

Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com

Steven R. Paul (#7423) spaul@nsdplaw.com

Daniel B. Garriott (#9444) dbgarrriott@msn.com

Joshua D. Egan (15593) Joshua.d.egan@gmail.com

NELSON, SNUFFER, DAHLE & POULSEN

10885 South State Street

Sandy, Utah 84070

Telephone: (801) 576-1400

Facsimile: (801) 576-1960

Attorneys for RAPower-3, LLC, International Automated Systems, Inc.,

LTB1, R. Gregory Shepard and Neldon Johnson

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p>NSDP’S REPLY MEMORANDUM REGARDING ITS NOTICE AND/OR MOTION TO WITHDRAW AS COUNSEL FOR DEFENDANTS</p> <p>Judge David Nuffer</p>
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Denver C. Snuffer, Jr., Steven R. Paul, Daniel B. Garriott, Joshua D. Egan, and the law firm of Nelson, Snuffer, Dahle & Poulsen, P.C. (“NSDP”), counsel for Defendants Rapower-3, LLC, International Automated Systems, Inc., LTB1, LLC, and Neldon Johnson (“Defendants”) and for Solco I, LLC, XSun Energy LLC, Cobblestone Centre, LC, LTB O&M, LLC, U-Check, Inc., DCL16BLT, Inc., DCL-16A, Inc., N.P. Johnson Family Limited Partnership, Solstice Enterprises, Inc., Black Night Enterprises, Inc., Starlight Holdings, Inc., Shepard Energy, and

Shepard Global, Inc. (“Affiliated Entities”)¹ hereby respond to the opposition to motion to withdraw filed by Ms. Healy-Gallagher on June 30, 2020.

The observations and arguments made in Ms. Healy-Gallagher’s opposition are precisely why NSDP should be given leave to withdraw as counsel for Defendants. Defendants are entitled to unbiased advice as to whether the Rule 60 Motion should be withdrawn or whether it has merit and should be pursued. It goes without saying that Ms. Healy-Gallagher’s advice would be to withdraw the motion and avoid the issues raised in the Rule 60 Motion, but she is not counsel to Defendants and her opinion does not impact Defendants’ decision to withdraw or proceed.

The position taken by the IRS before the Tax Court in the Preston Olsen matter along with the trial testimony from Dr. Mancini are irrefutable. Counsel for the IRS unquestionably conceded that “you can take these lenses, and they can be used to generate enough heat through some system to power an engine and produce electricity.”² That concession undermines the government’s case before this Court where it argued the lenses don’t work in any power generation system and could never work.

Adding to the IRS concession, Dr. Mancini testified in the Tax Court case the opposite of his testimony at the trial in this proceeding:

MANCINI TESTIMONY (Tax Court):

On Direct Examination:

¹ Defendants were permitted to have trial counsel represent them in pursuant to ¶10 of ECF 491, which states, in relevant part: “Neither Johnson nor Shepard, nor anyone acting on their behalf, shall make any court filings or submissions to other government entities on behalf of the Entity Receivership Defendants **other than in this case** or in the pending appeal of an order in this case.” (Emphasis added.)

² Exhibit 1, TR 26:10-12 and 29:2-11 (“THE COURT: I think you’ve got the concession [] that you want. So on that basis, I will exclude this report as not relative to any point in dispute. MR. JONES: With that concession being part of the ruling? THE COURT: Right. Right.”).

Q That's okay. Okay. So again, it sounds like we don't have a disagreement with the ring. The ring with the lenses on it comes to a focal point where there is heat absorption. And so from that point, do you believe that it's possible to implement **any number of different systems that might generate or that would generate electricity?**

A **Yes.** I mean, I think the discussion yesterday about maybe putting photocells at that location or something like that, although there are other issues and so forth. **Yes. The answer to that is yes.**³

On Cross Examination (Tax Court):

Q And we heard testimony yesterday from Randy Johnson, for example, where they had also intended just to use one tower alone. And so you're -- I just want to make sure I'm being clear. **You're saying there's no reason why that couldn't be done.** You could use this one tower or --

A **That's correct. They could use just one tower and the power cycle there, yes.**⁴

Q Yeah. So you testified in direct when Mr. Bradbury was asking you that you think it probably could be a viable system. And I got specific points here, but I think in your direct you said this so we can save some time here, but you kind of made the overarching statement that, yeah, get better personnel, I guess wash the lenses. I think you have an issue about sandblasting the towers and painting them, things like that. But get all this in place. You think the technology could probably work to generate electricity in five years, you said. Is that --

A Oh, I don't know. I don't know five years. But I think if you got the right team on it, and you really invested the money in it, **you could probably make something that would generate electricity using the concept as it stands.**⁵

But, during trial before this Court, Mr. Mancini's testimony was to the contrary⁶:

Dr. Mancini (District Court Trial):

A. My first opinion is that the IAS solar dish system has not produced any electricity or any other useful form of energy from sunlight.

Q. Why do you think that?

³ Exhibit 1, TR 506:17 -507:2 (emphasis added.)

⁴ Exhibit 1, TR 509: 18-24 (emphasis added.)

⁵ Exhibit 1, TR 516:4-18 (emphasis added.)

⁶ Copies of the transcripts from Dr. Mancini's testimony from this case are attached as Exhibit 2 to this Reply.

A. I never saw anything operating. **It's a series of components that, once I analyzed them, really don't fit together into a system that will operate efficiently or effectively at all.**⁷

On the Tracking System, Dr. Mancini's testimony before the Tax Court was:

And I think during the second visit, I think they were tracking it automatically, but I don't know that. But Randale was operating it, so I assume that that same dish was tracking in both elevation and azimuth. But it was not fully populated with lenses at that point either.⁸

But during trial, Mr. Mancini's testimony was:

Q. At any time on your site visit, Dr. Mancini, did you see any of the collectors automatically tracking the sun?

A. No, ma'am. There were only two. On each visit there was one collector moved. During the first visit it moved only in azimuth, and during the second visit they had both an elevation and an azimuth on that collector, but they were both moved manually. I saw none track automatically.⁹

On the economic viability, or "commercial grade" of solar equipment, in the Tax Court Dr. Mancini testified:

THE COURT: Well, could I ask a question about that. It seems to me, commercial grade can be a lot of different things. On the one hand, an invention that has gone through all four stages of development and really works and is ready to be sold, you might say is commercial. When it's going to be highly profitable given the market and the competing products and the tariffs and the taxes, that's whole different question, right?

THE WITNESS: And that's why I said, **I'm not aware of a good definition of commercial grade, what that means.** And that's why I'm trying to qualify it a little bit here. But the work I did in those cases was technical work. It was not related to that. Certainly, commercial grade has a lot to do with profitability and whether you can sell it in the open market. And you might try, and it doesn't work. And you don't make it.¹⁰

But during trial before this Court, Mr. Mancini's testimony was:

⁷ Exhibit 2, TR 86:1-8 (emphasis added.)

⁸ Exhibit 1, TR 523: 19-24.

⁹ Exhibit 2, TR 91:5-13.

¹⁰ Exhibit 1, TR 480: 9-25. (emphasis added.)

A. It's my opinion that the IAS solar technology will never be a commercial solar energy system producing electrical power or any other form of useful energy.

Q. And what are the two primary reasons for that conclusion?

A. The two primary reasons are, first of all, the components are just a series of components. They don't really fit together as a system that will -- will make a commercial grade solar energy system. And the second is that the -- probably, one of the major underpinnings for all of my conclusions here are that the resources, both in intellectual capacity in terms of training and background and in terms of sheer numbers of people working on this project are not sufficient to produce or develop a commercial system.¹¹

A. Well, certainly as it's currently represented, it's, **in my opinion it will never be a commercial system or will ever produce electricity or any other useable form of energy.**¹²

For the foregoing reasons, it appears that this Court was misled by the Department of Justice and Internal Revenue Service and their witnesses. The prior decision in this case was predicated on that misleading information and should be revised. The Department of Justice should have brought this to the Court's attention, but has failed to do so. Therefore, this Court should reassess the prior decision, set it aside, and dismiss the case brought against the Defendants.

But, since Ms. Healy-Gallagher has threatened the filing of a Rule 11 motion against NSDP for bringing the Rule 60 Motion to the Court's attention, this law firm has a conflict. We certainly don't want to taint the Defendants' decision on whether the Rule 60 Motion should be pursued or withdrawn because we are faced with threatened sanctions. But we also have an interest in avoiding the risk of sanctions, and therefore our firm's self-interest is in withdrawing the motion to avoid risk. We already have a large, unpaid legal bill. To face any risk of paying sanctions atop being unpaid is not a risk in the best interests of our firm. We have a conflict.

¹¹ Exhibit 2, TR 111:21 – 112:10.

¹² Exhibit 2, TR 162:21-24 (emphasis added.)

Therefore, based on the foregoing, counsel for Defendants' notifies and/or requests leave to withdraw from further representation of Defendants in these proceedings.

DATED this 2nd day of July, 2020.

NELSON SNUFFER DAHLE & POULSEN

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

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **NSDP'S REPLY MEMORANDUM REGARDING ITS NOTICE AND/OR MOTION TO WITHDRAW AS COUNSEL FOR DEFENDANTS** was sent to the following and in the manner described below.

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

Sent via:
 Mail
 Hand Delivery
 Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
 Electronic Service via Utah Court's e-filing program

Wayne Klein, Receiver
P.O. Box 1836
Salt Lake City, Utah 84110

Sent via:
 Mail
 Hand Delivery
 Email: wklein@kleinutah.com
 Electronic Service via Utah Court's e-filing program

Jonathan O. Hafen
Michael Lehr
PARR BROWN GEE & LOVELESS
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
Attorneys for Receiver

Sent via:
 Mail
 Hand Delivery
 Email: jhafen@parrbrown.com
jcovey@parrbrown.com
 Electronic Service via Utah Court's e-filing program

Neldon P. Johnson
International Automated Systems, Inc.
RaPower-3, LLC
LTB1, LLC
11404 South 5825 West
Payson, Utah 84651-3622

Sent via:
 Email: glendaejohnson@hotmail.com
 Mail

R. Gregory Shepard
858 W. Clover Meadow Dr.
Murray, Utah 84123

Sent via:
 Email: greg@rapower3.com
 Mail

/s/ Steven R. Paul
Attorneys for Defendants