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*Attorneys for Defendants*

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><b>DEFENDANTS' OBJECTION TO EXHIBITS DESIGNATED IN PLAINTIFF'S RULE 26 PRETRIAL DISCLOSURES AND USE OF DEPOSITIONS IN LIEU OF LIVE TESTIMONY</b></p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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**I. Background.**

1. On February 9th, 2018, Plaintiff provided the Defendants its pretrial disclosures pursuant to Rule 26(a)(3)(a)(ii).

2. Plaintiff designated the, among others, the following exhibits it intends to use at trial which Defendants object to on the grounds set out for each exhibit:

23A No copy has been provided and Defendants' counsel have not seen the document

28 Not a complete document

- 30 Missing attachments
- 38 Need foundation to be admissible
- 40 Need foundation to be admissible
- 41 Need foundation to be admissible
- 44 The exhibit has a handwritten note on it that will need some foundation to be admissible
- 48 Need foundation to be admissible
- 50 Defendants' counsel does not have a copy and has never seen this exhibit
- 51 Need foundation to be admissible
- 52 Need foundation to be admissible
- 54 Need foundation and cannot tell if it is complete
- 56 Need foundation to be admissible
- 57 Need foundation to be admissible
- 59 Need foundation to be admissible
- 60 Need foundation to be admissible
- 61 Need foundation to be admissible
- 62 Need foundation to be admissible
- 63 Tax return needs redacted the personal information including SSIs and a foundation
- 64 Tax return needs redacted the personal information including SSIs and a foundation
- 65 Tax return needs redacted the personal information including SSIs and a foundation
- 66 Tax return needs redacted the personal information including SSIs and a foundation
- 67 Tax return needs redacted the personal information including SSIs and a foundation
- 68 Tax return needs redacted the personal information including SSIs and a foundation
- 70 Incomplete, missing attachment
- 70A Not provided and Defendants counsel has never seen the document

- 75 Missing an attachment and therefore incomplete
- 76 Incomplete, missing attachments
- 77 Incomplete
- 78 Incomplete
- 81 Needs foundation to be admissible
- 83 Needs foundation to be admissible
- 85 Incomplete and will need a foundation
- 87 Needs foundation to be admissible
- 88 Incomplete document
- 91 Needs foundation, irrelevant third-party document
- 92 Has taxpayer ID numbers that should be redacted-then no objection
- 93 Incomplete missing attachments
- 94 Has taxpayer ID numbers that should be redacted-then no objection
- 95 Incomplete document
- 127 Has taxpayer ID numbers that should be redacted-Needs foundation
- 128 Has taxpayer ID numbers that should be redacted-Needs foundation
- 129 Has taxpayer ID numbers that should be redacted-Needs foundation
- 130 Has taxpayer ID numbers that should be redacted-Needs foundation
- 132 Has taxpayer ID numbers that should be redacted-Needs foundation
- 134 Incomplete document and needs foundation
- 135 Incomplete document and needs foundation
- 141 Appears incomplete and needs foundation
- 142 Incomplete document and needs foundation
- 147 Incomplete document needs foundation

- 154 Incomplete missing attachments
- 158 Incomplete, needs foundation to be admissible
- 168 Has taxpayer ID numbers that should be redacted-Needs foundation
- 169 Has taxpayer ID numbers that should be redacted-Needs foundation
- 170 Has taxpayer ID numbers that should be redacted-Needs foundation
- 171 Has taxpayer ID numbers that should be redacted-Needs foundation
- 172 Has taxpayer ID numbers that should be redacted-Needs foundation
- 173 Has taxpayer ID numbers that should be redacted-Needs foundation
- 175 Needs foundation to authenticate
- 181 Has highlights and handwriting that need authentication and foundation
- 184 Document has been marked and needs foundation for the alteration
- 187 Document has been marked and needs foundation for the alteration
- 191 Has taxpayer ID numbers that should be redacted-Needs foundation
- 198 Needs foundation to be admissible
- 198A Not provided and Defendants counsel have never seen this document
- 198B Not provided and Defendants counsel have never seen this document
- 198C Not provided and Defendants counsel have never seen this document
- 199 Needs foundation to be admissible
- 200 Needs foundation to be admissible, hearsay, relevance
- 216 Needs foundation to be admissible, hearsay, relevance
- 217 Needs foundation to be admissible, hearsay, relevance
- 218 Needs foundation to be admissible, hearsay, relevance
- 220 Needs foundation to be admissible, hearsay, relevance
- 237 Needs foundation to be admissible, hearsay, relevance

246 Needs foundation to be admissible, hearsay, relevance  
249 Needs foundation to be admissible, hearsay, relevance  
294 Needs foundation to be admissible, hearsay, relevance  
295 Needs foundation to be admissible, hearsay, relevance  
296 Needs foundation to be admissible, hearsay, relevance  
297 Needs foundation to be admissible, hearsay, relevance  
300 Needs foundation to be admissible, hearsay, relevance  
301 Needs foundation to be admissible, hearsay, relevance  
302 Needs foundation to be admissible, hearsay, relevance  
303 Needs foundation to be admissible, hearsay, relevance  
304 Needs foundation to be admissible, hearsay, relevance, incomplete  
305 Needs foundation to be admissible, hearsay, relevance  
307 Needs foundation to be admissible, hearsay, relevance  
308 Needs foundation to be admissible, hearsay, relevance  
310 Needs foundation to be admissible, hearsay, relevance  
311 Needs foundation to be admissible, hearsay, relevance  
312 Needs foundation to be admissible, hearsay, relevance  
314 Needs foundation to be admissible, hearsay, relevance, needs to be redacted  
315 Needs foundation to be admissible, hearsay, relevance, needs to be redacted  
316 Needs foundation to be admissible, hearsay, relevance, needs to be redacted  
317 Needs foundation to be admissible, hearsay, relevance, needs to be redacted  
318 Needs foundation to be admissible, hearsay, relevance, needs to be redacted  
319 Needs foundation to be admissible, hearsay, relevance, needs to be redacted  
320 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

- 323 Needs foundation to be admissible, hearsay, relevance
- 324 Needs foundation to be admissible, hearsay, relevance
- 325 Needs foundation to be admissible, hearsay, relevance
- 326 Needs foundation to be admissible, hearsay, relevance
- 327 Needs foundation to be admissible, hearsay, relevance
- 328 Needs foundation to be admissible, hearsay, relevance, incomplete
- 329 Needs foundation to be admissible, hearsay, relevance, compound
- 330 Needs foundation to be admissible, hearsay, relevance
- 331 Needs foundation to be admissible, hearsay, relevance
- 332 Needs foundation to be admissible, hearsay, relevance
- 333 Needs foundation to be admissible, hearsay, relevance
- 334 Needs foundation to be admissible, hearsay, relevance
- 346 Needs foundation to be admissible, hearsay, relevance
- 347 Needs foundation to be admissible, hearsay, relevance
- 349 Needs foundation to be admissible, hearsay, relevance
- 351 Needs foundation to be admissible, hearsay, relevance, incomplete
- 352 Needs foundation to be admissible, hearsay, relevance, compound, incomplete
- 371 Needs foundation to be admissible, hearsay, relevance
- 372 Needs foundation to be admissible, hearsay, relevance
- 387 Needs foundation to be admissible, hearsay, relevance
- 388 Needs foundation to be admissible, hearsay, relevance, needs to be redacted
- 389 Needs foundation to be admissible, hearsay, relevance, needs to be redacted
- 390 Needs foundation to be admissible, hearsay, relevance, needs to be redacted
- 391 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

392 Needs foundation to be admissible, hearsay, relevance

394 Needs foundation to be admissible, hearsay, relevance

395 Needs foundation to be admissible, hearsay, relevance

396 Needs foundation to be admissible, hearsay, relevance

397 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

398 Needs foundation to be admissible, hearsay, relevance

399 Needs foundation to be admissible, hearsay, relevance, cumulative

400 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

401 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

402 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

403 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

404 Needs foundation to be admissible, hearsay, relevance, needs to be redacted

413 Incomplete document, only excerpts provided in the exhibit

414 Incomplete document, only excerpts provided in the exhibit

415 Incomplete document, only excerpts provided in the exhibit

416 Incomplete document, only excerpts provided in the exhibit

417 Needs foundation to be admissible, hearsay, relevance

420 Needs foundation to be admissible, hearsay, relevance

424 Needs foundation to be admissible, hearsay, relevance

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433 Needs foundation to be admissible, hearsay, relevance

434 Needs foundation to be admissible, hearsay, relevance

- 435 Needs foundation to be admissible, hearsay, relevance
- 437 Needs foundation to be admissible, hearsay, relevance
- 438 Needs foundation to be admissible, hearsay, relevance, incomplete – missing attachments
- 441 Needs foundation to be admissible, hearsay, relevance, incomplete – missing attachments
- 447 Incomplete
- 448 Incomplete
- 459 Needs foundation to be admissible, hearsay, relevance, incomplete
- 460 Needs foundation to be admissible, hearsay, relevance
- 463 Needs foundation to be admissible, hearsay, relevance, incomplete
- 464 Needs foundation to be admissible, hearsay, relevance
- 465 Needs foundation to be admissible, hearsay, relevance
- 466 Needs foundation to be admissible, hearsay, relevance
- 467 Needs foundation to be admissible, hearsay, relevance
- 468 Needs foundation to be admissible, hearsay, relevance
- 469 Needs foundation to be admissible, hearsay, relevance
- 470 Needs foundation to be admissible, hearsay, relevance, incomplete – missing pages
- 471 Needs foundation to be admissible, hearsay, relevance, incomplete
- 474 Needs foundation to be admissible, hearsay, relevance
- 476 Needs foundation to be admissible, hearsay, relevance
- 479 Needs foundation to be admissible, hearsay, relevance
- 480 Needs foundation to be admissible, hearsay, relevance, incomplete
- 481 Needs foundation to be admissible, hearsay, relevance, incomplete
- 482 Needs foundation to be admissible, hearsay, relevance
- 483 Needs foundation to be admissible, hearsay, relevance

- 489 Needs foundation to be admissible, hearsay, relevance
- 490 Needs foundation to be admissible, hearsay, relevance
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- 494 Needs foundation to be admissible, hearsay, relevance
- 500 Needs foundation to be admissible, hearsay, relevance
- 501 Needs foundation to be admissible, hearsay, relevance
- 503 Needs foundation to be admissible, hearsay, relevance
- 504 Needs foundation to be admissible, hearsay, relevance
- 505 Needs foundation to be admissible, hearsay, relevance
- 507 Needs foundation to be admissible, hearsay, relevance
- 509 Needs foundation to be admissible, hearsay, relevance, incomplete
- 510 Needs foundation to be admissible, hearsay, relevance
- 511 Needs foundation to be admissible, hearsay, relevance
- 512 Needs foundation to be admissible, hearsay, relevance
- 513 Needs foundation to be admissible, hearsay, relevance
- 514 Needs foundation to be admissible, hearsay, relevance, attorney client privileged  
document
- 515 Needs foundation to be admissible, hearsay, relevance, incomplete
- 518 Needs foundation to be admissible, hearsay, relevance
- 519 Needs foundation to be admissible, hearsay, relevance
- 520 Needs foundation to be admissible, hearsay, relevance
- 523 Needs foundation to be admissible, hearsay, relevance
- 525 Needs foundation to be admissible, hearsay, relevance

526 Needs foundation to be admissible, hearsay, relevance  
530 Needs foundation to be admissible, hearsay, relevance  
531 Needs foundation to be admissible, hearsay, relevance  
532 Needs foundation to be admissible, hearsay, relevance  
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545 Needs foundation to be admissible, hearsay, relevance  
546 Needs foundation to be admissible, hearsay, relevance  
547 Needs foundation to be admissible, hearsay, relevance  
550 Needs foundation to be admissible, hearsay, relevance, incomplete  
553 Needs foundation to be admissible, hearsay, relevance  
554 Needs foundation to be admissible, hearsay, relevance  
555 Needs foundation to be admissible, hearsay, relevance  
556 Needs foundation to be admissible, hearsay, relevance  
558 Needs foundation to be admissible, hearsay, relevance  
560 No copy has been provided and Defendants' counsel have not seen the document  
561 No copy has been provided and Defendants' counsel have not seen the document  
562 No copy has been provided and Defendants' counsel have not seen the document

- 563 No copy has been provided and Defendants' counsel have not seen the document
- 564 No copy has been provided and Defendants' counsel have not seen the document
- 565 No copy has been provided and Defendants' counsel have not seen the document
- 566 No copy has been provided and Defendants' counsel have not seen the document
- 567 No copy has been provided and Defendants' counsel have not seen the document
- 574 Needs foundation to be admissible, hearsay, relevance
- 575 Needs foundation to be admissible, hearsay, relevance
- 579 Excerpts from deposition transcript of a party witness. Should not replace live testimony.
- 581 Excerpts from deposition transcript of a party witness. Should not replace live testimony.
- 582 Attorney client privileged document, also requires foundation, hearsay
- 587 Needs foundation to be admissible, hearsay, relevance
- 588 Needs foundation to be admissible, hearsay, relevance
- 589 Needs foundation to be admissible, hearsay, relevance
- 590 Needs foundation to be admissible, hearsay, relevance
- 592 Needs foundation to be admissible, hearsay, relevance
- 595 Needs foundation to be admissible, hearsay, relevance
- 596 Needs foundation to be admissible, hearsay, relevance
- 597 Needs foundation to be admissible, hearsay, relevance
- 598 Needs foundation to be admissible, hearsay, relevance
- 599 Needs foundation to be admissible, hearsay, relevance
- 603 Needs foundation to be admissible, hearsay, relevance
- 605 Needs foundation to be admissible, hearsay, relevance
- 608 Needs foundation to be admissible, hearsay, relevance
- 609 Needs foundation to be admissible, hearsay, relevance

637 Needs foundation to be admissible, hearsay, relevance  
642 Needs foundation to be admissible, hearsay, relevance  
646 Needs foundation to be admissible, hearsay, relevance  
647 Needs foundation to be admissible, hearsay, relevance  
648 Needs foundation to be admissible, hearsay, relevance  
649 Needs foundation to be admissible, hearsay, relevance  
650 Needs foundation to be admissible, hearsay, relevance  
668 Needs foundation to be admissible, hearsay, relevance  
669 Needs foundation to be admissible, hearsay, relevance  
673 Objection to the use of deposition when the live witness is available to testify, hearsay  
674 Needs foundation to be admissible, hearsay, relevance  
678 Needs foundation to be admissible, hearsay, relevance  
679 Needs foundation to be admissible, hearsay, relevance  
680 Needs foundation to be admissible, hearsay, relevance  
681 Objection to the use of deposition when the live witness is available to testify, hearsay  
682 Objection to the use of deposition when the live witness is available to testify, hearsay  
683 Hearsay  
685 Objection to the use of deposition when the live witness is available to testify, hearsay  
687 Hearsay  
688 Hearsay  
689 Hearsay  
690 Hearsay  
693 Hearsay, Deposition has never been provided  
697 Hearsay

713 Objection to the use of deposition when the live witness is available to testify, hearsay

714 Needs foundation to be admissible, hearsay, relevance

715 Needs foundation to be admissible, hearsay, relevance

716 Needs foundation to be admissible, hearsay, relevance

717 Needs foundation to be admissible, hearsay, relevance

718 Needs foundation to be admissible, hearsay, relevance

719 Needs foundation to be admissible, hearsay, relevance

720 Needs foundation to be admissible, hearsay, relevance

721 Needs foundation to be admissible, hearsay, relevance

722 Needs foundation to be admissible, hearsay, relevance

723 Needs foundation to be admissible, hearsay, relevance

724 Needs foundation to be admissible, hearsay, relevance

728 Needs foundation to be admissible, hearsay, relevance

729 Needs foundation to be admissible, hearsay, relevance

730 Needs foundation to be admissible, hearsay, relevance

731 Footnote 3 to Paragraph 7.a. of the Scheduling Order requires that “The Parties must disclose and exchange any demonstrative exhibits or animations with the 26(a)(3) disclosures.” Plaintiff failed to provide a copy of this exhibit in violation of that requirement. Further, needs foundation to be admissible, hearsay, relevance

732 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance

733 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance

- 734 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 735 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 736 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 737 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 738 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 739 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 740 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 741 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 742 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 749 Hearsay, Plaintiff did not designate any forensic computer expert in its Initial Disclosures, Plaintiff did not timely designate any expert witness who was a forensic computer expert, Plaintiff has not provided an expert report from any forensic computer expert, Plaintiff has not provided copies of any such documents from any forensic computer expert.

- 750 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 751 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 752 Plaintiff failed to provide a copy of this exhibit in violation of the Scheduling Order, as identified above. Needs foundation to be admissible, hearsay, relevance
- 753 Plaintiff failed to provide copies of this exhibit. Defendants have never seen these videos. Needs foundation to be admissible, hearsay, relevance.
- 754 Needs foundation to be admissible, hearsay, relevance.
- 756 Needs foundation to be admissible, hearsay, relevance.
- 759 Needs foundation to be admissible, hearsay, relevance.
- 780 Needs foundation to be admissible, hearsay, relevance, cumulative, unfairly prejudicial.
- 781 Needs foundation to be admissible, hearsay, relevance, cumulative, unfairly prejudicial.

## **II. Argument.**

### **A. The depositions of Mr. Johnson, Mr. Shepard, LBTI, IAS, and RaPower3 should not be used in lieu of live witness testimony.**

Defendants object to Plaintiff's designated use of the deposition testimony in lieu of live testimony of Mr. Johnson and Mr. Shepard. Specifically, this objection includes the deposition testimony of (1) International Automated Systems, Inc. (taken June 29, 2017), (2) LBTI 1, LLC, (taken July 7, 2017), (3) RaPower-3, LLC (taken June 30, 2017), (4) Mr. Neldon Johnson (taken June 28, 2018 and October 3, 2018), and Mr. R. Gregory Shepard (taken May 22, 2017).

Deposition testimony is ordinarily inadmissible hearsay, although [Rule 32\(a\)](#) creates an exception to the hearsay rules.<sup>1</sup> Under the rule, a party may use all or part of a deposition against an opposing party at trial if each of the following conditions are met:

- (A) the party was present or represented at the taking of the deposition or had reasonable notice of it;
- (B) it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
- (C) the use is allowed by [Rule 32\(a\)\(2\) through \(8\)](#).<sup>2</sup>

A party who intends to use a deposition in lieu of live testimony must promptly file a designation of witness testimony which the party expects to present by deposition.<sup>3</sup> However, a party may not use deposition testimony for any purpose in lieu of live witness testimony unless the court determines the deposed witness is unavailable.<sup>4</sup>

A witness is unavailable if the court finds any one of the following applies:

- (A) that the witness is dead;
- (B) that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
- (C) that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
- (D) that the party offering the deposition could not procure the witness's attendance by subpoena; or
- (E) on motion and notice, that exceptional circumstances make it desirable—in the interest of justice and with due regard to the importance of live testimony in open court—to permit the deposition to be used.<sup>5</sup>

The proponent of the deposition bears the burden of proving that it is admissible under Rule 32(a).<sup>6</sup> The preference for a witness's attendance at trial is axiomatic, particularly when key

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<sup>1</sup> [Garcia-Martinez v. City & Cty. of Denver](#), 392 F.3d 1187, 1191 (10th Cir. 2004)

<sup>2</sup> [FRCP 32\(a\)\(1\)\(A\)-\(C\)](#).

<sup>3</sup> [FRCP 26\(a\)\(3\)\(ii\)](#).

<sup>4</sup> *Id.* at 32(a)(1)(C); 32(a)(4).

<sup>5</sup> [FRCP 32\(a\)\(4\)](#); see also [Fed. R. Evid. 804\(a\)\(1\)-\(5\)](#); [804\(b\)\(1\)\(A\)-\(B\)](#).

factual issues at trial turn on credibility and demeanor of the witness.<sup>7</sup> This is especially true if the witness is the party.<sup>8</sup>

Here, Plaintiff cannot satisfy its burden of proving that the designated deposition testimony is admissible under [Rule 32\(a\)](#). First, both Plaintiff and Defendants have identified these witnesses as persons they intend to call at trial. Both Mr. Nelson and Mr. Shepard will attend trial, and therefore will not be more than 100 miles from this court. Second, neither witnesses are unable to testify because of age, illness, infirmity or imprisonment. Third, Defendants have provided Plaintiff with a proposed waiver of service of a subpoena to appear at trial for these witnesses, so Plaintiff cannot show that it could not procure the witnesses' attendance by subpoena. Finally, Plaintiff has not filed a motion that "exceptional circumstance make it desirable – in the interest of justice with due regard to the importance of live testimony in open court- to permit the deposition[s] to be used."<sup>9</sup>

In sum, Plaintiff should not be permitted to the use the testimony it has identified in its Rule 26 Pretrial disclosures except for the purposes of impeachment.

**B. The depositions of Robert Aulds, Peter C. Gregg, Roger Halverson, John Howell, Frank Lunn, Pacificorp, Mike Penn, and Brian Zeleznik should not be used in lieu of live testimony.**

Defendants object to the use of deposition testimony in lieu of live testimony for the following:

1. Robert Aulds (March 14, 2017) (Boyd, TX)
2. Peter C. Gregg (November 16, 2016) (Boring OR)
3. Roger Halverson (Oct 18, 2016) (Stuart, FL)
4. John Howell (Aug. 23, 2017) (Wichita Falls, TX)

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<sup>6</sup> [Garcia-Martinez, 392 F.3d at 1191.](#)

<sup>7</sup> [Id. at 1191-92.](#)

<sup>8</sup> [See Id.](#)

<sup>9</sup> See [FRCP 32\(a\)\(4\)\(E\)](#).

5. Frank Lunn
6. Pacificorp (Nov. 15, 2016) (Portland, OR)
7. Mike Penn (March 13, 2017) (Wichita Falls, TX)
8. Brian Zeleznik (Aug 2, 2016) (Leroy, IL)

Plaintiff neither disclosed these individuals in their initial disclosure nor supplemented disclosure to include these individuals. Additionally, current counsel for Defendants were not present for their deposition, with the exception of John Howell. Furthermore, Plaintiff has not provided Defendants with any copies of the transcripts of the excerpts Plaintiff intends to use at trial.<sup>10</sup> For these reasons, the depositions of these witnesses should not be used in lieu of live testimony.

### **III. Conclusion**

For the reasons stated above, the Court should not permit Plaintiff to use the deposition testimony of the above witnesses in lieu of live testimony.

Dated this 23<sup>rd</sup> day of February, 2018.

NELSON SNUFFER DAHLE & POULSEN

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Steven R. Paul  
Daniel B. Garriott  
*Attorneys for Defendants*

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<sup>10</sup> [See FRCP 32\(c\).](#)

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' OBJECTION TO EXHIBITS DESIGNATED IN PLAINTIFF'S RULE 26 PRETRIAL DISCLOSURES AND USE OF DEPOSITIONS IN LIEU OF LIVE TESTIMONY** was sent to counsel for the United States in the manner described below.

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