

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 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>DEFENDANTS' OBJECTION TO PLAINTIFF'S PRETRIAL WITNESS LIST AND REQUEST TO STRIKE</p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
---	--

Pursuant to Pursuant to Rule 37(c)(1) of the Federal Rules of Civil Procedure, Defendants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC., R. Gregory Shepard, Neldon Johnson, and Roger Freeborn, (hereinafter collectively "the Defendants") respectfully submit this objection to Plaintiff's proposed witnesses that were neither disclosed prior to February 9, 2018, nor deposed at any time by any party during the pendency of these proceedings. Additionally, Defendants object to Plaintiff's proposed witnesses that were not

disclosed prior to February 8, 2018. For the reasons stated *infra*, Defendants request that the Court strike the witnesses identified below from Plaintiff's pretrial disclosure and that these witnesses not be allowed to testify at the trial commencing in April 2018.

I. Background

1. On February 9, 2018, Plaintiff served its "Fed. R. Civ. P. 26(a)(3)(A)(I) Witness List" on Defendants.
2. The list contains three names never previously disclosed. The three are: (1) Terri Eppich, (2) JoAnna Perez, and (3) Amanda Reinken (hereinafter collectively referred to as "the surprise witnesses").
3. Prior to receiving Plaintiff's witness list, Defendants did not know the name of the surprise witnesses, their involvement in the case, much less the subject matter of their testimony.
4. The surprise witnesses are not disclosed in Plaintiff's Initial Disclosures, dated April 22, 2016. A copy of Plaintiff's Initial Disclosures is attached hereto.
5. These surprise witnesses have not been deposed by any party.
6. The Defendants did not depose the surprise witnesses because prior to February 9, 2018, the Defendants were unaware of their existence, much less their anticipated designation as witnesses in the April 2018 trial.
7. Additionally, the following witnesses were not disclosed prior to February 9, 2018:
 - a. Jessica Anderson. Delta, Utah;
 - b. Todd Anderson, Delta, Utah;
 - c. Kenneth Birrell, Salt Lake City, Utah;
 - d. Cody Buck, Salt Lake City, Utah;

- e. Preston Olsen, Salt Lake City, Utah;
 - f. Ken Oveson, Salt Lake City, Utah;
 - g. Undisclosed “Forensic Computer Expert”;
 - h. Robert Rowbotham, Salt Lake City, Utah;
 - i. Lynette Williams, Salt Lake City, Uta;
 - j. Robert Aulds, Wichita Falls, Texas;
 - k. Roger Halverson, Stuart, Florida;
 - l. Frank Lunn, LeRoy, Illinois;
 - m. PacifiCorp, Bret Reich, Salt Lake City, Utah;
 - n. Mike Penn, Wichita Falls, Texas; and
 - o. Brian Zeleznik, LeRoy, Illinois.
- 8.

II. Analysis

The Surprise Witnesses Terri Eppich, Joanna Perez, and Amanda Reinken should not be allowed to testify.

Rule 26(a)(1)(A)(i) requires all parties to disclose, without awaiting a discovery request, the name of every person that is likely to have discoverable information, along with the subjects of that witness’ expected information that the disclosing party may use to support its claims or defenses. A party must supplement its disclosures in a timely manner.¹ A party who fails to identify a witness as required under Rule 26(a) is not allowed to use that witness on a motion, at a hearing, or at a trial.² A party may overcome exclusion if the party can show that the failure

¹ U.R.C.P. 26(e)(1)(A).

²

was substantially justified or is harmless.³ District courts are to consider the following factors⁴ when determining whether was the failure to disclose was substantially justified or is harmless:

- (1) the prejudice or surprise to the party against whom the testimony is offered;
- (2) the ability of the party to cure the prejudice;
- (3) the extent to which introducing such testimony would disrupt the trial; and
- (4) the moving party's bad faith or willfulness.

Each of these factors weigh in favor of exclusion of the surprise witnesses. First, since April 22, 2016 (the date of Plaintiff's Rule 26 initial disclosures), Plaintiff has provided no notice of the names or subject of testimony of the surprise witnesses. The late surprise naming of these new witnesses comes as a complete surprise and thereby prejudices the Defendants.

Second, Plaintiff has withheld their names until their pretrial disclosures, which was long after the close of fact discovery in this matter. Defendants are thereby unable to cure the prejudice, short of the court (1) granting of a continuance of the April 2018 trial, *and* (2) permitting additional fact discovery limited in scope to the evidentiary subject matter related to the surprise witnesses' testimony.

Third, introducing such testimony would disrupt the trial because the Defendants have had neither the time or means to prepare for their anticipated examination. All testimony of the surprise witnesses would be subject to an objection on the grounds of - at a minimum - untimely disclosure.

There is evidence of bad faith or at least willfulness related to Plaintiff's failure to disclose the identities of the surprise witnesses until now. Plaintiff's dubious and tactical timing of unveiling the surprise witnesses was clearly willful. The addresses of these witnesses (counsel

³ *Id.*

⁴ *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999). See also *HCG Platinum, LLC v. Preferred Product Placement Corp.*, 873 F.3d 1191 (10th Cir. 2017), (holding that trial court abuses its discretion if it does not consider each *Woodworker's Supply* factor making a Rule 37(c) ruling).

for Plaintiff) suggest they are each employed by or are agents of the U.S. government. Their identity could hardly be unknown to Plaintiff throughout the 22 months since its initial disclosure in April 2016. To reveal their identities now can only be interpreted as willful; therefore, their exclusion is justified.

III. Witnesses Not Otherwise Disclosed Should not be Allowed to Testify

In addition to the surprise witnesses, Plaintiff has identified in its pretrial witness list that it intends to call fifteen (15) other individuals who were not been identified in Plaintiff's Initial Disclosures or any supplementation thereto.

Specifically, Plaintiff has identified the following individuals it claims it will call "live at trial":

1. Jessica Anderson. Delta, Utah.
2. Todd Anderson, Delta, Utah.
3. Kenneth Birrell, Salt Lake City, Utah.
4. Cody Buck, Salt Lake City, Utah.
5. Preston Olsen, Salt Lake City, Utah.
6. Ken Oveson, Salt Lake City, Utah.
7. Undisclosed "Forensic Computer Expert"
8. Robert Rowbotham, Salt Lake City, Utah.
9. Lynette Williams, Salt Lake City, Utah.
10. Robert Aulds, Wichita Falls, Texas.
11. Roger Halverson, Stuart, Florida.
12. Frank Lunn, LeRoy, Illinois.
13. PacifiCorp, Bret Reich, Salt Lake City, Utah.

14. Mike Penn, Wichita Falls, Texas.

15. Brian Zeleznik, LeRoy, Illinois.

None of the foregoing individuals (and one “unknown” individual that has not been identified) are not identified in Plaintiff’s Initial Disclosures. Rule 26 requires the name and, if know, the address and telephone number of each individual likely to have discoverable information – along with the subjects of that information – that the disclosing party may use to support its claims or defenses. At most, Plaintiff identified categories of witnesses, but at no time did Plaintiff name the above-listed individuals or provide any supplemental disclosure of witnesses it expected to call at trial, until February 9, 2018 (less than 60 days before trial).

Rule 37(c) provides that if a party fails to provide the information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing or at a trial, unless the failure was substantially justified or is harmless. Given the failure to disclose the names of witnesses prior to just before trial, Plaintiff should not be allowed to call those witnesses or rely on the testimony at trail.

IV. Conclusion

Rule 37 mandates exclusion of evidence not properly disclosed under the rules which nondisclosure was not substantially justified or harmless to the aggrieved party. The 10th Circuit factors articulated in Woodworker’s Supply all preponderate in favor of Defendants’ request to strike the surprise witnesses from Plaintiff’s witness list, thereby excluding them from presenting evidence at trial. Additionally, the Defendants request an award of their reasonable attorney’s fees incurred in preparing and prosecuting this motion pursuant to Rule 37(c)(1)(A).

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.

Denver C. Snuffer, Jr.

Steven R. Paul

Daniel B. Garriott

Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' OBJECTION TO PLAINTIFF'S PRETRIAL WITNESS LIST AND REQUEST TO STRIKE** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher
Erin R. Hines
Christopher R. Moran
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
 Mail
 Hand Delivery
 Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
christopher.r.moran@usdoj.gov
 Electronic Service via Utah Court's e-filing program

/s/ Denver C. Snuffer, Jr.
Attorneys for Defendants