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

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

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

Defendants.

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Civil No. 2:15-cv-00828 DN

**UNITED STATES' EXPEDITED  
MOTION TO TAKE CERTAIN  
DISCOVERY OUT OF TIME**

Judge David Nuffer  
Magistrate Judge Evelyn J. Furse

Discovery in this case has been open since March 10, 2016.<sup>1</sup> At that time, counsel for all parties agreed on the relevant and proportional topics for discovery.<sup>2</sup> The United States has diligently pursued discovery on these topics from Defendants and third-party witnesses.<sup>3</sup> But the discovery deadline is June 2, 2017,<sup>4</sup> and the United States has been unable to complete the discovery it requires for its case. Therefore, and in light of the following good cause, the United States asks to complete certain discovery tasks, described below, out of time. Counsel for all Defendants consent to the relief requested in this motion.

The depositions of four Defendants, LTB1, LLC, International Automated Systems, Inc., RaPower-3, LLC, and Neldon Johnson were noticed for May 23 through May 26, 2017.<sup>5</sup> Those depositions were stayed in light of this Court's May 22 order allowing former counsel for those Defendants to withdraw.<sup>6</sup> The United States seeks to depose them during the week of June 26, 2017.

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<sup>1</sup> ECF Doc. 35 ¶ 1(c).

<sup>2</sup> *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., id.*; ECF Doc. 2.

<sup>3</sup> *E.g.*, ECF Docs. 71, 73, 85, 86, 129, 137, 138, 140.

<sup>4</sup> ECF Doc. 37 ¶ 2(j).

<sup>5</sup> Pl. Ex. 484, U.S. Not. of Party Depos. of R. Gregory Shepard and Neldon Johnson, Apr. 21, 2017; Pl. Ex. 485, U.S. Not. of Dep. of Def. LTB1, LLC, Apr. 21, 2017; Pl. Ex. 486, U.S. Not. of Dep. of Def. International Automated Systems, Inc., Apr. 25, 2017; Pl. Ex. 487, U.S. Not. of Dep. of Def. RaPower-3, LLC, Apr. 27, 2017.

<sup>6</sup> ECF Doc. 168.

The parties are awaiting orders from the Court before other discovery may be completed the deposition of Kenneth Birrell,<sup>7</sup> the production of documents by and deposition of Todd Anderson,<sup>8</sup> and the depositions of Cody Buck, Ken Oveson, and David Mantyla<sup>9</sup>. In light of the latter pending order, the parties agreed to postpone the deposition of Richard Jameson, an Enrolled Agent and tax return preparer for customers of Defendants' solar energy scheme, because former defense counsel asserted that they would invoke the tax practitioner privilege, 26 U.S.C. § 7525. Further, the United States had to move to compel the deposition of another tax return preparer, John Howell, in the Northern District of Texas.<sup>10</sup> If this Court, and/or the Northern District of Texas, grant some or all of these motions, the United States asks that it be allowed to take these depositions on or before October 6, 2017.

The United States requires certain information from Jameson and Howell before it can, in good faith, disclose to Defendants certain tax returns they prepared for people believed to be Defendants' customers.<sup>11</sup> Therefore, the United States also requests at least two weeks after each preparer's respective deposition to produce the tax returns he prepared (if such disclosure is permissible).

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<sup>7</sup> ECF Docs. 160, 162.

<sup>8</sup> ECF Docs. 161, 163.

<sup>9</sup> *E.g.*, ECF Docs. 137, 152, 154.

<sup>10</sup> *US v. RaPower-3, LLC, et al.*, Doc. 1, Mot. to Compel the Dep. of 3d Party John Howell, Civ. No. 7:17-mc-00002-O (N.D. Tex. May 5, 2017). Howell was ordered to respond to the United States' motion no later than June 5, 2017. *Id.*, Order (May 30, 2017).

<sup>11</sup> *See* 26 U.S.C. § 6103(h)(4); Pl. Ex. 457 at 4-5.

The most relevant factors to determine whether to extend time for discovery are “the likelihood that discovery will lead to relevant evidence,” whether the United States “was diligent in obtaining discovery,” “whether the request is opposed,” and “prejudice to the non-moving party.”<sup>12</sup> The third-party discovery addressed herein is highly relevant,<sup>13</sup> as are the depositions of Defendants themselves.

As the docket in this case shows, the United States has been diligent in conducting discovery and in moving for compliance with the discovery rules when needed. The discovery deadline has not yet expired. This is the United States’ first motion to take discovery out of time. “Where a party is diligent in its discovery efforts and nevertheless cannot comply with the scheduling order,” good cause exists “to modify the scheduling order if the requesting party timely brings forward its request.”<sup>14</sup>

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<sup>12</sup> *Water Servs. v. Zoeller Co.*, No. 2:12-CV-723 TS, 2013 WL 5964457, at \*8 (D. Utah Nov. 7, 2013) (Stewart, J.). The other factors are “whether trial is imminent” and “the foreseeability of the need for additional discovery in light of the time allowed for discovery by the Court.” *Id.* Here, trial is set for April 2018, and therefore is not imminent. ECF Doc. 37 ¶ 7(f). The discovery requested will not likely result in still additional discovery needs from the United States. Instead, if there are small follow-up requests, the United States anticipates being able to resolve those issues among the parties.

<sup>13</sup> *See, e.g., supra* n.7-10 and oral argument by counsel for the United States during the hearing on April 4, 2017 (*see* ECF Doc. 154).

<sup>14</sup> *Fed. Deposit Ins. Corp. v. Dee*, No. CIV 14-0066 JB/KBM, --- F. Supp. 3d ---, 2016 WL 7320913, at \*29 (D.N.M. Dec. 5, 2016); *accord* Fed. R. Civ. P. 6(b)(1)(A) (“When an act may or must be done within a specified time, the court may, for good cause, extend the time: (A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires . . . .”); *Ruleford v. Tulsa World Pub. Co.*, 266 F. App’x 778, 786 (10th Cir. 2008); *Johnson v. Peay*, No. 1:14-CV-147-TC-BCW, 2015 WL 7112942, at \*2 (D. Utah Nov. 13, 2015) (“[T]he Court finds good cause exists for an extension of the discovery deadline for the limited purposes of deposing additional witnesses who were previously noticed for depositions but due to scheduling concerns have not been deposed.”) (Wells, M.J.).

All Defendants consent to the relief the United States requests, and will not suffer prejudice from it.<sup>15</sup> Accordingly, the United States respectfully requests that this Court grant this motion and enter its proposed order, which will be submitted pursuant to the Local Rules.

**CERTIFICATION IN ACCORDANCE WITH FED. R. CIV. P. 37(a)(1) &  
THE SHORT FORM DISCOVERY MOTION PROCEDURE (Doc. No. 115)**

Counsel for Defendants consent to entry of the proposed order that will be submitted to the Court. Because this motion addresses various third-parties, counsel for the United States sent the proposed order to their attorneys as a courtesy. They have either consented to the relief requested with respect to their clients, or not taken a position on the proposed order as of the time of filing.

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<sup>15</sup> *Wilcox v. Career Step*, No. 2:08-CV-00998-CW-DBP, 2012 WL 5997199, at \*3 (D. Utah Nov. 30, 2012) (Pead, M.J.) (recognizing that a party which has “complied with all discovery obligations” would suffer some prejudice by extending the discovery deadline, and minimizing that prejudice by allowing only specific, limited fact discovery after the original deadline).

Dated: June 1, 2017

Respectfully submitted,

/s/ Erin Healy Gallagher

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***ATTORNEYS FOR THE  
UNITED STATES***

**CERTIFICATE OF SERVICE**

I hereby certify that on June 1, 2017, the foregoing document and its supporting exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Erin Healy Gallagher  
ERIN HEALY GALLAGHER