

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

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

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

Joshua D. Egan (15593) Joshua.egan@me.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, 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, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p>DEFENDANTS' REPLY IN SUPPORT OF 12(f) MOTION TO STRIKE IMMATERIAL, IMPERTINENT, OR SCANDALOUS ALLEGATIONS IN PLEADINGS [DOC. 173].</p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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I. Defendants' Motion is Timely.

The government argues that this Court should deny Defendants' Motion on the basis that it is untimely under the rule. Federal Rule of Civil Procedure 12(f) provides that:

The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.¹

"Courts have read Rule 12(f) to allow a district court to consider a motion to strike at any point in a case, reasoning that it is considering the issue of its own accord despite the fact that its attention was prompted by an untimely filed motion."²

In this case, Defendants' motion is timely under the rule for the following reasons. First, the Court's decision to strike is within discretion of the Court and not subject to a time limit. According to Rule 12(f)(1), the Court may strike matters on its own, and without any time limit or deadline imposed upon it.³ This Court is not limited by the 21 days identified in paragraph (2).

Second, Defendant's motion is timely in light of the Court's Order [\[Doc. 158\]](#) denying bifurcation on April 21, 2017. Prior to this Court's ruling, Defendants had no reason to question the relevancy of allegations in the Complaint touching on the viability of the solar technology in this case. Until this Court ruled that "...the viability of the technology would not determine any of the counts", Defendants had neither notice nor justification to move to strike.

¹ See [Fed. R. Civ. P. Rule 12\(f\)\(2017\)](#).

² See [Williams v. Jader Fuel Co., Inc.](#), 944 F.2d 1388, 1399 (7th Cir. 1991); see also [Tiscareno v. Frasier](#), No. 2:07-CV-336, 2012 U.S. Dist. LEXIS 55553, at *36 (D. Utah Apr. 19, 2012) ("Even where a party fails to file a motion to strike in a timely manner, courts have discretion to rely on their *sua sponte* power under Rule 12(f) to grant such motions.") (citing [United States v. Lot 65 Pine Meadow](#), 976 F.2d 1155, 1157 (8th Cir. 1992); see also [Emmpresa Cubana Del Tabaco v. Culbro Corp.](#), 213 F.R.D. 151, 155 n. 2 (S.D.N.Y. 2003) ("[T]he Court's discretion renders the twenty-day rule essentially unimportant.") (quotation marks and citation omitted).

³ See [Scherer v. United States Dep't of Educ.](#), 78 F. App'x 687, 689 (10th Cir. 2003). ("[I]t is within this court's discretion to grant a motion to strike. While Plaintiff's motion to strike... is tardy by a significant margin, the court will consider the merits of the motion and determine whether to exercise its discretion to strike any defense that may be prejudicial to Plaintiffs.")

Third, the motion is timely in light of the timing of new counsels' entry to this case. The government correctly notes that "[f]our days after new counsel entered an appearance in this case, Defendants moved to strike certain paragraphs of the United States' complaint and prayer for relief against them."⁴ Defendants' present counsel would have brought this motion immediately following the entry of this Court's April 21, 2017 order [[Doc. 158](#)]. The lapse in time stems entirely from the timing of the substitution of Defendants' current counsel in this matter.

II. The Parties Have a Fundamental Disagreement About the Interpretation of the Court's Order on Defendants' Motion to Bifurcate.

Defendants' support for their motion is derived from this Court's order in which the Court stated, "But the viability of the technology would not determine any of the counts." It follows that if the technology would not determine any of the counts in the Complaint, then it is necessarily immaterial and impertinent. If the material is either immaterial or impertinent, then the government's repetitive assertions could only serve to needlessly prejudice defendants' reputation and, therefore, should be stricken.

III. Granting Defendants' Motion Would Conserve Judicial Resources.

The government notes that courts and commentators have observed that a motion to strike relevant allegations is a "time waster" and filing one may be a "dilatory tactic."⁵ First, Defendants dispute that they are attempting to strike "relevant" allegations. Quite the contrary, Defendants seek to strike the allegations on the basis that they are irrelevant to the claims being

⁴ ECF [Doc. 184](#) at 5.

⁵ ECF [Doc. 184](#) at 7.

prosecuted by the government in light of this Court's April 21st Order. According to this Court ruling, the viability of the technology really is not a factor, one way or another to the government's claims. The motion is intended to clean up and reduce the breadth of the claims to allow the parties to concentrate solely on the issues that are relevant to the Court's determination.

Second, Defendants' motion is not a "time waster." Defendants' objective is to simplify these proceedings by removing the need to conduct discovery, identify expert witnesses to discuss, or litigate during a trial any matters that would not determine any of the government's counts. Instead, Defendants submit that the time is better served focusing on material that would determine the government's case. Granting this request would likely reduce trial time by half.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that paragraphs 16 through 22, 29, 41 through 42, 45 through 51, 53 through 56, 68, 72, subparagraph b and e of paragraph 76, 88, 95, 97, 104, 110, 113, 117 through 118, 121 through 122, 128, 134, 140, 146, 159, 163 through 164, subparagraph a and b of paragraph 169, subparagraph b of paragraph 177, 178, subparagraph a and b of paragraph 185, 186, subparagraphs a and b of paragraph 193, and 194 of the Complaint. Additionally, Defendants move to strike subparagraphs b, e, f, g, i(ii), and k of Plaintiff's prayer for relief.

DATED this 23rd day of June, 2017.

NELSON, SNUFFER, DAHLE & POULSEN, P.C.

/s/Denver C. Snuffer, Jr.
*Attorneys for Defendants RAPower-3, LLC,
International Automated Systems, Inc., LTB1, and
Neldon Johnson*