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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., LTB1,
LLC, R. GREGORY SHEPARD,
NELDON JOHNSON, and ROGER
FREEBORN,

Defendants.

Civil No. 2:15-cv-00828 DN

**UNITED STATES' MOTION TO
EXTEND TIME TO FILE A MOTION
TO AMEND COMPLAINT AND TO
JOIN PARTIES**

Judge David Nuffer
Magistrate Judge Brooke C. Wells

Pursuant to the Scheduling Order entered in this case,¹ Fed. R. Civ. P. 6(b)(1)(A) and DUCivR 7-1(a)(2)(A), the United States respectfully requests that the deadline to file a motion to amend its complaint and to join parties as defendants be extended from November 4, 2016, to December 5, 2016. The lengthy, and continued, delay in receiving discovery responses from Defendants and certain third parties, along with the extensive briefing and other filings to date in this case has impeded the United States' ability to file such a motion by the current deadline. The United States seeks this extension for good cause and in the interests of justice and judicial economy.

I. Facts regarding the status of discovery and the procedural posture of this case.

This case was filed on November 23, 2015.² Discovery commenced on March 10, 2016 with the Rule 26(f) attorneys' conference.³ On April 6, 2016, this Court entered the Scheduling Order in this case, setting November 4, 2016, as the last day to file a motion to amend pleadings and as the last day to file a motion to join parties.⁴ The last day for fact discovery in this case is June 2, 2017.⁵

¹ ECF Doc. 37 at 1 ("The times and deadlines set forth herein may not be modified without the approval of the Court and on a showing of good cause pursuant to Fed. R. Civ. P. 6.")

² ECF Doc. 2.

³ ECF Doc. 35 ¶ 1(c).

⁴ ECF Doc. 37 ¶ 3.

⁵ *Id.* ¶ 2(j).

The United States issued its first requests for the production of documents and first set of interrogatories to all Defendants on April 8, 2016.⁶ On April 11, 2016, the United States also moved for relief from the District of Utah's Standard Protective Order.⁷ From March 14, 2016 through July 21, 2016, the United States served Defendants with notice of its intent to issue subpoenas for the production of documents to third-party witnesses, and did serve the subpoenas.⁸

Defendants have resisted nearly all of the United States' discovery requests and many of the third-party subpoenas for the production of documents that the United States has issued. Their primary, and often sole, objection to any production of documents or information centers on the protective order – or lack thereof. They refuse to produce *any* relevant and responsive documents (or, in the case of Shepard and Freeborn, most such documents) and certain information until a protective order is entered and the issue is settled.⁹ Their motions to quash have also delayed some third-party productions in response to the United States' subpoenas.

On September 20, 2016, this Court granted the United States' motion for relief from the application of the Standard Protective Order.¹⁰ The order granting such relief also stayed this case “for forty-five days to allow the parties to negotiate a new protective order.”¹¹ The parties

⁶ See, e.g., ECF Doc. 95-6, excerpts from United States First Requests for the Production of Documents to Defendant Neldon Johnson; ECF Doc. 57-1, United States' First Interrogatories to Neldon Johnson.

⁷ See generally ECF Doc. 39.

⁸ E.g., ECF Doc. 39 at 2-3; ECF Docs. 71, 73, 77, 85, 86, 87.

⁹ E.g. ECF Doc. 66-1; ECF Doc. 83; Pl. Ex. A, “Defendant Neldon Johnson's Production of Documents.”

¹⁰ ECF Doc. 92.

¹¹ *Id.* at 6.

submitted their respective proposed protective orders on November 3, 2016.¹² To date, a new protective order has not been entered by the Court. The stay expires today, November 4, 2016.¹³

All of these issues, and others in this case, have resulted in counsel for the United States spending a substantial amount of time on briefing, other filings, and related matters in this case.¹⁴

II. Argument

Under the terms of the Scheduling Order in this case, its deadlines “may not be modified without the approval of the Court and on a showing of good cause pursuant to Fed. R. Civ. P. 6.”¹⁵ Under Fed. R. Civ. P. 6(b)(1)(A), when an action must be taken within a specific time, the Court may extend the time “for good cause” if a request is made before the deadline expires.¹⁶ This motion is filed before the expiration of the deadline to file a motion to amend the complaint or to file a motion to join parties,¹⁷ and therefore “only good cause must be shown.”¹⁸

“Good cause means little more than there is a good reason for the action proposed to be taken and can be satisfied by a mere showing of good faith or lack of prejudice to the adverse party.”¹⁹ The facts recited above provide the “good cause” showing that such an extension is

¹² ECF Docs. 106 and 110.

¹³ ECF Doc. 92 at 6.

¹⁴ *E.g.* Docket.

¹⁵ ECF Doc. 37 at 1.

¹⁶ *See also* Fed. R. Civ. P. 16(b)(4) (a scheduling order “may be modified only for good cause and with the judge’s consent”).

¹⁷ ECF Doc. 37 ¶ 3.

¹⁸ *McCann v. Cullinan*, No. 11 CV 50125, 2015 WL 4254226, at *7 (N.D. Ill. July 14, 2015).

¹⁹ *Anderson v. Herbert*, No. 2:13-CV-00211, 2014 WL 2919708, at *2 (D. Utah June 27, 2014) (Shelby, J.) (quotations omitted).

warranted here. Counsel for the United States has been diligently pursuing discovery in this case and it has collected information and documents from some subpoenaed third parties. It has been reviewing that discovery to the best of its ability.

This review suggests that a motion to amend the complaint and to join parties is appropriate. Discovery collected to date suggests that the relief requested in the current complaint arises out of the same “series of transactions or occurrences”²⁰ in the alleged solar energy scheme undertaken by both current Defendants and by other people or entities the United States may seek to join as parties. Discovery collected to date suggests that there are “common questions of law and fact”²¹ regarding the conduct of both current Defendants and potential additional defendants who are not yet parties in this case. In light of the potential claims against additional people or entities, at this time it appears that the United States may also need to amend the complaint with respect to the current Defendants. At this time, any such amendment would not change the actual claims against the current Defendants, but would make the pleading consistent throughout.

The United States takes seriously the decision to file a motion to amend the complaint and to join parties. In light of the discovery delays and the time counsel for the United States has spent on other matters in this case, in spite of counsel’s best efforts to meet the current deadline, counsel will not be able to finalize and file both a motion seeking to amend the complaint and add parties and the required proposed amended complaint²² today.

²⁰ See Fed. R. Civ. P. 20(a)(2)(A).

²¹ See Fed. R. Civ. P. 20(a)(2)(B).

²² DUCivR 15-1.

Allowing the United States an additional 30 days to file a motion will ultimately serve the interests of justice and judicial economy. If the United States is entitled to relief against both the current Defendants and additional defendants due to the same “series of transactions or occurrences” or “common questions of law and fact” applicable all, both the interests of justice and judicial economy will be served by trying all such issues expeditiously and efficiently in this case rather than in this case and also in other, separately filed cases.

Further, granting the relief requested in this motion will not likely cause undue delay or prejudice to the current Defendants. The United States has already sought discovery – which should be produced soon after entry of the new protective order – from Defendants and third parties that is relevant to the claims against the current Defendants *and* to the United States’ potential claims against additional defendants. The United States anticipates pursuing the same avenues of discovery in this case, whether this Court ultimately allows additional parties to be joined or does not allow joinder. Therefore, absent continued substantial delays, all discovery should be completed by the current deadline for fact discovery in this case.

This is the first request by the United States to extend this deadline.

For this good cause shown, the United States respectfully requests that this Court extend the deadline for it to file a motion to amend its complaint and join parties from November 4, 2016 to December 5, 2016. A proposed order granting this relief will be submitted pursuant to the Local Rules.

Dated: November 4, 2016

Respectfully submitted,

/s/ Erin Healy Gallagher

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***ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2016, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to the following:

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