CASE NOS. 18-4150 and 18-4119

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee,

v.

RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON,

Defendants – Appellants.

On Appeal from the United States District Court
For the District of Utah, Central Division
The Honorable Judge David Nuffer
D.C. No. 2:15-cv-00828-DN

APPELLANTS' REPLY BRIEF

Respectfully submitted,

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Oral Argument is requested.

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DOJ	Department of Justice
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ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT CONCLUDED SELLING LENSES WAS A TAX SCHEME WHEN ALL OF THE ELEMENTS OF 26 U.S.C.A §§ 46 AND 48 HAVE BEEN FULLY MET.

DOJ misrepresents the ubiquitous presence of ″disclaimers″ on every contract,[1] every website,[2] and throughout correspondence as merely something that ″sometimes accompanied″ their public information. (B2 p.16.) It was impossible to purchase any lens without signing an agreement cautioning purchasers to get their own tax advice. All transactional documents contained tax disclaimers. (See PLEX5, p. 2; PLEX14, p. 2; PLEX20, p. 3; PLEX27, pp. 1-3; PLEX94, p. 5; PLEX95, p. 5; PLEX119, pp. 1-2; PLEX174, pp. 1-2; PLEX511, p. 1-2; PLEX531, pp. 3-6; PLEX533, pp. 5-6; PLEX620, p. 6, among others).

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[1] The purchase contract, for example, stated: ″Seller and Purchaser acknowledge that they each understand that the Alternative Energy System may qualify for certain tax incentives and benefits under the 2005 Energy Policy Act and other statutes. Purchaser agrees to obtain the evaluation and opinion of its own tax attorney or accountant as to any tax matters relating to this Agreement and to the Alternative Energy System. Seller does not guarantee any tax incentive or benefit to Purchaser.″ (PLEX94.)

[2] The Ra-Power3 website, for example, stated: ″RaPower-3 is a seller of energy systems and does not give tax advice nor does Greg Shepard or Matt Shepard. They are not CPAs or qualified tax preparers. Website references toward tax incentives are provided in general terms only; it is the sole responsibility of purchasers of RaPower-3 equipment to verify all tax benefits through a competent tax preparer.″ (PLEX832A.)

In the same paragraph DOJ mentions the lenses "generated a small amount of electricity." (B2 p.17; see also B2 p. 3-4; Ap2 p. 70). It is impossible to produce any amount of electricity unless the lenses produced "solar process heat." §48 allows the energy credit for solar process heat—and no quantity of electricity production is required.[3] During trial DOJ never argued the lenses failed to produce some minimum quantity of electricity. Their claim was the lenses could not produce solar process heat to generate any amount of electricity at all. Their brief dramatically changes their position to allow electricity was generated, just *not enough*. Only lenses were sold, and they are qualified energy equipment producing solar process heat.

DOJ argues Defendants should have known tax benefits were unavailable. (B2 p. 32-35.) Their examples prove the opposite: Like the tax professionals testified, tax decisions require "specific facts and circumstances" and Defendants explained individual circumstances determined tax effect.[4] The attorney who wrote the tax memorandum expected Defendants to rely on it,[5] and to show it to the public as part of marketing lenses.[6]

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[3] Tr.699:18-20. See also IRS Form 3468 Instructions for Qualified Progress Expenditures.
[4] See PLEX94 ¶25, Tr.701:4-10; PLEX362.
[5] Tr.697:4-8.
[6] Tr.701:18-20.

II. DISGORGEMENT AWARD WAS IN ERROR.

A. Standard of Review.

Disgorgement is an equitable remedy claimed in SEC, FTC, IRS and other proceedings. Courts apply the same standard for all federal disgorgement cases. See B2 p. 40; *see also United States v. Stinson*, 729 F. App'x 891, 898-99 (11th Cir. 2018) (Applying SEC disgorgement case law reviewing a 26 USC §7402 case.) Disgorgement is reviewed for abuse of discretion, but the amount awarded reviewed for clear error. *Klein-Becker USA, Ltd. Liab. Co. v. Englert*, 711 F.3d 1153, 1163 (10th Cir. 2013) ("Although we review the district court's decision to award disgorgement of profits from trademark infringement for abuse of discretion, we review the amount awarded for clear error and the district court's method for determining that amount de novo.") (citing *FTC v. Kuykendall*, 371 F.3d 745, 763 (10th Cir. 2004)).

Calculating disgorgement is a question of law reviewed de novo. See *S. Colo. MRI, Ltd. V. Med-Alliance, Inc.*, 166 F.3d 1094, 1100 (10th Cir. 1999) (While reviewing the amount of a damage award for clear error, "the methodology a district court uses in calculating a damage award, such as determining the proper elements of the award or the proper scope of recovery, is a question of law we review de novo.") DOJ incorrectly stated the standard of review is solely "abuse of discretion." Appellants appeal not only the award of disgorgement, but the methodology used

for the amount as well. This Court should review the award of disgorgement for abuse of discretion but the calculation de novo.

B. DOJ Did Not Meet the Burden of Showing a Reasonable Approximation.

Disgorgement is an equitable remedy, imposed to ″forc[e] a defendant to give up the amount by which he was unjustly enriched.″ *See FTC v. Bronson Partners*, 654 F.3d 359, 372 (2d Cir. 2011), quoting *SEC v. Commonwealth Chem. Secs., Inc*., 574 F.2d 90, 102 (2d Cir. 1978). Forcing wrongdoers to return the fruits of conduct determined to be illegal ″has the effect of deterring subsequent fraud.″ *SEC v. Cavanagh*, 445 F.3d 105, 117 (2d Cir. 2006). Because disgorgement is not a penalty the amount may not exceed the gain from wrongdoing. *Id.* at 116 n.25. It is plaintiff's burden to establish a reasonable approximation of the unjust gain. Restatement of Judgements §51(5)(d); *accord SEC v. Curshen*, 372 F. App′x 872, 883 (10th Cir. 2010). Only after a reasonable approximation is proven does the burden shift to defendants to show any inaccuracies. *Id*. at cmt. i. The district court ignored DOJ′s actual evidence and relied on conjecture to fashion a punitive award many times greater than DOJ's deficient evidence supported.

DOJ argues ″in cases involving the operation of a fraudulent business, courts accept revenues or gross receipts obtained by the defendant as a reasonable measure of disgorgement, regardless of the defendant's expenses." (B2 p. 40). This was not

the measure used by the district court. In fact, the district court ignored evidence of receipts/deposits in its calculation.

C. Approximation Was Unreasonably Based Upon the District Court's Conjecture.

Typically, reasonable approximation looks at gross receipts. DOJ relies on *FTC v. AMG Cap. Mgmt., LLC*, 910 F.3d 417, 427 (9th Cir. 2018). Unlike this case, the *AMG Cap. Mgmt, LLC* court did not conclude their expert review with just the number of transactions or the number of customers. It audited those amounts and reduced by qualifying expenses. *Id*. They relied upon actual financial data presented by an expert witness for a reasonable approximation.

DOJ also cites *Klein-Becker USA, LLC v. Eglert*, 711 F.3d 1153, 1163 (10th Cir. 2013). In that case, experts audited the ″Paypal sales records″ to determine the amount of defendant's wrongful gains. *Id*. Again, qualified experts reviewed actual financial data and relied on solid documentary information to calculate the correct disgorgement amount.

Here DOJ gave two "estimates": One based on an Excel spreadsheet, the other totaling bank deposits. Both were horribly flawed. For both, DOJ only produced non-expert testimony from witness-employees (who were not disclosed or examined during discovery). The Excel spreadsheet was based on an unreliable database, resulting in an unreliable number of lenses sold, an unreliable average price for

lenses sold, and an unreliable total sales price of lenses. See PLEX749.[7] The bank summaries were an overinclusive, unreliable and incomplete lay examination of Defendants' and non-parties' (Solco I, and Xsun Energy) deposits.

For both methods, there was no expert examination of the data, no audit, and the DOJ employee/paralegals failed to use actual financial data, despite its availability. *Id*. They failed to provide a reasonable approximation of Defendants' actual receipts. Then the court used the Excel spreadsheet to multiply unreliable estimates to guesstimate total gross income from lens sales, compounding the errors from an unreliable approximation into a penalty.

The Excel database (PLEX749) contained inaccurate tallies for the number of lenses purportedly "sold," the purported "average price" of the lenses, and the estimated "total sales price" of lenses. Both DOJ and the court acknowledged these were unreliable numbers taken from an inaccurate database gathered by lay witnesses. The data in the database did not disclose that most initial contracts were not fully paid and many were unpaid.

DOJ's spreadsheet was created by their witness downloading raw data from Defendants' noncommercial proprietary computer program. That program did not allow any posted data to be deleted, and therefore any "test" (fictitious) transactions,

[7] In PLEX749 compare column AQ, which identifies the intended sales with column AP, which accounts for amounts due, and lists checks to establish amounts received.

canceled transactions, or failed sales, once posted could not be removed. PLEX749 purports to list clients and the number of lenses each client purchased. The district court took an Excel data column (the number of lenses ORDERED – not the number of lenses PAID FOR) to make its inaccurate estimate of Defendants′ receipts. That calculation ignored bank statements, ignored the record of payments included on the same spreadsheet, and ignored obvious duplicate postings, resulting in a defective, fictional amount called "revenue received." This was not a reasonable approximation but instead a maximum penalty.

PLEX749 contains entries listing a small down payment, some entries show a partial down payment, some of those payments bounced (but could not be deleted from the database), some orders were cancelled (but could not be deleted), and some amounts were refunded (but could not be deleted) and all contracts offered a full refund. See PLEX749, Column AP. Partial payments are shown in the exhibit. *Id*. Despite the court acknowledging not all of the customers paid the full amount, it counted each transaction as if it had been paid. (ECF 467, p. 126). Doing so ignored evidence in the same spreadsheet identifying actual receipts. The court's calculation was a grossly inflated, punitive, hypothetical award.

A reliable cross-check was potentially available in bank statements showing deposits, which the DOJ had but never used to compare. Bank statements would have allowed DOJ to compare entries on PLEX749 to confirm any payments actually

received. DOJ acknowledged in open court PLEX749 does not support $50,025,480 as either gross receipts or the increase in net assets.[8] The court acknowledged "[t]here was testimony that not all of Defendants' customers have paid the down payment amount for all of the lenses they purportedly bought." (ECF 467, p. 126).

The district court didn't examine PLEX749 for evidence of actual payments. PLEX749 has a "comments" column explaining "payments." (See PLEX749, column AP). Although identified by DOJ's witness, the lower court ignored this information.[9] The court totaled column AQ for its disgorgement award. Column AQ lists the proposed sale amount, not actual payments received. DOJ's witnesses acknowledged, in most cases, column AP identifies a "due" amount (unpaid), and checks separately. (TR.810:20-811:6; 811:24-812:22).

The district court recognized the amount reported on AP line 3967 shows $41,580 "due" and a check for $6,615. But column AQ shows a total of $48,195, acknowledged as the amount **due** and not the amount of any check **paid**. (TR. 811:24-812:22). Using AQ overstated "disgorgement" for this single transaction by at least $41,965.[10]

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[8] ECF 412, p. 98; TR.2447:15-2448:2.
[9] TR.810:20-811:6; 811:24-812:22.
[10] AQ total $48,195 minus the check of $6,615—however, that check may have bounced or been cancelled. It would require the bank statements to determine if the check was actually paid.

Another example is on line 2492 of PLEX749 (TR. 810:20-811:6). Because of these disparities, DOJ admitted gross receipts in PLEX749 was no more than $17,911,507.[11] DOJ acknowledged "there is evidence that not everybody paid for every single lens in the amount of $1,050."[12]

DOJ's argument that Appellants called no witnesses does not fix their failure of proof. DOJ did not meet their burden, so the burden never shifted. Evidence failed to establish a reasonable approximation. The court ignored problems with DOJ's evidence. Even DOJ understood the court's calculation was an unreasonable approximation of Defendants' gains.

In addition to the "comments" column of PLEX749 listing checks and payments, DOJ had bank account documents. Bank deposit slips could have verified gross amounts received. Despite having this information, DOJ encouraged the court to rely upon the most inaccurate and unreliably overstated "approximation."

It is not Appellant's burden to establish a reasonable amount of disgorgement. That was DOJ's burden. DOJ argues the Memorandum Decision denying Defendants' Motion in Limine to Exclude Testimony Regarding Damages Relating to Disgorgement of Funds cures the problem. Ap1 114 (ECF 338). DOJ quotes, "Moreover, Defendants have repeatedly withheld information from Plaintiff

[11] TR.821:7-822:2; 887:11-25.
[12] TR.892:15-17. Even if column AP were totaled, it would not be proof of payment, only proof of posting.

regarding the basis for disgorgement, despite being ordered to do so." *Id*., A. 115. DOJ inaccurately uses this excerpt to claim Appellants were ordered to produce financial information for DOJ to prove its reasonable approximation of damages. This misstates the record.

Appellants did not refuse to supply financial information, nor were they ever found to have withheld financial information, or compelled to produce it. That Order (ECF 235) had nothing to do with bank and financial records, but the following specific information:

> a. The computer program, or data extracted from it, that (among other things) purportedly tracks solar lens customer names and sales, serial numbers of lenses, and the location of any customer's lens;
> b. All RaPower-3 solar lens purchase agreements with customers since 2010;
> c. The solar lens purchase contract between SOLCO I and a "company back East" with a down-payment of $1 million.

From ECF 218 the district court ordered Defendants produce:

> 1. The computer program, or data extracted from it, that (among other things) purportedly tracks solar lens customer names and sales, serial numbers of lenses, and the location of any customer's lens;
> 2. All RaPower-3 solar lens purchase agreements with customers since 2010;
> 3. The solar lens purchase contract between SOLCO I and a "company back East" with a down-payment of $1 million;
> 4. The list of IAS shareholders; and
> 5. Any letter or purported documentation that supports Mr. Johnson's belief that the IRS "exonerated" him by giving him any tax credit.

These were produced. The order does not involve financial records or receipts—DOJ obtained those directly from banks using subpoenas.

The district court allowed DOJ to conceal from discovery the financial evidence it intended to use at trial. This resulted in trial-by-ambush. Appellants were bushwhacked when the court admitted summaries Appellants first saw on the eve of trial.

In the second approach, limited bank account information was selectively used for summary exhibits. Bank records were not presented at trial. DOJ selectively assembled numbers from its "review of 32,000 pages of bank records for accounts of all defendant entities."[13] DOJ paralegals chose total deposits of $25,874,066 in RaPower-3 accounts,[14] $5,438,089 in IAS accounts,[15] and non-party accounts with the total of all deposits being $32,796,196.[16] (See ECF 467, pp. 81-85). These were double or triple counted. DOJ's paralegal witness was not a CPA (TR.877:8-9) or a lawyer. (TR.877:10-11). She used the term "gross receipts," but included all deposits on bank statements, without associating any deposit to lens sales. (TR.877:16-878:22). She did not use any available information on checks or deposit slips to identify and isolate lens sales. (TR.879:1-14). She identified only bank statement transfers, not gross revenues generated by lens sales. (TR.880:3-25). Her exhibits may have been labeled "gross receipts" but none of the exhibits

[13] ECF 467, 80.
[14] ECF 467, 81.
[15] ECF 467, 82.
[16] ECF 467, 85.

attempted to audit or limit data to lens sales. (PLEX735-TR.881:11-16; PLEX737-TR.881:25-882:6; PLEX738-TR882:8-14; PLEX739-TR.882:21-883:1; PLEX740-TR.883:2-7.)

DOJ's paralegal failed to segregate redeposits or inter-account transfers. (TR.883:25-884:16). She made no attempt to exclude $3 million deposited from an IAS stock purchase, although DOJ knew that happened. (TR.1812:4-12).[17] The exhibits are inherently unreliable.

The exhibits included deposits for non-parties Solco I and XSun Energy. Both Solco I and XSun Energy were not sued because they followed written opinions from the Kirton & McConkie lawfirm.[18] Depositions focused on those letters.[19] Both entities had their records confiscated by the IRS in a search warrant in 2012. Yet neither Solco I nor XSun were named as parties. DOJ chose to strategically exclude these entities rather than naming them at the outset or asking the court for leave to join them. That strategic decision prevented these parties from participating and

[17] The court told DOJ this was impermissible double counting, but made no effort in its findings to correct it. (TR.2443:2-2444:24).
[18] See, e.g., PLEX358, PLEX364, PLEX370.
[19] PLEX579 79:8-81:7, 82:8-83:6; PLEX673 78:22-79:5, 79:12-80:9; PLEX581 38:10-40:6, 45:4-17, 47:2-19; See generally PLEX355.

presenting any defense to DOJ's claims about them.[20] Evidence of their deposits should have been excluded.

Even after combining all the deposits from parties and non-parties alike with RaPower and IAS bank accounts, and ignoring duplicates or transfers between accounts, DOJ calculated bank deposits totaling $44,129,012. (PLEX735-740). Yet the court calculated disgorgement at $6,000,000.00 more! (ECF 467, p. 126-127).

Presently the district court appointed receiver claims $1.498 million was transferred from RaPower and deposited into XSun, clearly a double-counting. See ECF 582. Even with double counting, bank deposits fell well short of the $50 million ordered disgorged. The court did not use bank summaries, but used the dubious PLEX749. (ECF 467, ¶86.) If the proof in this case is sufficient, then "reasonable approximation" holds no burden at all.

D. Income of Individual Defendants is Basis for Disgorgement.

There must be a proven "relationship between the amount of disgorgement and the amount of ill-gotten gain."[21] Income of individual defendants is counted only

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[20] *C.f. Glenny v. Am. Metal Climax, Inc*., 494 F.2d 651, 653 (10th Cir. 1974) ("Because appellants are demanding monetary and injunctive relief for damages caused solely by this smelter, we believe that Blackwell Zinc, although a wholly owned subsidiary of ALZ and AMAX, has at least an interest in the subject of this action. Without its joinder, Blackwell Zinc's ability to protect that interest may be impaired.")

[21] *C.F.T.C. v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999).

to the extent DOJ can show it came solely from the illicit or fraudulent activities and not a compounding calculation of amounts *already included* in the disgorgement calculation for the entities.[22]

All awards against individual Defendants are entirely derived from and included in the RaPower-3 total and is an improper double recovery. All money from lens sales passed through RaPower-3. Therefore, all funds paid to Neldon Johnson, R. Gregory Shepard, and after 2010 to IAS,[23] identified in PLEX 735-738 came directly from RaPower-3. To include those both for individual Defendants and also income to RaPower-3 results in prohibited double counting and double recovery.[24] RaPower is the only party whose revenues should be counted.[25]

III. DOJ VIOLATED THE DISCOVERY DISCLOSURE RULES.

A. Damage Evidence Was Not Disclosed.

DOJ failed to disclose its damages calculation prior to trial. The district court should not have admitted that evidence, nor relied on it. This Court reviews

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[22] See *United States v. Mesadieu*, 180 F.Supp. 1113, 1122 (M.D. Fla. 2016) (refusing to award disgorgement when government failed to distinguish legitimate gains from illegitimate gains).

[23] IAS sold lenses in 2009, but in 2010 those sales were transferred to RaPower and thereafter all sales were conducted by RaPower alone. (TR.2441:23-2442:6).

[24] The government also included other income not from lens sales. The extent of that error is impossible to determine without seeing the government's source documents and how they were selectively used to reach their calculated results, a document which **the court ruled defendants could not see** in ECF 376.

[25] Further, RaPower did not collect on all sales. What was "booked" and "collected" are very different. Collections were much lower.

decisions to admit evidence for abuse of discretion. See *United States v. Boeing Co.*, 825 F.3d 1138, 1145 (10th Cir. 2016). "Under this standard, we will not reverse unless the district court's decision exceeded the bounds of permissible choice in the circumstances or was arbitrary, capricious or whimsical." *Id*. (internal quotation marks omitted).

"[B]y its very terms Rule 26(a) requires more than providing-without any explanation-undifferentiated financial statements; it requires a 'computation' supported by documents."[26] Because DOJ only provided a description of claimed damages, it had an obligation under Fed.R.Civ.P. 26(e) to supplement its disclosure and elaborate on the "income information available to the IRS, income information in the possession of all Defendants, and the financial records and accounts of all Defendants and any business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme."[27]

Rule 26(e) mandates supplementing initial disclosures throughout the case. "A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—**must** supplement

[26] *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006).
[27] See Ap1 pp.110-111.

or correct its disclosure."[28] The timing of supplementation is critical to whether it is allowable.[29]

DOJ over-generalized damages in its Initial Disclosures and never supplemented. Defendants could not analyze or prepare to confront damage proof at trial. The plaintiff in *Design Strategy*, infra, was barred from using evidence when it relied on generalized initial disclosures using a broad categorical description of "all monies paid to [Defendant] . . . based upon breach of fiduciary relationship".[30] That description did not satisfy Rule 26 and was not supplemented before trial.[31]

DOJ cannot circumvent Rule 26(a) by referring to undisclosed documents as merely "summary calculations."[32] Nor can it claim disgorgement is not damages for purposes of Rule 26(a). DOJ robbed Defendants of the opportunity to hire an expert witness to rebut their flawed calculations.

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[28] Rule 26(e) (emphasis added).
[29] *AVX Corp. v. Cabot Corp*., 252 F.R.D. 70, 79 (D. Mass. 2008) (finding a supplemental calculation untimely when made after the close of discovery because the opposing party was without the means to explore and challenge it).
[30] *Design Strategy*, 469 F.3d at 292.
[31] *Id.* at 293. See also, *Silicon Knights, Inc., v. Epic Games, Inc.*, 2012 WL 1596722 (E.D.N.C. May 7, 2012) (the court held a description of "several million dollars" was not the specific computation required by Rule 26 because it lacked precision and analysis.)
[32] *See Design Strategy,* 469 F.3d at 292 (finding inadequate the disclosing party's assertion that calculating damages was "simple arithmetic").

The remedy for untimely disclosure is excluding evidence, particularly when disclosed on the eve of trial.[33] Late disclosure prejudices the opposing party even when untimeliness only results in scheduling changes, reopening discovery or other delays and increased costs of litigation.[34] Here the late disclosure was after discovery ended, and any opportunity for expert witnesses cut-off. This left Defendants without any opportunity to use experts to refute and criticize the DOJ's paralegal-witnesses' inaccurate lay summaries. Had Defendants known of the dubious damage evidence during discovery, they would have retained expert witnesses to challenge DOJ's wrong assumptions and conclusions.

B. Expert Witness Testimony Was Not Properly Disclosed or Admitted.

Rule 26(a)(2)(B) requires experts and their proposed testimony be disclosed. DOJ failed to identify any expert on financial calculations, summaries, charts, or explanations. DOJ claimed it was not expert testimony; only summarized and compiled deposits from Defendants' accounts and depreciation, and solar tax credits from customers' tax returns.[35] Even were this true, Defendants were robbed of *their* opportunity for an expert witness to examine the surprise material and refute inaccurate "summary calculations" and bad "arithmetic." The trial court's decision

[33] *See CQ, Inc. v. TXU Mining Co.*, 565 F.3d 268, 280 (5th Cir. 2009).
[34] *Id.*; *see also Bean v. Pearson Educ., Inc.*, 949 F. Supp. 2d 941, 953 (D. Ariz 2013).
[35] ECF 332, p. 4.

to admit or exclude expert testimony is reviewed for an abuse of discretion. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 152 (1999).

DOJ claimed the surprise evidence was "a reasonable approximation of the Defendants' gross receipts"[36] and "the harm to the government that resulted from the Defendants' scheme."[37] Their witnesses testified to much more than tallying numbers. They provided analysis and summaries of summaries.[38] There are mathematical comparisons of different summaries (gross receipts vs. harm to government),[39] which necessarily entailed making expert assumptions and drawing conclusions. Their testimony and documentation went beyond the ken of a layman. Ms. Perez testified about 1,643 tax returns,[40] including the total depreciation and total solar tax credits, then "applied the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government) from Defendants' scheme."[41] The tax loss (harm to the government) was not disclosed despite Rule 26. The calculations were not mentioned during discovery. There was no hint of the theory

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[36] ECF 329, p. 4.
[37] *Id*.
[38] *Id*. fn 11.
[39] *Id*. fn 13
[40] Unexplained returns were given Defendants in three installments, the last on September 15, 2017, a week after the Amended Scheduling Order (ECF 205) set counter-expert reports to be due, preventing any opportunity to analyze the material and meet the deadline. TR.483:7-15. Even if they were produced timely, no explanation was provided for how they were going to be used as part of the case.
[41] *Id*. fn 14.

of "harm to government." Nothing was disclosed about the assumptions and calculations used to determine an "average tax rate" nor about how the "average tax loss" was calculated. These were conclusions wholly unanchored in disclosed methods, assumptions, or application.

Because DOJ never disclosed a calculation of damages, Defendants never knew how disgorgement would be calculated. Defendants were unable to challenge surprise witnesses' calculations and computations. Defendants never knew how the individual tax returns fit into DOJ's claims. Until trial, Defendants never knew the tax rates applied by Perez. Tax returns are not simple math. They are complex. To address the alleged harm to the Treasury, each individual tax return would have to be compared to a hypothetical tax return recalculated without the solar business deductions. DOJ did not do that and Defendants were prevented from using an expert to accomplish it before trial.

DOJ made generalized assumptions about tax refunds and lump-summed those numbers into a summary called "Harm to the Treasury" attributed to Defendants. Common sense dictates if the solar energy equipment is withdrawn from the tax calculations, there would still be taxes owed, or taxes overpaid with refunds owed, or deficiencies paid by each taxpayer based on their unique circumstances. There is no "average" but an actual, calculable number that was not calculated, nor proven.

Those complex calculations were missing, and DOJ's assumed numbers were put in summaries and charts. DOJ sidestepped the duty to disclose expert witnesses and expert reports. The tax code and its application in this case requires specialized knowledge subject to Fed.R.Evid. 701 and 702 and DOJ did not comply.

IV. DEFENDANTS WERE ENTITLED TO A JURY.

A. The Correct Standard of Review for reviewing denial of Appellants' Jury Right on this Appeal is De Novo.

DOJ argues the "grant or denial of a motion for trial by jury is reviewed for abuse of discretion." (B2 p. 54.) (citing *Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1090 (10th Cir. 1980) (Fed.R.Civ.P. 39(b)), but Rule 39 and *Thompson*, do not apply here. In *Thompson*, this Court decided whether a trial court erred vacating a jury on the first day of trial was an abuse of discretion. *Thompson*, 621 F.2d at 1090. In *Thompson* the jury was requested several months after the time allowed under Rule 38(b) had expired. *Id.* On the eve of trial, the plaintiff for the first time asked to strike the jury, arguing the demand was untimely and the issues being tried did not entitle defendants to a jury. *Id.*

Unlike *Thompson*, Appellants filed a request for a jury at the outset of the case: At no point had they waived their rights by failing to make a timely demand. *See Hargrove v. American Cent. Ins. Co*., 125 F.2d 225, 228 (10th Cir. 1942) (holding that failure to make a timely demand results in waiver). Therefore, Appellants were under no obligation to invoke Rule 39(b) because they had satisfied

its timeliness requirements. See Fed.R.Civ.P. 39(b) ("Issues not demanded for trial by jury ***as provided in Rule 38*** shall be tried by the court; but, ***notwithstanding the failure of a party to demand a jury*** in an action in which such a demand might have been made of right, ***the court in its discretion upon motion may order a trial by a jury of any or all issues***.") (emphasis added).

The *Thompson* court "assume[d] defendants were entitled to a jury under the principles announced in *Dairy Queen, Inc. v. Wood*, 369 U.S. 469 (1962)." Therefore, unlike this case, *Thompson's* analysis focused solely on whether the trial court abused its discretion in denying an *untimely* jury demand.

B. Defendants Were Not Required to File an Objection to the Magistrate's Order Striking the Appellants' Jury Demand as a Precursor to Revisiting Their Right to a Jury.

DOJ argues Appellants are barred from asserting their right to a jury trial because they failed to timely object to the magistrate's order. This ignores the magistrate's plain directive in her order.

On May 2, 2016, the magistrate denied a jury because the remedy DOJ sought was equitable - not punitive - in nature and therefore did not implicate a party's constitutional right to a jury. (Ap1 p.70.) However, the magistrate invited Defendants "to make a motion for a jury trial if penalties become part of this case." (Ap1 p.71.) The US Supreme Court decided *Kokesh v. SEC*, 137 S. Ct. 1635 (2017) over a year later, June 5, 2017. The basis to determine disgorgement was punitive

was unavailable when the magistrate struck Appellants' jury demand. With no grounds to do otherwise, Appellants followed the magistrate's directive, filing a motion for a jury trial once it was clear penalties had become a part of this case.

C. The Motion to Reinstate a Jury was Timely.

The magistrate's ruling striking the jury did not set any time limit "to make a motion for a jury trial if penalties become part of this case." (Ap1 p.71.) Moreover, neither Rule 38 nor 39 of the Federal Rules of Civil Procedure govern a motion to reinstate a timely demand for a jury previously struck.

D. The District Court Had Discretion to Reconsider Its Decision to Strike Defendants' Timely Jury Demand.

DOJ argues the district court lacked discretion to grant a request for a jury because under Rule 38(b)(1), "the time expired on February 9, 2016, more than a year before *Kokesh* purportedly changed disgorgement from an equitable remedy to a legal remedy." DOJ's argument is nonsensical. Appellants requested a jury on January 25, 2016, within the time permitted under Rule 38(b)(1). As of February 9, 2016 - the day that DOJ argues "the time expired" - Appellants′ jury request remained unchallenged.

Applying DOJ′s tortured logic, Appellants would need to anticipate before February 9, 2016 (1) the government's subsequent challenge[42] to the jury demand,

[42] DOJ filed its Motion to Strike the Jury Demand on February, 22, 2016.

and (2) the court's decision to grant the government's relief at a time when their timely jury demand remained unchallenged. Even with such clairvoyance, what would Appellants need to file to satisfy DOJ's interpretation of Rule 38 that had not already been filed before February 9, 2016?

E. The Principles in *Kokesh* are Analogous in Deciding Whether IRS Disgorgement is Punitive Rather than Remedial.

DOJ argues *Kokesh* has a narrow holding, inapplicable to this appeal. DOJ argues Appellant "stretches the holding of *Kokesh* far beyond its breaking point." If Appellants were arguing the *holding* in *Kokesh* demands that IRS disgorgement constitutes a penalty, then the DOJ's argument may be rational. *Kokesh* admittedly is limited to SEC disgorgement in the context of 28 U.S.C. §2462. But this is not the analysis Appellants adopted before the trial court and again on appeal.

For the purposes of this appeal, the way the US Supreme Court reasoned its holding in *Kokesh* is what this Court should consider to determine here disgorgement constitutes a penalty. A unanimous US Supreme Court characterized SEC disgorgement as "penal in nature" by asking: "(1) whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual and (2) the purpose is to deter others from offending in like manner as opposed to compensating a victim for his loss." *See Kokesh*, 137 S. Ct. at 1642 (citing *Huntington v. Attrill*, 143 U.S. 657, 667 (1892). These principles apply to disgorgement in non-SEC and non-statute-of-limitation cases, and would apply to **all** cases where, as here, a court is

asked to determine whether "a sanction represents a penalty." *Kokesh*, at 1638. DOJ offers no reason why this Court should abandon these principles. Instead, DOJ relies solely on the holding, without any effort to demonstrate how disgorgement in this case "sought to redress… a wrong to the public," or its purpose is to "deter others from offending in like manner as opposed to compensating a victim for his loss." *Kokesh*, 137 S. Ct. at 1642.

Put simply, this appeal is an invitation to determine whether disgorgement in this case is a penalty using the same analytical framework the US Supreme Court used in *Kokesh.* If this Court determines $50,000,000 disgorgement is a penalty, Appellants have a right to a jury under the Seventh Amendment.

F. The IRS is Already Treating SEC Disgorgement as a Penalty in Contexts Broader than 28 U.S.C. § 2462.

Glaringly absent from DOJ's brief is any attempt to address the issue that the IRS is already treating SEC disgorgement post-*Kokesh* in contexts broader than the holding in *Kokesh*. Because of *Kokesh*, the IRS now recognizes SEC disgorgement is punitive. Consequently, the IRS now prohibits deducting disgorgement paid under 26 U.S.C. §162(f) and §1.162-21(b)(1) because it is a penalty. (See Income Tax Regs. *See* App. Vol. V at 847-49.) This position undermines DOJ's contention *Kokesh* is limited to 28 U.S.C. §2462 and SEC

disgorgement claims. Appellants briefed this issued, and DOJ ignored this point. (B1 p. 49.)

V. Solco and XSun Energy Are Non-Parties and Should Not Be Included in Evidence for Damages.

DOJ was aware of both entities before suing. DOJ used exhibits involving both. Summary exhibits used bank records of both. Yet DOJ deliberately chose to exclude Solco I or XSun as parties.

No evidence proved funds of Solco or XSun came from lens sales, tax benefits, or any Defendant. There is no evidence of Defendants transferring funds into Solco I or XSun accounts. The only evidence is Solco and XSun funds are not related to the Defendants. DOJ needed separate exhibits (Solco I-PLEX739, XSun-PLEX741) to account for their independent funds.

There was no evidence Solco I or XSun participated in the ″tax scheme″ in this case. Neither maintained a website, participated in multi-level marketing. They have no burden to prove they should be allowed to keep their property. The IRS has the burden to show they have the right to take their property. There is no such proof.

A. The Trial Court Violated Solco and XSun's Due Process Rights.

The US Supreme Court in *Fuentes v. Shevin*, 407 U.S. 67 (1972) discusses due process. "Parties whose rights are to be affected are entitled to be heard; and in

order that they may enjoy that right they must first be notified."[43] The right to notice and an opportunity to be heard "must be granted at a meaningful time and in a meaningful manner."[44]

In *Fuentes*, the primary question was whether certain state statutes, including the Florida and Pennsylvania replevin statutes, were constitutionally defective in failing to provide for hearings "at a meaningful time." *Id*. Neither statute provided for notice or an opportunity to be heard *before* seizure. The issue is whether procedural due process requires an opportunity for hearing *before* the State authorizes its agents to seize property upon the application of another. *Id*, citing *Lynch* v. *Household Finance Corp*., 405 U.S. 538, 552. *Stanley* v. *Illinois*, 405 U.S. 645, 647.

This is not a novel principle of constitutional law, but has long been recognized under the Fifth and Fourteenth Amendments. Although the Court has held that due process tolerates variances in the *form* of a hearing "appropriate to the nature of the case," *Mullane* v. *Central Hanover TR.Co*., 339 U.S. 306, 313, and "depending upon the importance of the interests involved and the nature of the subsequent proceedings [if any]," *Boddie* v. *Connecticut*, 401 U.S. 371, 378, the

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[43] *Id*. at 80 (citing *Baldwin* v. *Hale*, 68 U.S. 223, 233 (1864). See *Windsor* v. *McVeigh*, 93 U.S. 274; *Hovey* v. *Elliott*, 167 U.S. 409; G*rannis* v. *Ordean*, 234 U.S. 385.)

[44] *Id*. (citing *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965))

Court has insisted, whatever its form, opportunity for hearing must be provided before the deprivation occurs.[45]

Without due process, their assets should not be frozen. In *United States v. 51 Pieces of Real Property Rosell, N.M.,* 17 F.3d 1306 (10th Cir. 1994), an action was initiated, the complaining party was named as a defendant, and plaintiff attempted to have that party served a complaint before it pursued default and seizure of an asset. *Id*. Although proceeding under a federal forfeiture statute void of any due process requirements, the Court recognized "due process requires that a person be given notice and an opportunity for a hearing before being deprived of a property interest." *Id*. (citing *Fuentes*, 407 U.S. at 81-82). No such hearing occurred here. The assets of these parties (and others similarly situated) were simply frozen by court order and then confiscated by the Receiver without any proof or hearing. There was no due process provided these parties.

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[45] *See e.g. Bell* v. *Burson*, 402 U.S. 535, 542; *Wisconsin* v. *Constantineau*, 400 U.S. 433, 437; *Goldberg* v. *Kelly*, 397 U.S. 254; *Armstrong*, 380 U.S., at 551; *Mullane* v. *Central Hanover TR.Co., supra*, at 313; *Opp Cotton Mills* v. *Administrator*, 312 U.S. 126, 152-153; *United States* v. *Illinois Central R. Co*., 291 U.S. 457, 463; *Londoner* v. *City & County of Denver*, 210 U.S. 373, 385-386. See *In re Ruffalo*, 390 U.S. 544, 550-551. "That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event." *Boddie, supra*, at 378-379 (emphasis in original).

VI. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT A PERMANENT INJUNCTION WAS REQUIRED BECAUSE THE SYSTEM DID NOT AND WOULD NEVER WORK.

A. Finding System Will Not Ever Work – When It Now Does.

On 6/22/18, the lower court ruled: "And because power production is not possible with any designs to date power production has never taken place and there is no revenue. The field of towers creates the illusion of effort and success." (TR.2521.) Since then, Johnson Fresnel lenses have successfully generated independently measured electricity. Using RaPower-3 solar collector array and a model "Colorado" Sterling Engine built by Infinia, the lenses have generated electricity.[46]

In the Opening Brief, in ***System Works***, (B1 p. 3), several engineers tested and verified the lenses currently produce power.[47] Because the injunction was justified by finding it was "false or fraudulent" to sell solar energy equipment that could never create electricity, and now evidence shows the opposite, the injunction should be lifted.

There is no decision defining the appropriate standard for injunctive relief under §7402, particularly one abandoning the four-part test applied in the 10th

[46] Krazcek, Johnny, MET, Jorgensen, Jeffrey, EE PE, *Confirmation of Electrical Power Production Using Johnson Fresnel Lens in the Field Coupled to a Sterling Engine*, September 12, 2018, included in Appendix as Exhibit 69.
[47] Minute by minute readings of electricity generation, attached as Exhibit 70.

Circuit. The district court used factually and procedurally inapposite authority to this case. *United States v. Latney's Funeral Home* involved appointment of a receiver as a remedy in a civil contempt, not a violation of 26 USC § 6700, and only after the defendant repeatedly failed to comply with an injunction.[48] *United States v. Bartle*,[49] also involving civil contempt, appointed a receiver only after the defendant failed numerous times to comply with court orders. *Florida v. United States* appointed a receiver only after substantial tax liability appeared and the Government's collection of the tax appeared jeopardized if a receiver was not appointed.[50] All dealt with civil contempt for non-compliance. None of these relied solely on a statutory grant of authority, but instead considered factors like the four-part test of the 10th Circuit.

The trial court reached an erroneous conclusion when it required a certain amount of electricity to be created when the statute is silent. There was no conduct justifying an injunction.

B. The Mancini Testimony Should Have Been Stricken.

A Motion in Limine to exclude Mancini's testimony prior to trial was denied. At trial, Mancini admitted during cross-examination he had no understanding of tax issues, performed no tests, did not understand the RaPower-3 components, failed to use commonly available measuring equipment, and based his analysis on guess-

[48] *United States v. Latney's Funeral Home, Inc*., 41 F.Supp.3d 24, 37 (D.D.C. 2014).
[49] *United States v. Bartle*, 159 F.App'x 723, 725 (7th Cir. 2005).
[50] *Florida v. United States*, 285 F.2d 596, 602 (8th Cir. 1960).

work that was never peer reviewed, had no known error rate, no known standards, no method to replicate his results, and therefore his opinions were only his subjective views. (B1, pp. 5-6, 41.) In response to his trial admissions showing he fails to qualify under Rule 702 (*Id*., p. 41) DOJ improperly relies on the pretrial Motion in Limine ruling. (B2, pp. 54-55.) That motion was not based upon and did not address Mancini's trial admissions proving he was unqualified. His testimony should have been stricken under *Daubert v. Merrell Dow Pharmaceuticals Inc.*, 509 U.S. 579 (1993). Mancini did not clearly identify his methodology, had no data, and made unscientific assumptions. He admitted his methodology is not used or widely accepted. He used no applicable standards and failed to justify that failure. He cited no authority to justify his conclusions. His assumptions were not supported or supportable. He worked for decades on solar energy, wrongly believing they were "on the right track" but never succeeded in solving problems with the system. (TR.175:10-25; 178:2-22.)

He offered only personal views based on the absence of information. He saw nothing about layout design. (TR.96:21- 97:4.) He saw no staffing information. (TR.118:10-25.) He saw no component interface. (TR.160:7-10.) He saw no drawings for the heat exchanger and testified, "I have no idea how it works." (TR.211:1-6.) He had no measurements for the solar flux on the receiver plane. (TR.212:15-18.) He has no information from a calorimeter. *(Id*. at 19-21.) He saw

nothing about how the controller operated although he saw it work. (TR.214:1-10.) Faced with the absence, of information he took no measurements and performed no tests to have a reliable basis to opine. (TR.173:1-7.) His analysis required taking measurements to be reliable. He did not take any. (TR.181:11-18.) When asked, "Did you apply those?" He responded, "I did not. It requires making measurements at the time you're observing the image." He was then asked, "Right. But that wasn't done?" He admitted, "That wasn't done." (*Id*.) He admitted not seeing something doesn't prove its non-existence. (TR.191:23-25.) His testimony is not based on scientifically reliable information, but is personal opinion based only on his lack of information.

His personal views are meaningless, and non-scientific. *See Cohlmia v. Ardent Health Servs., LLC*, 254 F.R.D. 426, 430 (N.D. Okl. 2008) (Expert reports must include 'how and why' the expert reached a particular result, not just his conclusory opinions). He does not meet any of the criteria (see ***Facts Related to Expert Witness Failures***, B1 p. 4): (1) his techniques cannot be and have not been tested; (2) his methods have not been subjected to peer review; (3) he has no known error rate; (4) there are no standards controlling his methods; and (5) nothing he has done has attracted widespread acceptance within a relevant scientific community. *See Becker v. Kroll*, No. 2:02-cv-24 TS, 2010 WL 273370 at *2 (D. Utah Jan. 22, 2010) (Expert report found insufficient because it contained no statement of methods, theories, or

techniques used in reaching conclusions.) Mancini's unqualified testimony should have been stricken, not relied upon.

CONCLUSION

The disgorgement award should be dismissed as punitive and not a reasonable approximation of ill-gotten gains. Judgment and Injunction should be reversed. Further proceedings, if there are to be any, should be on remand before a jury with witnesses Mancini, Reinken, Perez and Roulhoc barred from testifying and their exhibits excluded.

Respectfully submitted,

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Section 2. Receivership Estate

Pursuant to paragraph 10 of the Receivership Order (ECF 410) no receivership funds or receivership property was used in the preparation or filing of this document.

By: /s/ Denver C. Snuffer, Jr.
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CERTIFICATE OF DIGITAL SUBMISSION AND PRIVACY REDACTIONS

I hereby certify that a copy of the foregoing APPELLANTS' REPLY BRIEF, as submitted in Digital Form via the court's ECF system, is an exact copy of the written document filed with the Clerk and has been scanned for viruses with the Windows Defender (virus scan up to date) and, according to the program, is free of viruses. In addition, I certify all required privacy redactions have been made.

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CERTIFICATE OF SERVICE

I, Denver C. Snuffer, Jr. hereby certify that on the 7th day of May, 2019, I served a copy of the foregoing **APPELLANTS' REPLY BRIEF,** to the following in manner indicated:

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