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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' EXPEDITED
MOTION TO COMPEL NELDON
JOHNSON, INTERNATIONAL
AUTOMATED SYSTEMS, INC.,
RAPOWER-3, LLC, AND/OR LTB1,
LLC, TO PRODUCE DOCUMENTS**

Judge David Nuffer
Magistrate Judge Evelyn J. Furse

Fact discovery in this case was open between March 10, 2016 and June 2, 2017.¹ Counsel for all parties agreed on the relevant and proportional topics for discovery.² The United States served its first discovery requests to Defendants Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, and LTB1, LLC on April 8, 2016.³ These Defendants produced nearly 20,000 pages to the United States on January 13, 2017.⁴ They asserted that every single page was responsive to every single document request.⁵

Only after the fact discovery deadline did it become clear that these Defendants had not produced all documents in their possession, custody, or control that are responsive to the United States' requests.⁶ During Johnson's deposition, and the entity depositions that followed, Johnson identified many documents that 1) exist, 2) are relevant and responsive to these requests, and 3) are within either these Defendants' possession, custody, and/or control, but 4) have not been produced to the United States.

¹ ECF Doc. 35 ¶¶ 1(c), 2(j).

² *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.

³ Pl. Ex. 568, United States' First Requests for the Production of Documents to Defendant Neldon Johnson; Pl. Ex. 569, United States' First Requests for the Production of Documents to Defendant International Automated Systems, Inc.; Pl. Ex. 570, United States' First Requests for the Production of Documents to Defendant RaPower-3, LLC; Pl. Ex. 571, United States' First Requests for the Production of Documents to Defendant LTB1, LLC.

⁴ Pl. Ex. 572, Defendants RaPower-3, LLC's, International Automated Systems, Inc.'s, LTB1, LLC's, and Neldon Johnson's Supplemented Production of Documents.

⁵ *Id.*

⁶ *Pulsecard, Inc. v. Discover Card Servs., Inc.*, 168 F.R.D. 295, 307 (D. Kan. 1996) ("The response to Request 35 is also deficient. SPS states that it has produced all responsive documents in its possession. It must, however, produce all responsive documents in its possession, custody, or control. *See* Fed.R.Civ.P. 34(a). Parties may retain the requisite control or custody of documents outside their actual possession.").

The specific documents include:

- The computer program, or data extracted from it, that (among other things) purportedly tracks solar lens customer names and sales, serial numbers of lenses, and the location of any customer's lens;⁷
- All RaPower-3 solar lens purchase agreements with customers since 2010;⁸
- The solar lens purchase contract between SOLCO I and a "company back East" with a down-payment of \$1 million;⁹
- The list of IAS shareholders;¹⁰ and
- Any letter or purported documentation that supports Mr. Johnson's belief that the IRS "exonerated" him by giving him any tax credit¹¹.

Johnson's testimony shows that he and/or his entities are violating their discovery obligations under Fed. R. Civ. P. 34(b)(2), and have been violating their discovery obligations since their Rule 34 discovery responses were due.¹²

A district court has the discretion to consider a motion to compel discovery filed after the fact discovery deadline "if the movant offers an acceptable explanation for the motion's

⁷ *E.g.*, Excerpts from Pl. Ex. 573, Deposition of Neldon Johnson, 205:6-206:11, June 28, 2017; Excerpts from Pl. Ex. 574, Deposition of International Automated Systems, Inc., 67:4-71:16, June 29, 2017; Excerpts from Pl. Ex. 575, Deposition of RaPower-3, LLC, 97:16-98:6, June 30, 2017; Pl. Ex. 569, 570 & 571, Request Nos. 22, 25; Pl. Ex. 568, Request Nos. 21, 24. Johnson testified that LTB1, LLC (and every LTB entity) has done nothing since it was created. Excerpts from Pl. Ex. 576, Deposition of LTB1, LLC, 6:24-19:9, July 1, 2017. Nonetheless, the United States includes that Defendant on this motion in an abundance of caution because an employee or other agent of LTB worked on the computer program at issue. *Id.*, LTB1 Dep., 27:1-7.

⁸ Pl. Ex. 575, RaPower-3 Dep. 40:24-41:23; Pl. Ex. 570, Request No. 22.

⁹ Pl. Ex. 573, Neldon Johnson Dep. 82:11-87:12, 122:21-125:13; Pl. Ex. 568, Request No. 21.

¹⁰ Pl. Ex. 574, IAS Dep. 99:8-100:9; Pl. Ex. 569, Request No. 1.

¹¹ Pl. Ex. 573, Neldon Johnson Dep. 286:2-288:12; Pl. Ex. 577, United States' Fourth Requests for the Production of Documents to Defendant Neldon Johnson, Request No. 43.

¹² Fed. R. Civ. P. 37(a)(3)(B)(iv) & (a)(4).

tardiness.’”¹³ While the fact discovery deadline has passed, this motion is actually timely in light of the facts and circumstances of this case. And even if the motion is considered “tardy,” those same facts and circumstances justify its filing now.

Throughout this case, these Defendants have made baseless attempt after baseless attempt to deny, by evasion or indefinite delay, the United States’ discovery into key facts and circumstances of their abusive tax scheme.¹⁴ Had the United States taken these Defendants’ depositions when they were originally scheduled, May 23-26, 2017,¹⁵ the information about the documents they withheld from production would have come out and the United States would have filed this motion before the fact discovery deadline. But because these Defendants fired their former attorneys on the eve of their depositions, the depositions were postponed until June 22.¹⁶ This Court should not reward Defendants for creating this delay, especially when granting this motion will not jeopardize the dispositive motion deadline or the trial date for this case.¹⁷

In light of these “compelling, good reasons required by the need to promote justice,”¹⁸ this Court should grant the United States’ motion and order Defendants to produce the documents at issue immediately. The United States will submit a proposed order, consistent with the Local Rules, granting the relief requested.

¹³ *Johnson v. Sector 10, et al.*, No. 2:10-CV-00092-DAK, 2013 WL 4456636, at *3 (D. Utah Aug. 16, 2013) (quoting *United States ex rel. Becker v. Westinghouse Savannah River Co.*, 305 F.3d 284, 290 (4th Cir. 2002)) (Pead, M.J.); *cf. Buttler v. Benson*, 193 F.R.D. 664, 666 (D. Colo. 2000).

¹⁴ *E.g.*, ECF Docs. 85, 127, 140, 143, 156, 160, 203, 206.

¹⁵ ECF Doc. 178 at 2.

¹⁶ ECF Doc. 197 ¶ 2.

¹⁷ ECF Doc. 205 ¶ 5(b) & 7(f).

¹⁸ *Lane v. Page*, 273 F.R.D. 665, 667 (D.N.M. 2011).

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

The United States made reasonable efforts to resolve this dispute, including sending a letter to counsel for these Defendants on July 27, 2017 requesting production of the documents at issue by August 10. When counsel for the United States received no response on August 10, she emailed counsel for these Defendants on August 14 with specific dates and times to meet and confer on this issue by telephone. Counsel for these Defendants sent an email on August 16 stating that he would not respond to the request until he received the deposition transcript, reviewed it, and conferred with Johnson. He did not provide a date-certain for his response. Because of the already extended delay in receiving these documents, the United States filed this motion.

Dated: August 17, 2017

Respectfully submitted,

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**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2017, 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 all counsel of record.

/s/ Erin Healy Gallagher

ERIN HEALY GALLAGHER

Trial Attorney