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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,)
)
Defendants,

Case No: 2:15-CV-828DN

BEFORE THE HONORABLE DAVID NUFFER

JUNE 22, 2018

BENCH TRIAL

PAGES 2396-2534

Reported by:
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A P P E A R A N C E S

FOR THE U.S.:

U.S. DEPARTMENT OF JUSTICE

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1 SALT LAKE CITY, UTAH, FRIDAY, JUNE 22, 2018

2 * * * * *

3 THE COURT: Good morning, counsel.

4 MS. HEALY-GALLAGHER: Good morning.

08:58:47 5 THE COURT: We're convened in United States vs.
6 RaPower for closing arguments.

7 Do we have any concern further about Exhibit 360,
8 or were you able to look at the transcript and verify that our
9 exhibit records are correct? And honestly, I forgot entirely
08:59:06 10 to look at your concerns about exhibits. If you e-mailed that
11 to us I just failed to look at it.

12 MS. HEALY-GALLAGHER: We actually did not, so we
13 will get that to you promptly.

14 THE COURT: Okay.

08:59:16 15 MR. GARRIOTT: Your Honor, I think the record was
16 clear, the transcript was clear that it was not admitted.

17 THE COURT: And that's how I read the transcript
18 pages, too. So thank you.

19 All right. Well, anything else before we proceed
08:59:28 20 with closings?

21 MS. HEALY-GALLAGHER: Nothing from us, Your Honor.

22 THE COURT: Okay.

23 MR. SNUFFER: We're ready, Your Honor.

24 THE COURT: All right. Then we're at 9 o'clock.

08:59:37 25 Do you want a warning before 10:30?

1 head, but I can definitely research that and submit it.

2 THE COURT: Okay. All right. Thank you.

3 I appreciate counsel giving me the materials that
4 were sent to me over the noon hour. That's all my questions.

13:51:44 5 Thanks.

6 MS. HEALY-GALLAGHER: Thank you.

7 THE COURT: I want to thank counsel for their
8 responsiveness, their adaptation to the changes in schedule.
9 As the parties have both said today, many of the facts in this
10 case are not at issue. It's the effect of those facts that
11 are at issue, and I guess it's my job to define the effect of
12 those facts.

13 At the outset I'm denying Docket Number 394, the
14 motion to dismiss; and Docket 401, the motion for judgment as
13:52:18 15 a matter of law, both made under Rule 52(c).

16 The meaning of this case in a sentence is minimal
17 investment of money for outsized tax benefits. That's the
18 foundation of everything that runs through this case. The
19 defendants' enterprise is one of massive scope. The best
13:52:46 20 evidence that I have shows over \$50 million in revenue has
21 been received without any productive result except allowing
22 customers to take at least \$14 million in tax benefits from
23 the United States Treasury.

24 It appears that defendants may have sold as many as
13:53:05 25 50,000 in lenses, which at the usual market price of \$3500

1 each would potentially yield \$175 million in revenues. I have
2 not attempted to calculate the effect of the March 27th, 2018,
3 letter informing every lens user that they got more lenses
4 and inviting them to take more tax credits.

13:53:31 5 But the numbers tell us that this is a massive
6 fraud on the defendants' customers, many -- well, I should say
7 some of whom have cases pending against them in tax court, the
8 minority. But it's also a fraud on the American people who
9 have effectively paid to operate defendants' enterprise.

13:53:51 10 And an injunction will issue, and disgorgement of
11 revenues will be ordered. This enterprise involves great
12 effort and has broad customer support. Mr. Johnson has
13 patents for many components which may function separately or
14 two at a time. But the project to create a useful product
13:54:12 15 from solar energy has no sound scientific basis as a whole;
16 has no demonstration of economic viability, not even the
17 barest evidence; and does not qualify lens buyers for federal
18 tax credit or depreciation deductions.

19 Mr. Johnson and other defendants have created an
13:54:34 20 aura of success by several websites, operating components, a
21 large physical site with impressive construction, intense
22 marketing and communication, but this enterprise is destined
23 to fail by the lack of sound scientific, engineering, utility
24 and management expertise. This is an amateur integration of
13:54:59 25 tax law, engineering and multilevel marketing enabled by the

1 defendants' universal rejection of all conventional
2 authoritative expertise and process. It's a hoax funded by
3 the American taxpayer through defendants' deceptive advocacy
4 of abuse of the tax laws.

13:55:21 5 Enforcement of this -- of the law has been
6 excessively been delayed. Although less than 100 individual
7 tax audits and tax court appeals by my count are underway or
8 have been completed, the government has taken too much time in
9 effectively shutting down defendants' operations. This is in
13:55:40 10 some part due to the unique nature of defendants' enterprises,
11 the multiple entities used by defendants, the shifting use of
12 entities, the disbursement of thousands of customers across
13 the United States, the remote location of the defendants'
14 physical site and the lack of cooperation by defendants in
13:55:59 15 providing information in the litigation discovery process.

16 This delay does not weigh in the merits of the
17 case, but it has aggravated losses to the Treasury, increased
18 the revenues received by the defendants and emboldened the
19 defendants to continue operations. Just days before trial
13:56:18 20 started they directed customers to take tax credits on lenses
21 defendants distributed at no cost. The RaPower3 website still
22 uses all the arguments and appeals at issue now adjudicated in
23 this case as deceptive.

24 Mr. Johnson's qualifications by experience or
13:56:41 25 formal education are insufficient to support a theoretical

1 analysis of his proposed solar energy project. He has no
2 degree and has never designed or constructed an entire solar
3 energy project and has not published even on portions of his
4 work except in promotional materials.

13:57:02

5 As one small example of Johnson's simplistic and
6 erroneous understandings it is his impression that the local
7 power company is required by law to allow connection of solar
8 generation to the grid. This is true only of a very small
9 scale renewable energy projects and is still subject to very
10 specific rules including state tariffs for which he has made
11 no effort of qualification and he's made no other effort of
12 contract negotiation.

13:57:21

13 While Mr. Johnson claims to have information and
14 evaluations from professionals in many areas of technical
15 expertise required for solar energy production project he
16 refuses to identify these experts, has provided no
17 identification, has no reports from them.

13:57:39

18 Mr. Johnson and Mr. Shepard repeatedly received
19 advice from tax professionals that the tax benefits they
20 sought for customers were not available. They shopped for the
21 opinions they liked. They concealed facts from the few
22 professionals who told them their efforts might have some
23 merit. Contrary to instructions from tax lawyers, they posted
24 and disseminated drafts in limited memoranda in a deliberate
13:58:18 25 attempt to mislead the public, and they refused to remove them

1 when the authors demanded removal. This demonstrates
2 defendants' purposeful dishonesty.

3 Johnson and Shepard drafted summaries and glosses
4 on the memoranda that misrepresented them. Defendants' web
13:58:38 5 page represented the truth about tax law as the defendants
6 simultaneously emphasized the project's goal is to eliminate
7 the customers' tax liability. Suddenly after audits
8 commenced, the tune changed to advocacy of clean energy for
9 America. But none of that appeared in marketing materials
13:59:01 10 prior to the commencement of audits.

11 The disclaimers buried in defendants' websites have
12 no real effect by virtue of their language and by virtue of
13 the overwhelming predominance of false information about tax
14 law on the websites.

13:59:26 15 Greg Shepard ignited Neldon Johnson's enterprise
16 with multilevel marketing. Shepard is a master marketer who
17 amplified the information that Johnson provided to fit the
18 sales need. The combination of incentives from multilevel
19 marketing fees and tax benefits energized sales. Johnson, the
13:59:48 20 claimed scientist, engineer and project designer distorted tax
21 issues to fit his plan, and Shepard experienced in marketing
22 overstated the tax and scientific issues and operational facts
23 and misstated and exaggerated this bad advice in volume and
24 content. Shepard has repeatedly glowingly reported that the
14:00:10 25 project is about to create power. For many years promises of

1 power next month have been repeated so many times.

2 Shepard was key in his literature in preventing any
3 careful reading of the Kirton McConkie and Anderson opinions
4 by his overstatement of their contents in letters, marketing
14:00:32 5 materials and on the website. He was repeatedly confronted
6 with the truth but rejected it and continued to advocate the
7 falsehoods about the project and its tax implications.

8 Mr. Johnson is the center. He has a central
9 control of every entity in his solar energy enterprise, which
14:00:53 10 has any business activity and has interest in other entities
11 which are managed by other persons, but those entities have
12 been shown to have no business activity. He alone makes
13 decisions about businesses.

14 Relationships and responsibilities are most often
14:01:08 15 undocumented. Checks have been written from entities with no
16 apparent obligation to make payment to persons with no
17 obligation to receive payment from those entities. His
18 network of entities seems to morph, disappear and reappear
19 without any reason other than his discretion. While
14:01:30 20 contractual documents assigned obligation to entities, those
21 obligations transfer without documentation. The agreements
22 between the entities and customers refer to many documents to
23 defining obligations such as the safety and operating
24 guidelines referred to in the O&M agreement or the routine O&M
14:01:50 25 services referenced in the agreement. But none of those

1 standard or referenced documents exist.

2 Defendants have failed to demonstrate this project
3 can actually function, and plaintiff has demonstrated that it
4 cannot. Defendants have failed to demonstrate that this
14:02:09 5 project has any possibility of creating revenues. Plaintiffs
6 have demonstrated that it cannot. While defendants have
7 assembled a large staff, site and equipment, built massive
8 structures and demonstrated functionality of some components
9 of the energy project, it's a Potemkin project. They have
14:02:32 10 carefully avoided any integrated function of a test site or
11 model project. The many project components which are all
12 unconventional, largely self-invented have never been
13 assembled into a successful end-to-end working model partly
14 because the components are regularly redesigned and
14:02:52 15 perpetually changing.

16 Johnson claims to have performed tests and produced
17 power but has no records or witnesses to substantiate his
18 claims. Johnson testified that the technology as currently
19 designed has never been fully operational.

14:03:08 20 Shepard testified that he has seen the lenses
21 produce solar process heat but, quote, I am not sure that I
22 have seen everything work simultaneously to produce
23 electricity, close quote. Shepard has also testified that
24 Johnson has said that Johnson has seen everything produce
14:03:23 25 electricity in doing research and development, but there is no

1 documentary evidence. Shepard testified that to his knowledge
2 no lenses are putting solar electricity on the grid.

3 Defendants have no evidence that revenue has been produced
4 from any of the project components.

14:03:41 5 The project site has towers full of lenses arranged
6 in four circular arrays per tower with 34 lenses in each
7 circle and sheets of uncut plastic in a warehouse without any
8 active solar collector, heat exchanger, generator or
9 transmission line interconnect or any effective continually
14:04:02 10 operating connections between any of those or any connection
11 to a power grid. Revenues might accrue to lens owners if
12 power was produced. And because power production is not
13 possible with any designs to date power production has never
14 taken place and there is no revenue. The field of towers
14:04:24 15 creates the illusion of effort and success.

16 The only scientific evidence presented at trial is
17 it that the system will not work and that if it did work
18 overlooking all its untested impossibilities it will not
19 produce electricity at a rate of return that would be
14:04:46 20 commercially acceptable even assuming generous tax benefits.

21 Johnson 's methodical avoidance of system
22 components, interconnections and testing conceals the ultimate
23 fraudulent reality of a system and its business. The
24 defendants know there is no factual support for a stable
14:05:06 25 project but represented to the contrary. In spite of being

1 under development for 13 years and taking massive tax
2 advantages this project has no production. No contracts are
3 in place for sale of an energy product or any solar product.
4 Normally an energy production product of this size would be
14:05:28 5 financed by commercial entities, but that would require
6 economic viability demonstrated to assure lawyers, bond
7 issuers and commercial investors of some sophistication. But
8 defendants have preyed on the unsophisticated small investors.

9 How can a project without a viable product be so
14:05:49 10 successful as to generate sales of 50,000 products and
11 \$175,000 in contracted obligations and \$50,000 in payments to
12 defendants. Deceptive advocacy of tax benefits is the key. A
13 customer who puts down as little as \$105 is able to take \$1050
14 in tax credits, and in an example in 2012 on Exhibit 496 also
14:06:24 15 take a first year depreciation deduction of \$1,785. Over a
16 10-fold return on investment is achieved in the first year.

17 The business model and marketing materials were
18 carefully designed to generate the appearance of tax benefits
19 that outweigh cash outlay and, in fact, they have done so.
14:06:47 20 Most customers have never paid the \$3500 cost of a lens and
21 few have paid the \$1050 down payment which is equal to the
22 first full year tax credit. As the marketing material states,
23 earn money from your federal income tax. Zero percent of your
24 own money invested. With this program, you pay no federal
14:07:11 25 taxes. In fact, full participation makes you tax free till

1 2020.

2 The abuse of tax benefits has warped defendants'
3 model. They fund every component of the project, generators,
4 towers, frames, heat exchangers, concentrators, salaries,
14:07:33 5 equipment, through the inflated lens price which they can
6 exact by promising a tax credit many times greater than or at
7 most equal to the maximum down payment. If not for the tax
8 credit, it is highly doubtful that any investor would pay
9 70 to 400 times the value of a piece of breakable plastic
14:07:54 10 which has no energy production capability of its own. The
11 lens is a small, low value almost disposable components of an
12 unproven energy production system. Sheets of plastic sitting
13 on pallets in a warehouse uncut, ungrooved are clearly not
14 used in a trade or business or placed in service or solar
14:08:17 15 energy property. Lenses in frames or towers with no realistic
16 possibility of producing power or revenue are not qualified
17 for favorable tax treatment.

18 When the only cash of an organization comes from
19 investors it is a signal that it is not a trade or business
14:08:36 20 and likely merely a scheme to defraud.

21 Mike Penn, a purchaser of lenses first heard about
22 the lenses from his tax preparer. He didn't do any research
23 and woke up late on the last day of the year to purchase
24 lenses that entitled him allegedly to tax benefits and click
14:09:01 25 the button before midnight, as he said. He never paid for

1 anything, and nothing ever happened to him for failing to pay.

2 He did it again the next tax season. Penn
3 testified that it was presented to him as a tax incentive but
4 not as an investment. He looked at it as a tax viewpoint and
14:09:20 5 received no revenue.

6 The customers bought lenses created from sheets of
7 Lucite costing less than \$100 which were then cut into two and
8 so inexpensive that when the customer's \$3,500 breaks it is
9 replaced free of charge. No customer testified that they had
14:09:41 10 ever seen their lens or could identify their lens. No
11 evidence was produced that this sort of identification was
12 possible.

13 Customers were happy with the overstatement of
14 value that allowed excessive tax benefits. RaPower customers
14:09:58 15 are not concerned with details. Their testimony stated that
16 they knew that technology worked because they've known since
17 they were little children that you can take a magnifying glass
18 and create heat and that the technology just made sense, that
19 they felt heat when they put their hand underneath a lens and
14:10:18 20 they witnessed boards being set on fire. Not one of these
21 customers testified that they had any evidence that these
22 lenses could place actual power on the grid or generate
23 revenue, and few of them even asked.

24 This case has a disturbing undertone. It's one
14:10:37 25 thing to believe in the underdog, the innovator, the

1 disruptor, but rejecting expertise on the basis of homespun,
2 untested wisdom on highly technical topics is very dangerous.
3 If we allowed manufacturers to build projects or products
4 without regard to safety standards or food manufacturers to
14:11:00 5 produce food without sanitation or safety standards, we would
6 place society at risk. But individuals seem attracted to
7 unconventional counter authority advocates, and they do so
8 putting themselves in our institutions at risk.

9 This case echoes of the serious affinity fraud
14:11:15 10 problem we have in this state. The same psychological
11 motivations and willingness to believe contrary to
12 conventional established facts underlie all these schemes that
13 prey on individuals who are ill-prepared and can ill-afford a
14 downside by promising a massive unreasonable upside. An
14:11:38 15 injunction must now be entered to stop the losses and
16 establish the truth.

17 The defendants' multilevel marketing strategy has
18 further enrichment of their customers and investors.
19 Representatives of that group and employees are defendants'
14:11:54 20 only supporting witnesses. Some who testified on
21 cross-examination in favor of defendants are under threat of
22 audit and IRS and state tax commissions. If defendants fail
23 as they have in this case these customers face significant tax
24 consequences equivalent to their credits and deductions taken
14:12:14 25 over many years purchased with their very small down payment

1 on an inflated purchase price. These people could not turn
2 their back on their benefactor, and their non-credible
3 testimony shows that they're bias -- shows their disabling
4 bias because their financial lives are at stake.

14:12:43 5 Now, next week I will provide plaintiff's counsel
6 with my notes from trial, my selected notes from trial, and
7 from the deposition designations which I reviewed reflecting
8 facts I've specifically found, as well as a somewhat edited
9 version of the plaintiff's proposed findings of fact and
14:13:03 10 conclusions of law. Could we distribute these documents?

11 Copies will be sent to defendants' counsel.
12 Plaintiff's counsel will integrate these materials as
13 appropriate and proposed revised findings of fact and
14 conclusions of law to me by a certain date.

14:13:20 15 How long will you need to do that?

16 MS. HEALY-GALLAGHER: Do you mean within the next
17 week?

18 THE COURT: By a certain date. I'm giving you --
19 we're going to negotiate now.

14:13:35 20 MS. HEALY-GALLAGHER: Well, obviously, Your Honor,
21 we would like to do this as soon as possible. I can make
22 every effort to have something turned around by --

23 THE COURT: Let me just pause for a minute. I
24 just -- we're going to come back to schedule here. I just put
14:13:49 25 a draft order on your desk. This order is very summary, but I