

JOHN W. HUBER, United States Attorney (#7226)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
111 South Main Street, Ste. 1800
Salt Lake City, Utah 84111
Telephone: (801) 524-5682
Email: john.mangum@usdoj.gov

ERIN HEALY GALLAGHER, *pro hac vice*
DC Bar No. 985670, erin.healygallagher@usdoj.gov
ERIN R. HINES, *pro hac vice*
FL Bar No. 44175, erin.r.hines@usdoj.gov
CHRISTOPHER R. MORAN, *pro hac vice*
NY Bar No. 5033832, christopher.r.moran@usdoj.gov
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2452

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' MOTION TO
DEPOSE RICHARD JAMESON
OUT OF TIME**

Judge David Nuffer
Magistrate Judge Evelyn J. Furse

In the order allowing their former attorney to withdraw from representing them in this case, the Court also allowed R. Gregory Shepard and Roger Freeborn to make their expert witness disclosure(s) on September 28, 2017.¹ They disclosed Richard Jameson.²

Now, the United States asks to take Jameson's "expert" deposition after the current expert witness discovery deadline of November 3.³ With the extension granted to Shepard and Freeborn, the parties have only 25 working days to finish expert witness discovery with respect to Jameson. The parties have had, and continue to have, scheduled and unscheduled events requiring a substantial amount of work during those 25 working days, both for this case and for other cases assigned to the attorneys.⁴ Further, Daubert motions and summary judgment motions are due on November 17,⁵ just two weeks after the end of expert discovery.

The United States deposed Jameson as a fact witness on September 20 – eight days *before* his "report" was disclosed. While that deposition covered many facts relevant to this case,⁶ it did not encompass all of the matters that would go into an expert witness deposition.

¹ [ECF No. 216 at 2](#).

² [ECF No. 225](#).

³ [ECF No. 205](#) ¶ 5(a).

⁴ *E.g.*, Pl. Ex. 664, United States' Notice of Depositions of Neldon Johnson and Kurt Hawes on October 3 and 4, 2017; [ECF No. 226](#), United States' motion for sanctions *and* ECF No. 227, Notice of hearing on motion for sanctions; Pl. Ex. 665, Notice of Deposition of [Dr.] Thomas R. Mancini on October 23, 2017.

⁵ [ECF No. 205](#) ¶¶ 5(b), (c).

⁶ *See generally* Pl. Ex. 666, Deposition of Richard Jameson, Sept. 20, 2017. Counsel for Defendants invoked the Protective Order in this case at the beginning of the deposition. *Id.* 6:16-20; *c.f.* [ECF No. 116](#) ¶ 3(g) (requiring a party to "designate only that part of a document or deposition that is CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition". On October 10, 2017, the United States challenged this attempt to designate the entire transcript as CONFIDENTIAL INFORMATION because the Jameson deposition was not PROTECTED INFORMATION of any kind. Pl. Ex. 667; *see* [ECF No. 116](#) ¶ 2. Because five business days have passed since the United States'

(continued...)

Specifically, the United States did not have the opportunity to press Jameson on the specific opinions he proposes to offer the Court via “expert” testimony, and the bases for those opinions.

The United States does not anticipate requiring Jameson’s “expert” deposition before the deadlines for Daubert motions and summary judgment. But if Defendants do plan to make Jameson a trial witness, a deposition on his opinions and any factual support they may have is warranted. Therefore, the United States asks to depose Jameson regarding his “expert” report on or before January 31, 2018. The briefing schedules for Daubert and summary judgment motions, if filed on November 17 and without any extensions of time for briefing, will continue through December 29, 2017.⁷ The United States’ pretrial disclosures are due on February 9, 2018.⁸ Allowing the United States to depose Jameson on or before January 31, 2018 will allow the parties to prepare for the deposition and take it in a reasonable amount of time, and yet will not interfere with trial deadlines in this case.

An extension of time to take discovery after the end of the discovery period is warranted when the seeking party “was diligent in obtaining discovery;” when it is likely “that discovery will lead to relevant evidence;” when it is unlikely that there will be additional discovery

(...continued)

challenge and there has been no response, by operation of the Protective Order, the Jameson deposition transcript is not PROTECTED INFORMATION. [ECF No. 116](#) ¶ 8(c).

⁷ [DUCivR 7-1](#)(b)(3)(A).

⁸ [ECF No. 205](#) ¶ 7(a).

required on the topic in the time allowed; when trial is not imminent; when any prejudice to the opposing party is minimal; and when the request is unopposed.⁹

Here, the United States has been diligent in obtaining discovery, generally, but is at a disadvantage due to the disclosure of Jameson on September 28. His “expert” deposition will lead to relevant evidence about his opinions and the bases for them, and it is the last discovery that the United States anticipates taking on matters relating to his “expert” opinions. Further, trial is not imminent: it is scheduled for April 2018.¹⁰ Therefore, any prejudice to Defendants in allowing the United States this extension of time is minimal.¹¹

In light of these “compelling, good reasons required by the need to promote justice,”¹² this Court should grant the United States’ motion and order that the “expert” deposition of Richard Jameson take place in St. George, Utah, at a time and date set by the United States upon reasonable consultation with all necessary counsel, no later than January 31, 2018.

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 emailing counsel for all Defendants, who also represent Richard Jameson, on October 6, 2017, requesting

⁹ *Water Servs. v. Zoeller Co.*, No. 2:12-CV-723 TS, 2013 WL 5964457, at *8 (D. Utah Nov. 7, 2013) (Stewart, J.). *Braun v. Medtronic Sofamor Danek, Inc.*, No. 2:10-CV-1283, 2013 WL 30155, at *10 (D. Utah Jan. 2, 2013) (Pead, M.J.), *objection sustained on other grounds*, No. 2:10-CV-1283, 2013 WL 1842290 (D. Utah May 1, 2013) (Shelby, J.).

¹⁰ [ECF No. 205](#) ¶ 7(f).

¹¹ *C.f. 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” (which these Defendants have not) would suffer some prejudice by extending the discovery deadline, and minimizing that prejudice by allowing only specific, limited fact discovery after the original deadline).

¹² *Lane v. Page*, 273 F.R.D. 665, 667 (D.N.M. 2011).

their consent to depose Richard Jameson out of time and offering specific dates and times to meet and confer if needed. The United States did not receive a response to this email.

Dated: October 18, 2017

Respectfully submitted,

/s/ Erin Healy Gallagher

ERIN HEALY GALLAGHER

DC Bar No. 985760

Email: erin.healygallagher@usdoj.gov

Telephone: (202) 353-2452

ERIN R. HINES

FL Bar No. 44175

Email: erin.r.hines@usdoj.gov

Telephone: (202) 514-6619

CHRISTOPHER R. MORAN

New York Bar No. 5033832

Email: christopher.r.moran@usdoj.gov

Telephone: (202) 307-0834

Trial Attorneys, Tax Division

U.S. Department of Justice

P.O. Box 7238

Ben Franklin Station

Washington, D.C. 20044

FAX: (202) 514-6770

**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on October 18, 2017, the foregoing document and its 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

Trial Attorney