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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., LTBI, LLC, R.)

GREGORY SHEPARD, NELDON)

JOHNSON and ROGER)

FREEBORN,)

Case No: 2:15-CV-828DN

Defendants,

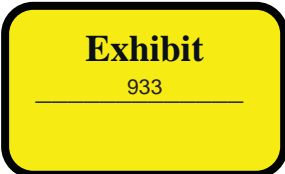
BEFORE THE HONORABLE DAVID NUFFER

April 26, 2018

BENCH TRIAL
DAILY COPY

PAGES 2051 -

Reported by:
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801-521-7238



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A P P E A R A N C E S

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I N D E X

WITNESS	EXAMINATION BY	PAGE
NELDON PAUL JOHNSON	CROSS (CONT'D) BY SNUFFER	2057
	REDIRECT BY HEALY-GALLAGHER	2211

EXHIBITS RECEIVED FOR IDENTIFICATION

PLAINTIFF'S	PAGE
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1 SALT LAKE CITY, UTAH, THURSDAY, APRIL 26, 2018

2 * * * * *

3 THE COURT: We're convened again in United States
4 vs. RaPower. And I notice that Mr. Johnson is ready to go
08:01:38 5 this morning. So am I.

6 Are there any preliminaries we need to handle? I
7 got some e-mails. I don't know that any of that has to be
8 handled before we start testimony, but tell me if it does.

9 MR. SNUFFER: I wanted to point out that Mr. Paul
08:01:56 10 sent what's marked as Exhibit 1525. It bears Bates Numbers
11 RA315651 through 16685, which is another version of the power
12 purchase agreement between the City of Boulder and
13 International Automated Systems, Inc. The one that was shown
14 yesterday or mentioned yesterday is a shorter version and has
08:02:36 15 edits on it. This is a longer version, and it no longer has
16 any edits.

17 A second document marked as 1526 --

18 THE COURT: Just a minute. The one discussed
19 yesterday that has the edits on it is what exhibit number? Is
08:02:55 20 it 536?

21 MR. SNUFFER: Yes.

22 THE COURT: Okay. And I still don't have a copy of
23 that.

24 MR. SNUFFER: Mr. Paul e-mailed it.

08:03:27 25 MR. PAUL: I didn't know I was supposed to e-mail

1 THE COURT: Mr. Snuffer, you may want to sit down
2 for a minute, I'm going to read a ruling.

3 Mr. Johnson, you can stay right there. That chair
4 is as good as any.

09:44:36 5 My practice is to make decisions in a deliberate
6 manner, but sometimes I'm too slow. In this case I wanted to
7 allow counsel to make a full record, but it's obvious that
8 I've given too much leeway, and license has been taken by
9 leeway.

09:44:52 10 Out of an abundance of caution, I reserved rulings
11 on motion in limine regarding defense experts. I felt I
12 didn't know about the case to be entirely secure on my
13 decision. We're now in the four plus two plus four, we're in
14 the 10th day of trial? Is that right? And I've heard a lot
09:45:15 15 of testimony in the depositions designations. I've read a lot
16 of exhibits. I've a much better idea of the factual setting
17 of the case from all of this exposure. While I've made no
18 factual findings and determinations that are final, I can now
19 see how the proposed experts fit or don't fit in the issues in
09:45:36 20 the case.

21 The issues presented by Mr. Johnson's testimony
22 under Rule 702 are similar to those presented by the other
23 experts. But I now know after many lines of testimony the
24 thinking of practice of Johnson on science. His methodology
09:46:04 25 disclaims records, data, references and peer review. Under

1 Rule 702 this is unacceptable. He claims qualifications and
2 endorsements without any proof other than patents. But
3 unfortunately our patent system in the United States is almost
4 self-authenticating without intensive governmental review.

09:46:28 5 A patent certifies very little especially when
6 compared to other world systems, and the EU system is the
7 landmark for making sure a patent really stands for something.
8 I take very little by patents except they were issued. That's
9 not the focus of my concerns.

09:46:46 10 My focus is on his qualification under Rule 702.
11 His testimony will not help the trier of fact to understand
12 the evidence to determine a fact in issue because he has shown
13 that his testimony is not based on sufficient facts or data at
14 least that are verifiable by the Court. It is not the product
09:47:13 15 of reliable and accepted principles and methods, and there's
16 insufficient proof that he's reliably applied the principles
17 and methods to the facts at issue in this case.

18 On some subjects including optics he has a mix of
19 insights and some comprehensible testimony, but most of his
09:47:35 20 testimony is so poorly articulated to require striking. I
21 grant all reserved objections and motions to strike on the
22 basis of foundation and Rule 702. He's nearly incapable of
23 answering a question, and when he does he offers confusing,
24 nonresponsive disconnected narratives. I'm glad this is not a
09:48:00 25 jury trial. It would have been impossible to manage with his

1 method of testimony.

2 Mr. Johnson presents with no college degree, no
3 experience with solar energy other than managing a plant in
4 Alaska, as I remember, in his work with IAS and his personal
09:48:22 5 work. He's never published his data findings or any articles
6 in anything other than a patent. He's never submitted any of
7 his research or actual work for authenticated peer review.

8 A defendant expert is always challenging because
9 they're a party with bias. Mr. Johnson is really the key of
09:48:52 10 this case. He's the inventor. He's the manager of most of
11 the entities that have any activity, and he makes the
12 decisions in all of the entity defendants.

13 Without contemporaneous documentation of his work
14 and unable to present current validating documentation of his
09:49:24 15 work with the highly questionable attempt at authentication
16 through unnamed experts and the explanation I find for his not
17 knowing their names, I find that not credible. I can't accept
18 that he has the qualifications necessary to testify as to
19 anything that requires a basis under Rule 702.

09:49:56 20 Now that's said, I have to know in this case what
21 Mr. Johnson did. In some instances why he did it may be
22 important. But I'm not going to regard in the larger part any
23 of his testimony about his actions, science, production or
24 operations as expert testimony under Rule 702. He has no
09:50:37 25 records of a successful commercial operation of a solar energy

1 production. He has no records showing third-party evaluation
2 of his proposed solar energy production facility. He has no
3 contractual relationships to engage in a successful commercial
4 operation of solar energy production for process heat or
09:51:06 5 electrical heat. He's testified of possibilities, plans,
6 tests and many repeated failures and barriers that have
7 prevented in spite of representations over the years that
8 success is at hand has prevented successful commercial
9 operation. This to me is one of the largest evidences of his
09:51:33 10 lack of qualification as an expert under Rule 702.

11 I think I've summarized the reasons for my action
12 in pointing out -- first of all, striking all objections --
13 striking all testimony on which I reserved objections with
14 regard to 702 and prohibiting Mr. Johnson's testimony under
09:52:08 15 Rule 702 going forward. I know that makes strategy in the
16 case somewhat challenging.

17 I also want to clarify for the record that the
18 proposed experts Hawes and Jameson do not fit the issues in
19 this case. Experts on the law are generally inappropriate.
09:52:24 20 The judge determines the law as advised by counsel. I have
21 competent counsel. They briefed the law. That enables me to
22 make decisions on the law. That's the biggest reason for
23 excluding the testimony.

24 I note that the government hasn't offered any
09:52:41 25 expert on tax law, and I know that these defense -- that some

1 defense experts are attempting to show subjective
2 reasonableness of beliefs of the defendants. And I've heard
3 Mr. Jameson on those points on how he advised, how he
4 reasoned, but I do not take any of his testimony as valid
09:53:03 5 opinion testimony under Rule 702. The material proposed for
6 expert testimony in the reports is not admissible under
7 Rule 702.

8 It's the function of the trial judge to determine
9 the law of the case according to United States vs. Zipkin,
09:53:23 10 729 F. 2d 384:

11 Likewise an expert may not offer conclusions that
12 certain actions complied with or would comply with the law.

13 There's only one applicable legal rule for each
14 dispute or issue. Back to the Zipkin case:

09:53:46 15 It requires only one spokesman of the law who of
16 course is the judge. To allow anyone other than the judge to
17 state the law would violate the basic concept. It would be a
18 waste of time if witnesses would duplicate the judge's
19 statement of the law.

09:54:06 20 While Mr. Jameson has been an attorney for 14 years
21 and has federal tax experience that began in 2011, he's never
22 counseled a client other than those connected to this case
23 about depreciation and tax credits related to solar energy.
24 And mere license as an attorney does not provide expertise
09:54:37 25 under 702. The level of his bias and interest by receipt of

1 his income and service as a referred tax consultant also leads
2 to concern about his impartiality and ability to express
3 opinions that would be helpful. The resistance that he's
4 demonstrated to applicable law as shown in his deposition
09:55:11 5 further demonstrates that he's not applied reliable
6 methodologies.

7 Really the big reason is that legal issues are
8 determined by the Court with the assistance and advice of
9 counsel, which I've been receiving. Mr. Jameson actually
09:55:32 10 testified at length regarding his work, and that's generally
11 permissible. But he's not going to be permitted to give any
12 testimony regarding 702 and under 702.

13 Did I reserve objections under 702 with
14 Mr. Jameson?

09:55:54 15 MS. HINES: Yes, Your Honor, I did.

16 MR. SNUFFER: No. I don't recall that.

17 THE COURT: Those are granted. Again, it's hard to
18 draw this factual line. What he told people, what he did, how
19 he reasoned, that may be helpful in determining the advice of
09:56:10 20 counsel defense. But I don't find that he's got the
21 qualifications to testify as a tax expert, though he is an
22 enrolled agent, has a master's in taxation, and he operated
23 tax offices for many years. The cited case law and
24 regulations in his report do not reflect the survey of the
09:56:41 25 field, but only support the defendant's position. And

1 essentially he recites tax and then draws a conclusion without
2 examination of the many factors that would normally be
3 presented in expert analysis.

4 The limited nature of his inquiries to which he
09:57:07 5 admitted during his testimony saying that he did not have to
6 audit further suggests that he was not even fitting his
7 analysis to the actual facts but to the reported facts. He
8 said it is not his responsibility to audit the tax return, but
9 his responsibility is to prove that his customers have the
09:57:33 10 documentation to support the claimed deductions and credits in
11 their returns. All he needed to see was a placed in service
12 letter from the client, provided by the client from RaPower to
13 know that including tax credits was legitimate.

14 So I've cleared up motions in limine 250, 249.
09:58:02 15 They're granted. Now, I wanted to do that because of the
16 stage we are at with Mr. Johnson's testimony. I'm also
17 concerned about trial management. I'd like to talk about that
18 at noon.

19 Ms. Hicken, should we be swapping court reporters
09:58:24 20 now?

21 THE COURT REPORTER: Are you taking another break?

22 THE COURT: We're going to be stopping around noon.

23 THE COURT REPORTER: Then, yes.

24 THE COURT: Okay. I apologize for taking the
09:58:40 25 unscheduled recess, but I needed some time to think and write.