST ALL RELATED OR PRIOR RELATED APPEALS IN THIS COURT WITH APPROPRIATE CITATION(S). If none, please so state.

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III. GIVE A BRIEF DESCRIPTION OF THE NATURE OF THE UNDERLYING CASE AND RESULT BELOW.

This case involves a claim that Defendants promoted an alleged fraudulent tax scheme under 26 U.S.C. 6700, which imposes 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.

Trial was held before Judge David Nuffer in Salt Lake City, Utah, in three sessions totaling twelve days divided from April to June, 2018. At the conclusion of trial, on June 22, 2018, the court made partial findings of fact from the bench and entered an initial order (ECF Doc. No. 413) granting partial injunctive relief.

On October 4, 2018, Judge Nuffer entered Findings of Fact and Conclusions of Law and Permanent Injunction (ECF Doc. No. 468) and Judgment (ECF Doc. No. 469).

IV. IDENTIFY TO THE BEST OF YOUR ABILITY AT THIS STAGE OF THE PROCEEDINGS, THE ISSUES TO BE RAISED IN THIS APPEAL.

A. The IRS failed to disclose their damages amount and basis during discovery and even during trial offered wildly divergent amounts from \$5 million to \$171 million.

Although the IRS had the burden to establish a reasonable approximation of defendants' ill-gotten gains, it prevented discovery of the damages theory and calculation during the discovery phase and failed to offer an actual calculation at trial.

The IRS failed to disclose a damage calculation under Rule 26 at any point.

The IRS failed to allow discovery using undesignated damage witnesses and opposing defendants' motion to compel deposition and successfully obtaining a protective order to prevent any deposition or disclosure of the evidence which was then offered as a surprise ambush at trial.

The IRS failed to establish a reasonable approximation of profit or gain by defendants and instead convinced the court to award damages to punish defendants' conduct.

There is no rational basis for the amount calculated and awarded by the Court as disgorgement.

B. Jury

Defendants were entitled to a jury; requested a jury and were denied the right to trial by jury; ultimately the amount calculated and awarded by the court is a penalty intended to punish defendants, not disgorge ill-gotten gains.

This was a legal, not an equitable proceeding and it was an error to deny the right to have a jury hear and decide the case.

It was an error to remove the jury at the outset of the case and an error to refuse to reinstate the jury on later motion by defendants.

C. Statute of Limitation bars relief on some transactions.

D. Government's expert witness did not perform any of the testing necessary to support his expansive conclusions. His testimony confirmed he was not qualified to offer the opinions he expressed and his testimony should have been excluded.

E. Not allowing Defendant Neldon Johnson to represent himself pro se.

F. Refusal to continue case for Greg Shepard's health.

G. Use of deposition testimony instead of live testimony when the witnesses were available.

H. Issues relating to the solar energy production system:

Finding that system will not ever work – when it now does.

Inclusion of Johnson turbine, heat exchangers, concentrators in the case when none of these were sold to the public and the tax issues related solely to the Fresnel Lenses sold by RaPower-3, LLC.

Whether a lens is a solar energy system.

Whether a lens generates solar process heat.

I. Permanent Injunction – injunction must be dismissed if system is working.

J. Judicial activism

Misinterpretation of the governing statute to require production of electricity in order to qualify for the tax credits as opposed to production of "solar process heat".

Whether research and development is enough to qualify for solar tax credit, or whether electricity must be produced to qualify under tax code.

Can the courts require a certain amount of electricity to be created when the statute is silent.

K. Does research and development meet the requirements for the energy tax credit?

V. ADDITIONAL INFORMATION IN CRIMINAL APPEALS.

A. Does this appeal involve review under 18 U.S.C. § 3742(a) or (b) of the sentence imposed? **NO.**

B. If the answer to A (immediately above) is yes, does the defendant also challenge the judgment of conviction? _____

C. Describe the sentence imposed. _____

D. Was the sentence imposed after a plea of guilty? _____

E. If the answer to D (immediately above) is yes, did the plea agreement include a waiver of appeal and/or collateral challenges?

F. Is defendant on probation or at liberty pending appeal? _____

G. If the defendant is incarcerated, what is the anticipated release date if the judgment of conviction is fully executed?

H. Does this appeal involve the November 1, 2014 retroactive amendments to §§ 2D1.1 and 2D1.11 of the U.S. Sentencing Commission's Guidelines Manual, which reduced offense levels for certain drug trafficking offenses?

NOTE: In the event expedited review is requested and a motion to that effect is filed, the defendant shall consider whether a transcript of any portion of the trial court proceedings is necessary for the appeal. Necessary transcripts must be ordered by completing and delivering the transcript order form to the Clerk of the district court with a copy filed in the court of appeals.

VI. ATTORNEY FILING DOCKETING STATEMENT:

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Attorneys for Defendants

PLEASE IDENTIFY ON WHOSE BEHALF THE DOCKETING STATEMENT IS FILED:

A. Appellants: Defendants below - RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC, R. Gregory Shepard, Neldon Johnson.

Petitioner

Cross-Appellant

B. PLEASE IDENTIFY WHETHER THE FILING COUNSEL IS

Retained Attorney

Court-Appointed

Employed by a government entity

(please specify _____)

Employed by the Office of the Federal Public Defender.

/s/ Steven R. Paul

Signature

October 24, 2018

Date

NOTE: A copy of the final judgment or order appealed from, any pertinent findings and conclusions, opinions, or orders, any tolling motion listed in Fed. R. App. P. 4(a)(4)(A) or 4(b)(3)(A) and the dispositive order(s), any motion for extension of time to file notice of appeal and the dispositive order **must be submitted with the Docketing Statement.**

The Docketing Statement must be filed with the Clerk via the court's Electronic Case Filing System (ECF). Instructions and information regarding ECF can be found on the court's website, www.ca10.uscourts.gov.

CERTIFICATE OF SERVICE

I, Steven R. Paul hereby certify that on the 24th day of October, 2018,

I served a copy of the foregoing **Docketing Statement**, to the following in manner indicated:

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Erin R. Hines
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