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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 FOR SANCTIONS AGAINST NELDON JOHNSON, INTERNATIONAL AUTOMATED SYSTEMS, INC., RAPOWER-3, LLC, AND/OR LTB1, LLC Judge David Nuffer Magistrate Judge Evelyn J. Furse
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At a hearing on August 29, 2017, this Court ordered Defendants Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, and LTB1, LLC to produce certain documents and information on or before September 28, 2017:

- 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;
- All RaPower-3 solar lens purchase agreements with customers since 2010; and
- The solar lens purchase contract between SOLCO I and a "company back East" with a down-payment of \$1 million.¹

The United States has fully explained both 1) that it requested these documents in its April 2016 discovery requests to Defendants and 2) that these documents are relevant to critical issues in this case.²

To date, Defendants have not produced this information to the United States.³ Defendants have not adequately explained this failure. Accordingly, pursuant to Fed. R. Civ. P. 37(b)(2)(A) and (C), the United States moves for an order 1) requiring Defendants to allow the United States and its contractors to enter onto their property to obtain copies of the information and documents Defendants were ordered to produce; 2) requiring Defendants to pay the United States' costs for enforcing this Court's order; and 3) warning Defendants of possible future sanctions including contempt of court and terminating sanctions.

The sanction for a party's violation of a discovery order must be "both 'just' and 'related to the particular 'claim' which was at issue in the order to provide discovery.'"⁴ The United

¹ ECF No. 217, [ECF No. 218](#). The Court also ordered Defendants to produce, on or before September 15, two additional sets of documents or information, or explain why they could not. *Id.* Defendants complied with this aspect of the order.

² *E.g.*, [ECF No. 210](#) and attachments.

³ Counsel for Defendants sought, and the United States agreed to, an extension of time for production until October 3, 2017.

⁴ *Ehrenhaus v. Reynolds*, 965 F.2d 916, 920–21 (10th Cir. 1992) (quoting *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 707 (1982)); accord *Osborn v. Brown*, No. 2:12-CV-00775-TC-EJF, 2014

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States is not – yet – seeking the ultimate sanction of striking all or part of Defendants’ answer and entering default judgment against them, nor is it – yet – asking for any adverse inferences or evidentiary sanctions against Defendants.⁵ Instead, the United States seeks only what it has sought since April 2016: information relevant to its claims in this case. Because Defendants are unwilling to follow this Court’s order to produce that information, the Court should allow the United States to go get it.⁶ The United States has already suffered serious prejudice in *not* having this information available throughout discovery and especially before it took Defendants’ depositions in this case. With the dispositive motions deadline approaching, and trial in spring 2018,⁷ time is now of the essence.

Further, a court “must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney’s fees, caused by the failure.”⁸ Johnson

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WL 12526269, at *3 (D. Utah Feb. 25, 2014) (issuing an order which, though not explicitly enumerated in Fed. R. Civ. P. 37(b), was “just,” “related to the particular ‘claim’ at issue,” and “calculated to result in compliance with discovery obligations”) (Furse, M.J.).

⁵ See Fed. R. Civ. P. 37(b)(2)(A); see also *QSG, Inc. v. Schlittler*, No. 2:11-CV-871-TC, 2014 WL 5742656, at *5 (D. Utah Nov. 5, 2014) (Campbell, J.); *Arlin Geophysical v. United States*, No. 2:08-CV-00414-DN-EJF, 2012 WL 5360967, at *1-3 (D. Utah Oct. 31, 2012) (Furse, M.J.).

⁶ See Fed. R. Civ. P. 37(b)(2)(A) (if a party fails to follow a discovery order, a court may issue “further just orders”); c.f., *Orbit Irr. Prod. v. Sunhills Int’l*, No. 2:10-CV-113 TS, 2014 WL 1329526, at *6-7 (D. Utah Apr. 2, 2014) (Stewart, J., adopting in part the Report and Recommendation of Furse, M.J.) (“[A]s late as four months after the Magistrate Judge issued her order to compel, the Hongchen Defendants possessed documents and emails responsive to Plaintiff’s discovery request that they refused to produce. The Hongchen Defendants have not provided any grounds for their refusal to provide the documents and emails they possessed at that time.” But a server failure made those discovery materials inaccessible by the time the motion for discovery sanctions was decided, so the moving party was unable to obtain the documents and information.).

⁷ ECF No. 205 ¶¶ 5(b), 7(f).

⁸ Fed. R. Civ. P. 37(b)(2)(C) (fee award is warranted “unless the failure was substantially justified or other circumstances make an award of expenses unjust,” which is not the case here); *United States v. Fraughton*, No. 2:14CV213, 2015 WL 506710, at *3 (D. Utah Feb. 6, 2015) (Warner, M.J.); *Brigham Young Univ. v. Pfizer, Inc.*,

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admitted, under penalty of perjury, to having the information and documents this Court ordered him to produce.⁹ Defendants have just not done so. This is exactly what Rule 37(b)(2)(C) was designed to combat.¹⁰

A party is in contempt of court when a valid order exists, the party knows about the order, and the party disobeys the order.¹¹ A party's continued violation of court orders may result in a court "striking pleadings in whole or in part" and "rendering a default judgment against the disobedient party."¹² The United States asks that this Court include in its order a warning to Defendants that such sanctions are available.

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 through its attorney Erin Healy Gallagher, her communications including emails, telephone conversations, and in-person conversations with counsel for these Defendants, Denver Snuffer and/or Steven Paul,

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262 F.R.D. 637, 650 (D. Utah 2009) (award of more than \$850,000 in attorney's fees entered in the hopes "that such an award will entice [a party] to comply with its discovery obligations") (quotation omitted) (Wells, M.J.).

⁹ E.g., [ECF No. 210 at 3](#).

¹⁰ *Moliere v. Option One Mortg.*, No. 2:10-CV-00802-CW, 2015 WL 429968, at *3, *6, *10-11 (D. Utah Feb. 2, 2015) (when a party admitted that she received certain documents and still had them in her possession, but did not produce those documents, this Court ordered that she pay the opposing party's reasonable expenses in bringing the motion for sanctions against her). (Waddoups, J., adopting the Report and Recommendation of Furse, M.J.).

¹¹ See *Smith v. Schryer*, No. 2:10-CV-01268-CW-DBP, 2013 WL 3200584, at *1 (D. Utah June 24, 2013) (Pead, M.J.).

¹² Fed. R. Civ. P. 37(b)(2)(A)(iii), (vi); see *Ehrenhaus*, 965 F.2d at 920–21 (before sanctions ending a disobedient party's case for discovery violations, a court must consider a number of factors including whether the court warned the disobedient party of this possible sanction in advance).

during the weeks of September 25 and October 2. Ms. Healy Gallagher and Mr. Paul, in particular, spoke repeatedly about Defendants' production of the computer program and its data and the contracts of RaPower-3, LLC customers since 2010. When it became clear that Defendants would not produce the ordered information, Ms. Healy Gallagher sent all counsel for Defendants an email on October 6, 2017, laying out the sanctions the United States would be seeking, and has sought in this motion, and inviting specific times to meet and confer on October 9 and 10. As of the time of filing this motion, counsel for Defendants have not responded to her October 6 email.

Dated: October 11, 2017

Respectfully submitted,

/s/ Erin Healy Gallagher

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**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 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