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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' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO REINSTATE TRIAL BY JURY** Chief Judge David Nuffer Magistrate Judge Evelyn J. Furse

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The primary relief the United States seeks here is a civil injunction, an equitable remedy,[1] to prevent Defendants' continued violations of the internal revenue laws and interference with the administration of those laws. We also request that this Court order disgorgement, in the nature of restitution, of Defendants' gross receipts from their fraudulent conduct. All of this relief is equitable: to stop Defendants from promoting their abusive solar energy scheme and profiting from it, to the detriment of the U.S. Treasury. In May 2016, this Court decided that all the relief we United States seek – including disgorgement – is "equitable in nature.[2]

Now, nearly two years later, and less than two months before trial, Defendants move to "reinstate trial by jury."[3] The motion should be denied because 1) there is no issue triable by jury and 2) in any event, Defendants' undue delay in filing the motion will result in serious prejudice to the United States.

I. The United States' claims in this case.[4]

The United States seeks to enjoin Defendants from organizing, promoting, and selling the "solar energy scheme" that they have been promoting since or before 2010.[5] Defendants make money by selling "lenses" to customers, which the customers purportedly lease to LTB, LLC.

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[1] *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 311 (1982); *see also Burlington N. Santa Fe Ry. Co. v. A 50-Foot Wide Easement Consisting of 6.99 Acres more or less*, 346 Fed. Appx. 297, 301 (10th Cir. 2009).

[2] ECF No. 43 at 2.

[3] ECF No. 289.

[4] The following information is drawn from the United States' complaint, ECF No. 2, and its motion for partial summary judgment, ECF No. 251, both of which are incorporated by reference herein.

[5] ECF No. 2 and ECF No. 35 ¶ 1(a).

Although LTB is a company that exists only on paper,[6] Defendants tell customers that LTB will operate and maintain the customer's lens for them, as part of a system that will generate electricity. Defendants tell customers that LTB will sell electricity to a third-party power purchaser, and then pay customers "rental income" for use of their lenses.[7]

Defendants assure their customers that, by purchasing lenses, customers may claim a depreciation deduction and a solar energy tax credit. Defendants' statements are false or fraudulent as to material matters under the internal revenue laws, and Defendants knew or had reason to know that these statements were false or fraudulent.[8] To increase the tax benefits they promote to their customers, Defendants falsely inflate the value of the lenses to more than 200 percent of the correct value, and therefore make a gross valuation overstatement.[9] Defendants will not stop this misconduct without an order from this Court.[10] They should be enjoined.[11]

Defendants should also be enjoined because they will not stop other misconduct that interferes with the enforcement of the internal revenue laws.[12] For example, all Defendants have spread the scheme to as many people as possible through extensive marketing efforts.[13] They

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[6] LTB has never done anything; it has never had a bank account, any employees, or any revenue. ECF No. 252-28, Pl. Ex. 673, Deposition of LTB1, LLC, July 1, 2017, 10:10-11:1, 14:7-16:7, 18:2-9, 42:10-43:5; 69:6-74:21, 90:19-91:8. LTB and Defendant LTB1, LLC, are indistinguishable. *Id.* 11:9-15.

[7] ECF No. 252-21, Pl. Ex. 581, Deposition of International Automated Systems, Inc., June 29, 2017, 162:1-165:9, 171:10-173:20; ECF No. 252-19, Pl. Ex. 532 at 6; *see also* ECF No. 252-18, Pl. Ex. 531.

[8] 26 U.S.C. § 6700(a)(2)(A); ECF No. 2, Counts VII-XI; ECF No. 251.

[9] 26 U.S.C. § 6700(a)(2)(B), (b)(1); ECF No. 2, Counts VII-XI.

[10] ECF No. 251 at 14-15, 36.

[11] *See* 26 U.S.C. §§ 6700, 7408; ECF No. 2, Counts VII-XI.

[12] 26 U.S.C. § 7402(a); ECF No. 2 at Counts I-VI.

[13] ECF No. 251 at 7-14.

enriched themselves, at the expense of the U.S. Treasury, by collecting commissions and other income from recruiting more people to sell lenses and expand the scheme.[14] R. Gregory Shepard and Roger Freeborn assisted customers in preparing tax returns to claim unlawful depreciation deductions and solar energy credits.[15] To date, at least 193 of their solar lens customers have filed petitions to challenge the IRS's disallowance of the very tax benefits Defendants promote.[16]

II. Argument

Defendants first demanded a jury trial on January 25, 2016.[17] They argued that this case should be tried to a jury because one of the issues is whether Defendants engaged in conduct subject to penalty under § 6700, and such penalties "are not equitable remedies."[18] In its motion to strike Defendants' jury demand, the United States explained that an award of money damages, including the disgorgement we seek in this case, is an equitable rather than a legal remedy because (1) the damages are restitutionary, "such as in 'action[s] for disgorgement of improper profits'" and (2) the monetary award is "incidental to or intertwined with injunctive relief."[19]

This Court agreed, granted the United States' motion, and struck Defendants' jury demand, finding that the disgorgement relief sought by the United States was "equitable in

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[14] ECF No. 251 at 7-14.

[15] ECF No. 251 at 31-35.

[16] ECF No. 257 at 2.

[17] ECF No. 24; *see* Fed. R. Civ. P. 38(b).

[18] ECF No. 32 at 3; *see also* ECF No. 289 at 10.

[19] ECF No. 31 at 2-3 (quoting *Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 570 (1990) (citing *Tull v. United States*, 481 U.S. 412, 424 (1987)) & *Adams v. Cyprus Amax Minerals Co.*, 149 F.3d 1156, 1161 (10th Cir. 1998)).

nature."[20] The Court observed that "money damages . . . may be equitable if restitutionary in nature, i.e. they restore the status quo and return the amounts rightfully belonging to another."[21] "A monetary award 'incidental to or intertwined with injunctive relief' may be equitable."[22] Because a penalty assessment under § 6700 was not part of this case, the Court concluded that "the Seventh Amendment right to a jury trial is not implicated."[23] The Court left the door open for "Defendants to make a motion for jury trial if penalties become part of this case"[24] – meaning, if the IRS were to assess penalties against Defendants under § 6700.

A. There is no "issue triable by jury" in this case.

The IRS has not assessed penalties against Defendants under § 6700. Nonetheless, Defendants now argue that this Court should allow a jury trial in light of *Kokesh v. SEC*. In *Kokesh*, the Supreme Court decided that a particular claim for disgorgement by the Securities Exchange Commission was a "penalty" within the meaning of a statute of limitations for securities enforcement penalties, such that the disgorgement action should have been commenced within five years of the date the claim accrued.[25] The Court expressly did not opine on whether "disgorgement" is a penalty in any other context (much less in *all* contexts).[26]

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[20] ECF No. 43 at 2 (noting the Supreme Court's instructions to first compare the action to actions brought before the merger of the courts of law and equity and second examine the remedy sought and determine whether it is legal or equitable in nature, giving greater weight to the second part of the inquiry); *Terry*, 494 U.S. at 565.

[21] ECF No. 43 at 2 (citing *Terry*, 494 U.S. at 570 and *Tull*, 481 U.S. at 424).

[22] ECF No. 43 at 2 (quoting *Terry*, 494 U.S. at 571 (quoting *Tull*, 481 U.S. at 424)).

[23] ECF No. 43 at 2.

[24] ECF No. 43 at 3.

[25] *Kokesh v. SEC*, 137 S. Ct. 1635, 1642 (2017).

[26] *Kokesh*, 137 S. Ct. at 1642 n.3; *see also Fed. Trade Comm'n v. Credit Bureau Ctr.*, LLC, No. 17 C 194, --- F. Supp. 3d ---, 2018 WL 482076, at *1-2 (N.D. Ill. Jan. 14, 2018); *SEC v. Jammin' Java Corp.*, No. 2:15–cv–08921

(continued...)

"Disgorgement" can have features of a penalty or features of restitution.[27] In reaching its decision, the Court identified characteristics of disgorgement used to punish a wrongdoer and comparing them with characteristics of disgorgement used to compensate a wronged party for injury caused by the defendant. The Supreme Court determined that the disgorgement sought by the SEC in *Kokesh* was a "penalty" for purposes of the statute of limitations because it punished Kokesh for having violated a public law of the United States and aimed to deter others from violating the same law by depriving him of his ill-gotten gains; significantly, the disgorgement sought there was not to compensate a victim for its loss.[28]

Defendants argue that the disgorgement relief we seek in this case is identical to the disgorgement sought by the SEC in *Kokesh*. They further contend that because the United States purportedly seeks a penalty that they are entitled to a jury trial on our claim for disgorgement

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(…continued)

SVW (MRWx), 2017 WL 4286180, at *3-4, & n.3 (C.D. Cal. Sept. 14, 2017); *SEC v. Brooks*, No. 07-61526-CIV, 2017 WL 3315137, at *8 (S.D. Fla. Aug. 3, 2017).

[27] *Kokesh* did not create this distinction; it merely applied past precedent identifying that distinction to its specific and limited context. *E.g. Kokesh*, 137 S. Ct. at 1642-45; *see also Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 212-14 (2002) ("'[R]estitution is a legal remedy when ordered in a case at law and an equitable remedy ... when ordered in an equity case,' and whether it is legal or equitable depends on 'the basis for [the plaintiff's] claim' and the nature of the underlying remedies sought." (quoting *Reich v. Continental Casualty Co.*, 33 F.3d 754, 756 (7th Cir. 1994) (Posner, J.)); *Terry*, 494 U.S. at 570 ("we have characterized damages as equitable where they are restitutionary, such as in "action[s] for disgorgement of improper profits"); *Tull*, 481 U.S. at 422 ("Remedies intended to punish culpable individuals, as opposed to those intended simply to extract compensation or restore the status quo, were issued by courts of law, not courts of equity."); *see also* Restatement (Third) of Restitution and Unjust Enrichment § 51(4) (2011) ("[T]he unjust enrichment of a conscious wrongdoer . . . is the net profit attributable to the underlying wrong. The object of restitution in such cases is to eliminate profit from wrongdoing while avoiding, so far as possible, the imposition of a penalty. Restitution remedies that pursue this object are often called 'disgorgement' or 'accounting.'").

[28] *Kokesh*, 137 S. Ct. at 1642-45.

relief.[29] But Defendants' syllogism fails because the disgorgement the SEC sought in *Kokesh* has different characteristics than the disgorgement we seek.

According to *Kokesh*, "SEC disgorgement is imposed by the courts as a consequence for violating . . . public laws" of the United States and not as a remedy for "an aggrieved individual."[30] "[I]n many cases, SEC disgorgement is not compensatory."[31] Neither the SEC itself nor the United States are being compensated for a loss due to a defendants' wrongdoing in the securities enforcement context, and disgorged funds are paid to the district court.[32] Disgorged funds may ultimately be paid to victims of securities fraud but they may not.[33] Even if the disgorged funds are paid to victims of securities fraud, the Court found the amount Kokesh was ordered to pay punitive and not compensatory because the disgorgement had been ordered by the lower court "without consideration of a defendant's expenses that reduced the amount of illegal profit."[34] Citing the Restatement (Third) of Restitution and Unjust Enrichment § 51, Comment *h*, the Supreme Court concluded that "[i]n such cases, disgorgement does not simply restore the status quo; it leaves the defendant worse off" and is punitive, not remedial.[35]

In this case, however, we seek disgorgement to compensate the U.S. Treasury for the harm it has suffered. The United States is the "aggrieved individual" that should be compensated

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[29] *See generally* ECF No. 289.

[30] *Kokesh*, 137 S. Ct. at 1643.

[31] *Kokesh*, 137 S. Ct. at 1644.

[32] *Kokesh*, 137 S. Ct. at 1644.

[33] *Kokesh*, 137 S. Ct. at 1644.

[34] *Kokesh*, 137 S. Ct. at 1644.

[35] *Kokesh*, 137 S. Ct. at 1644-45.

for its loss due to Defendants' wrongdoing.[36] Defendants created, promoted, and sold an abusive tax scheme to hundreds, perhaps thousands of people. They sold the scheme by falsely telling their customers they could rightfully claim tax deductions and credits that were (and are) unlawful.[37] Defendants illustrated the scheme by literally showing money leaving the IRS and ending up in Defendants' pockets.[38] They encouraged people to "zero out" their taxes by buying more lenses[39]; the more lenses customers bought, the richer Defendants became. These facts show that the primary goal for the disgorgement we seek is to compensate the U.S. Treasury for the millions of dollars it has lost due to Defendants' unlawful conduct that resulted in their unjust enrichment,[40] – the primary purpose is not to penalize or punish Defendants[41] or to deter others from similar conduct[42]. Disgorgement that will compensate the victim (the United States), bring

[36] *See United States v. United Techs. Corp.*, 782 F.3d 718, 724–25 (6th Cir. 2015) (restitution is a remedy available to the United States when the United States has been deprived of money that rightfully belongs to it); *U.S. Small Bus. Admin. v. Wasson*, 865 F. Supp. 753, 754 (W.D. Okla. 1994); *United States v. Water Quality Ins. Syndicate*, 613 F. Supp. 239, 243 (S.D.N.Y. 1985).

[37] *See generally* ECF No. 251.

[38] *E.g.* Pl. Ex. 688, ECF No. 256-30, Deposition of Roger Freeborn, 48:2-51:18; Pl. Ex. 496, ECF No. 255-44; Pl. Ex. 497, ECF No. 255-45; Pl. Ex. 777 at 1-2.

[39] *E.g.*, ECF No. 251 at 29-34.

[40] ECF No. 252 at 15; *see also* ECF No. 289 at 8 (acknowledging that the United States has stated that its disgorgement is remedial).

[41] As addressed thoroughly in the first round of motions practice regarding Defendants' jury demand, 26 U.S.C. § 6700 is one mechanism for assessing penalties against Defendants. The IRS has not assessed penalties against Defendants. *C.f.* ECF No. 43 at 2-3.

[42] Inherently, court-ordered consequences of wrongdoing may deter the Defendants or others from engaging in the same conduct. But the goal of disgorgement in this case is not to deter others. It is to begin to make the Treasury whole from Defendants' fraud. *See United States v. Stinson*, 239 F. Supp. 3d 1299, 1326-27 (M.D. Fla. 2017) (mentioning deterrence in passing, but focusing on remedying the defendant's unjust enrichment in discussion of disgorgement ordered pursuant to 26 U.S.C. § 7402(a)).

the parties back to their original starting point, and ensure that wrongdoers are not enriched by their ill-gotten gains, is "relief that [was] typically available in equity."[43]

Defendants argue that the disgorgement we seek is a "penalty" because we seek Defendants' gross receipts from the solar energy scheme. But the principles of equitable restitution support this relief. The United States has the burden of "producing evidence [at trial] permitting at least a reasonable approximation of the amount of [Defendants'] wrongful gain."[44] Defendants bear the "risk of uncertainty in calculating net profit."[45] The United States chose one method of approximating Defendants' wrongful gain in its motion to freeze assets and appoint a receiver, from Defendants' own customer list and our information about how and when they obtained payment from customers.[46] But we are not limited to that information at trial. At trial, we plan to present evidence from multiple sources to establish a reasonable approximation of Defendants' wrongful gain, including Defendants' customer database[47] and Defendants' bank

[43] *Great-West.*, 534 U.S. at 215; *c.f.* ECF No. 289 at 3, n.8; *see also SCO Group, Inc. v. Novell, Inc.*, Civil No. 2:04CV139DAK, 2007 WL 2684537, at *5 (D. Utah Sept. 7, 2007) (Kimball, J.).

[44] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & comment i.; *Stinson*, 239 F. Supp. 3d at 1329; *United States v. Mesadieu*, 180 F. Supp. 3d 1113, 1120-23 (M.D. Fla. 2016).

[45] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(d) & comment i. ("'Reasonable approximation' will suffice to establish the disgorgement liability of a conscious wrongdoer, when the evidence allows no greater precision, because the conscious wrongdoer bears the risk of uncertainty arising from the wrong. The same disposition against the wrongdoer yields the rule that 'when damages are at some unascertainable amount below an upper limit and when the uncertainty arises from the defendant's wrong, the upper limit will be taken as the proper amount.' *Gratz v. Claughton*, 187 F.2d 46, 51-52 (2d Cir. 1951) (L. Hand, J.). Supposing, in other words, that the true measure of unjust enrichment is an indeterminable amount not less than 50 and not more than 100, liability in disgorgement will be fixed at 100.").

[46] ECF No. 252 at 13.

[47] Defendants failed to produce this database. ECF No. 235; ECF No. 283. Counsel for the United States will obtain a copy on February 28, 2018.

deposits. We will also show evidence of the outflow from the Treasury based, in part, on the unlawfully claimed tax benefits from a subset of Defendants' customers.

Under some circumstances, a defendant "may be allowed a credit," that is, a reduction in the amount of its "wrongful gain" if the defendant shows that it spent money to "carr[y] on the business that is the source of the profit subject to disgorgement."[48] But when a defendant *defrauds* the claimant, as the United States has shown Defendants have done,[49] "such a defendant will ordinarily be denied any credit for contributions in the form of services, or for expenditures incurred directly in the commission of a wrong to the claimant."[50] At trial, the United States will show that any expenses they incurred were to perpetrate the solar energy scheme.

Accordingly, the United States' request for Defendants' gross receipts is consistent with principles of remedial (and equitable) disgorgement.[51] To the extent the monetary loss to the government from Defendants' misconduct, as proved at trial, is less than Defendants' gross

[48] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(c) & comment h; *see also* comment i. ("[T]he claimant has the burden of producing evidence from which the court may make at least a reasonable approximation of the defendant's unjust enrichment. If the claimant has done this much, the defendant is then free (there is no need to speak of 'burden shifting') to introduce evidence tending to show that the true extent of unjust enrichment is something less.").

[49] ECF No. 251 & ECF No. 277.

[50] Restatement (Third) of Restitution and Unjust Enrichment § 51(5)(c) & comment h ("The defendant will not be allowed a credit for the direct expenses of an attempt to defraud the claimant, even if these expenses produce some benefit to the claimant."). *SEC v. JT Wallenbrock & Assocs*., 440 F.3d 1109, 1114 (9th Cir. 2006) ("[I]t would be unjust to permit the defendants to offset against the investor dollars they received the expenses of running the very business they created to defraud those investors into giving the defendants the money in the first place."); *SEC v. Veros Farm Holding LLC*, No. 1:15-cv-00659-JMS-MJD, 2018 WL 731955, at *4 (S.D. Ind. Feb. 6, 2018); *SEC v. Art Intellect, Inc.*, No. 2:11-CV-357, 2013 WL 840048 at *23 (D. Utah, Mar. 6, 2013) ("The amount of disgorgement should not include any offset for the operating expenses of [the defendant company, which was run as a Ponzi scheme].") (Campbell, J.); *SEC v. Smart*, No. 2:09cv00224, 2011 WL 2297659 at *21 (D. Utah June 8, 2011) (the purpose of "depriving a wrongdoer of unjust enrichment" would not be served if defendants "who defrauded investors" were allowed a credit against disgorgement of the "expenses associated with this fraud.") (quoting *JT Wallenbrock*, 440 F.3d at 1115)) (Kimball, J.).

[51] Restatement (Third) of Restitution and Unjust Enrichment § 51 comment k. ("[T]he wrongdoer who is deprived of an illicit gain is ideally left in the position he would have occupied had there been no misconduct.").

receipts (also as proved at trial), the United States will seek compensation only for the amount of its loss.[52]

B. Granting Defendants' untimely filed "motion to reinstate jury trial" will cause serious prejudice to the United States.

Kokesh did not change the nature of the remedial disgorgement the United States seeks in this case; it remains, as it has always been, equitable relief for which there is no right to jury trial. Defendant's motion should be denied on that ground alone.

Even if *Kokesh* had changed the nature of the United States' request for disgorgement (which it did not), the Court should deny Defendants' motion because they waited far too long to seek to request a jury trial based on that opinion. When a party makes an untimely jury demand on an issue triable by jury,[53] the court should grant it "absent strong and compelling reasons to the contrary."[54] But when the untimely demand on an issue triable by jury is due to "nothing more than the mere inadvertence" of the demanding party, a district court properly acts within its discretion to deny it.[55] Other reasons to deny an untimely jury demand for an issue triable by jury include: 1) that there was undue delay in bringing the motion; 2) that the trial is imminent; and 3) that an opposing party has "relied on the absence of a jury demand in connection with executing their discovery or trial strategies," including taking discovery "on the assumption that trial would

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[52] *Stinson*, 239 F. Supp. 3d at 1327-29 (limiting a requested disgorgement amount to stay within equitable bounds of remedying unjust enrichment).

[53] Fed. R. Civ. P. 39(b).

[54] *Nissan Motor Corp. in U.S.A. v. Burciaga*, 982 F.2d 408, 409 (10th Cir. 1992).

[55] *Nissan Motor Corp.*, 982 F.2d at 409; *accord Dill v. City of Edmond*, 155 F.3d 1193, 1208 (10th Cir. 1998) (affirming district court's denial of untimely request for jury trial made almost a year and a half after the complaint was filed, when the moving party offered no explanation for the delay).

be to the court and not to a jury (e.g ., depositions were recorded stenographically and not on video)."[56]

Here, the "strong and compelling reasons" to deny Defendants' motion (even assuming the disgorgement we seek is an issue triable to a jury, which it is not) are Defendants' undue (and unexplained) delay in filing the motion and the resulting prejudice to the United States. The authorities upon which *Kokesh* relies – and which Defendants cite in their motion – were available to Defendants when they first made their jury demand in this case and briefed the issue in early 2016.[57] Defendants offer no explanation for why they did not raise the distinction between disgorgement as a remedy and disgorgement as a penalty two years ago. *Kokesh* itself was issued in early June 2017 – more than seven months before Defendants moved to "reinstate" a jury trial here. Defendants do they explain why, if they believe *Kokesh* changed the legal analysis of this issue, they waited until *seven months* after *Kokesh* issued to file a motion to "reinstate" their jury demand.[58]

Similarly, Defendants do not address the prejudice that will result to the United States if their motion is granted. This is not a case in which a defendant made a jury demand a few days after the original 14-day deadline in Fed. R. Civ. P. 38(b)(1), when discovery "has not even begun," and "trial is obviously not imminent," such that prejudice to the opposing party is low to

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[56] *Harvey v. Adams Cty. Sheriff's Office*, No. CIV.A.05CV01090BNBCB, 2008 WL 2323875, at *1-2 (D. Colo. June 4, 2008). Other factors include significantly increased costs and a substantially longer trial "to a jury because, for example, of the complexity of the issues." *Id.* at 1.

[57] *See generally* ECF No. 289.

[58] When a defendant fails to "explain why the court should exercise its broad discretion allow [it] to assert [a] late jury demand[,] [t]he court lacks any reason to permit the jury demand." *Klein v. Petty*, No. 2:11-CV-01099-RJS, 2014 WL 12600130, at *3 (D. Utah June 12, 2014) (Shelby, J.);

nonexistent.[59] Here, after this Court struck Defendants' jury demand, the United States spent nearly two years conducting discovery and building a trial strategy oriented to the bench, not a jury, on all issues. For just one example, anticipating submitting written deposition designations to the Court as factfinder, the United States did not incur the expense of capturing depositions of unavailable witnesses on video such that they could be easily presented to a jury.[60]

Trial is imminent. It begins on April 2.[61] Defendants filed their motion to reinstate jury trial only after this Court ordered that trial would take place over the course of three months with gaps in time between trial settings. The Court set this schedule with information from its docket that it would be a bench trial and not a jury trial. The gaps in time between trial days will prejudice the United States because of the potential loss in information retention and recall among jurors due to those gaps. If there is a jury trial, the United States might decide to file motions in limine regarding certain evidence and/or potential arguments by Defendants that could be prejudicial if presented to a jury.[62] If there is a bench trial, some motions in limine may not be needed because the Court's factfinding will not be adversely affected by irrelevant or inflammatory evidence or argument like a jury's could be. The United States has not anticipated

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[59] *C.f.* *Velocity Press, Inc. v. Key Bank, NA*, No. 2:09-CV-520 TS, 2010 WL 678945, at *2 (D. Utah Feb. 23, 2010) (Stewart, J.); *Harvey*, 2008 WL 2323875, at *2.

[60] *E.g.*, ECF No. 279, ECF No. 299, ECF No. 300, three of the United States' eight total deposition designations for witnesses outside of Utah.

[61] The District of Utah denied a motion for jury trial made *four* months before a trial setting when the case had been pending for four years, and the demanding party "failed to offer any reasons why the demand was not filed sooner" other than inadvertence of prior counsel. *Dick v. Phone Directories Co.*, No. 2:01-CV-785 TS, 2006 WL 539516, at *1 (D. Utah Mar. 6, 2006) (Stewart, J.); *see also Continental Cas. Co. v. Multiservice Corp.*. No. 06–2256–CMM, 2007 WL 3379701, at *2 (D. Kan. June 11, 2007) (citing cases denying an untimely jury demand because of the length of time the cases had been pending).

[62] Motions in limine are due March 5, ECF No. 288 ¶ 2, just one week from the date this opposition is being filed.

filing, much less prepared, critical pre-jury-trial documents like voir dire questions, proposed jury instructions, and a special verdict form.

Finally, trial would likely take more than the ten days currently set. Voir dire will take time not currently accounted for, especially to get jurors available across the span of trial dates. The United States will require additional time, too, to read its deposition designations into the record. And simply resetting trial for a later date, when the Court and all counsel and parties will be available, will cause serious prejudice to the United States. Defendants will only use the delay to sell more lenses to more customers, who will claim unlawful tax deductions and credits on their federal income tax returns, resulting in still greater harm to the Treasury.

III. Conclusion

Defendants' untimely motion to "reinstate trial by jury" should be denied. All of the relief, including disgorgement, sought by the United States is equitable relief so there is no right to jury trial. Even if there were such a right on any issue (which there is not), this Court should exercise its discretion to reject Defendants' untimely jury demand due to the prejudice it would cause to the United States.

Dated: February 26, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 26, 2018, 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
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Trial Attorney