U.S. Department of Justice

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May 12, 2017

VIA EMAIL

Justin D. Heideman (jheideman@heidlaw.com)
HEIDEMAN & ASSOCIATES
2696 North University Avenue, Suite 180
Provo, Utah 84604

Re: *United States v. RaPower-3, LLC, et al.*
Case No. 2:15-cv-00828-DN-BCW

Dear Mr. Heideman:

In our phone conference on May 9, I said that I would respond further to you regarding the United States' Objections and Responses to Defendants' First Discovery Requests to Plaintiff United States (attached as Pl. Ex. 453) – specifically, the United States' objections to your clients' Interrogatories. We stand by our objections to the Interrogatories. This letter is to provide additional context for certain of our objections that we discussed on the phone, but does not supplant or waive any objections. Further, if you agree that Interrogatory No. 2 may be limited as we describe below, we are willing to provide responsive information to that request at the appropriate time.

Fact discovery in this case.

Discovery in this case has been open since March 10, 2016, when we participated in the Rule 26(f) attorneys' planning meeting with your clients' prior attorneys and Mr. Reay. (ECF Doc. 35 ¶ 1(c).) At that time, the parties discussed and identified the necessary and proportional topics for discovery. (*Id.* ¶ 1(a).) Those topics include Defendants' conduct, statements Defendants have made to customers and others about the tax consequences of purportedly buying a "solar lens," Defendants' state of mind as they made such statements, the actual value of a "solar lens" relative to its price, and the gross receipts Defendants have collected as a result of the sale of "solar lenses" or any other activity related to their statements. (*E.g.*, ECF Doc. 2; ECF Doc. 35 ¶ 1(a).) All of this information is within Defendants' own possession, custody, and control. To the extent that the United States has information relevant to certain claims (for example, customers' filed federal tax returns claiming the tax consequences Defendants promote), we produced such documents with our initial disclosures (which were served on April

22, 2016) and throughout the discovery period, and will produce additional documents on May 15, 2017. (Pl. Ex. 453, Resp. to Doc. Req. No. 1.)

Since the March 10, 2016, planning meeting, the United States served its initial disclosures under Fed. R. Civ. P. 26(a). We have supplemented those disclosures throughout the discovery period. We have notified you of all of the discovery requests we have issued to Defendants; of subpoenas we have issued to third parties for the production of documents; and of subpoenas we have issued to third parties for deposition. You (or one of your associates) participated in each deposition we have taken to date, and received a copy of all of the exhibits marked by the United States to date. Although we objected to the sole request for production of documents you propounded, we also provided a robust response to that request noting the documents we collected from subpoenaed third parties in the course of discovery, all documents that we may use to support the United States' claims, and the documents that we will produce on May 15. You participated in the site visit we made to Millard County, Utah on April 4, 2017, so that we could see Defendants' purported technology as it exists today. On May 15, we plan to produce to you the video recorded during that site visit.

More than a year after the fact discovery period opened, and on the last day to serve written discovery in this case (ECF Doc. 37 ¶ 2(i)), you served the Interrogatories at issue. The fact discovery deadline is June 2. (*Id.* ¶ 2(j).)

Our objections to Interrogatory Nos. 1 and 3 through 7 are proper and we will not supplement our responses to them at this time.

Interrogatory Nos. 3 ("every fact which supports the allegations and claims in the Complaint") and 7[1] ("any and all facts" upon which the United States relies to "support any and all" of its factual allegations in this case "including without limitation" facts which "support or undermine or contradict" the United States' "legal claims" or "legal theories") "indiscriminately sweep" the Complaint. *See Hilt v. SFC Inc.*, 170 F.R.D. 182, 188 (D. Kan. 1997). They seek a lengthy and detailed narrative, which is improper under Fed. R. Civ. P. 33. *Id.* As I stated on the phone, because these Interrogatories have so broad a scope, we are not in a position to consider responding to Interrogatory Nos. 3 and 7 without written revisions from you.

Interrogatories 4, 5, and 6 also "sweep the case" to the extent they include a request for information about facts regarding the claims and defenses in this case, or large swaths of facts regarding those claims and defenses. Further, because these Interrogatories ask us to identify witnesses, persons, or entities with information about the entire scope of this case and with whom we have had contact, they are overly broad and are unduly burdensome. *Stoldt v. Centurion Indus., Inc.*, No. 03-2634-CM-DJW, 2005 WL 375667, at *3 (D. Kan. Feb. 3, 2005). As stated above, Defendants know who has information relevant to the claims and defenses in this case.

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[1] Because Interrogatory No. 8 is an exact copy of Interrogatory No. 7, we will not address it separately in this letter.

To the extent that the United States knows individuals with information we may use to support our claims, we have made all appropriate disclosures to Defendants throughout the course of discovery in the last 14 months.[2] Defendants allowed more than a year of discovery to pass before inquiring about people the United States "may have" contacted who "may have" information about this case, even if we have not disclosed them and therefore do not plan to rely on them to support our claims. At this late date, with three weeks left in discovery, this request invites a pointless exercise and is contrary to the Federal Rules of Civil Procedure. *See* Fed. R. Civ. P. 26(b)(1).

We also maintain our objections to Interrogatory No. 1 ("all witnesses" the United States "intend[s] to use at trial, including experts"). As an initial matter, the United States' expert witness disclosure is not due until June 30, 2017, and trial is not until April 2018. (ECF Doc. 37 ¶¶ 4(a), 7(f).) The United States' witness list is not due until February 9, 2018. (*Id.* ¶ 7(a).) Interrogatory No. 1 is a premature request for information that the United States will provide at the appropriate time under the scheduling order. The pretrial disclosure date is the appropriate time to disclose our witness list, not during discovery. *Brock v. R.J. Auto Parts & Serv., Inc.*, 864 F.2d 677, 679 (10th Cir. 1988) ("Ordinarily, . . . discovery is not the state of litigation at which a party identifies its prospective witnesses."). You have not offered a "particular need" to justify deviating from this procedure. *See id*; *D'Onofrio v. SFX Sports Grp., Inc.*, 247 F.R.D. 43, 54 (D.D.C. 2008). Instead, you stated that you want the United States' trial witness information so that you can decide whom to depose. The time for Defendants to attempt to establish a fact discovery strategy, including a list of individuals to depose, is long past. In addition to the information in Defendants' own possession about deposition candidates, for the past 14 months, the United States has made every discovery disclosure necessary for you to determine whom you may need to depose. Because you did not make any effort to notice depositions during that time, we will not agree to any extension of the fact discovery deadline that you may propose for this purpose. (*See* ECF Doc. 37 ¶ 2(j).)

We will provide information responsive to Interrogatory No. 2 when we make our expert witness disclosure at the time required by the scheduling order.

Interrogatory No. 2 requests "all evidence upon which any experts will or may rely upon in forming their opinion at trial." The scheduling order in this case requires the United States to disclose any expert witness by June 30, 2017. (ECF Doc. 37 ¶ 4(a).) The period for expert discovery closes on October 6, 2017. (*Id.* ¶ 5(a).) Accordingly, our objections to this interrogatory are valid: it is an effort to elicit an expert witness disclosure from the United States

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[2] Interrogatory Nos. 4 through 6 are not relevant or proportional to the needs of the case at this time to the extent they seek the identity of persons who are employees of the United States and who have *not* been disclosed by the United States in discovery. *See* Fed. R. Civ. P. 26(b)(1); *United States v. Elsass*, No. 2:10-CV-336, 2011 WL 3900846, at *3-5 (S.D. Ohio Sept. 6, 2011) ("Actions or positions [taken by IRS employees] of which Defendants had no knowledge are simply irrelevant to Defendants' state of mind or to the reasonableness of Defendants' conduct.").

before the time required by the scheduling order. *See PIC Group, Inc. v. Landcoast Insulation, Inc.*, No. 1:09cv662–KS–MTP, 2010 WL 4791710 at * 4-5 (S.D. Miss. 2010).

The United States' expert witness disclosure will contain all of the information required by Fed. R. Civ. P. 26(a)(2)(B), in the time required by the scheduling order in this case. And at the time of our expert witness disclosure, in response to Interrogatory No. 2, we will identify a list of all documents and other information we made available to our expert witness(es), to the extent such documents and information are not protected from disclosure under Fed. R. Civ. P. 26(a)(4)(B) and/or (C). This approach will not invite premature disclosure from the United States and yet will allow you ample time, within the expert discovery period, to examine our expert witness(es).

Please let me know if you have any questions or concerns.

Sincerely,

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney
Civil Trial Section, Central Region

CC: Christian Austin
Donald Reay