

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' MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
"OBJECTION TO PLAINTIFF'S
PRETRIAL WITNESS LIST AND
REQUEST TO STRIKE"**

Chief Judge David Nuffer
Magistrate Judge Evelyn J. Furse

On February 9, 2018, the United States served its witness list for trial on Defendants.¹ The Defendants object to 18 of the witnesses we disclosed, and move to strike them from our case for trial. Defendants argue that we did not disclose these witnesses during discovery and they are prejudiced.² The Defendants are wrong.

On April 22, 2016, we served the defendants with our initial disclosures pursuant to [Fed. R. Civ. P. 26\(a\)\(1\)](#).³ Our initial disclosures identified many individuals by name, and also included the following categories of witnesses: Defendant's customers; sponsors of any customer; distributors; Defendants' agents or employees; Defendant's banks; Defendant's advisors (including attorneys, CPA's, and tax return preparers); Utility Company Employees or Agents; and representatives of the IRS. We disclosed categories of potential witnesses because we did not yet know the specific identities of the witnesses we would rely on. As discussed below, we subsequently disclosed the specific witness information that Rule 26(a)(1) requires.

[Fed. R. Civ. P. 26\(e\)\(1\)\(A\)](#) requires a party to supplement its disclosures in a "timely manner" if its initial disclosures were incomplete *and* "if the additional information has not otherwise been made known to the other parties during the discovery process or in writing." "To satisfy the "made known" requirement, a party's collateral disclosure of the information that would normally be contained in a supplemental discovery response must in such a form and of such specificity as to be the functional equivalent of a supplemental discovery response."⁴

¹ [ECF Doc. No. 296 at 2](#); [ECF Doc. No. 308](#); [ECF Doc. No. 312](#); [ECF Doc. No. 314](#).

² [ECF Doc. No. 296](#).

³ Pl. Ex. 783, United States' Initial Disclosures (attached).

⁴ *L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.*, 125 F. Supp. 3d 1155, 1168–69 (D. Colo. 2015).

“[T]here is no need as a matter of form to submit a supplemental disclosure to include information already revealed by a witness in a deposition or otherwise through formal discovery.”⁵ We timely made all of the witnesses known and did not violate [Fed. R. Civ. P. 26\(e\)\(1\)\(A\)](#), and even if we did, there is no incurable prejudice to the Defendants.

I. We made known Ms. Eppich, Ms. Perez, and Ms. Reinken who are witnesses under [Fed. R. Evid. 1006](#).

Defendants ask the Court to strike three witnesses:⁶ Amanda Reinken, JoAnna Perez, and Terri Eppich. Reinken and Perez are paralegals at the Department of Justice, Tax Division. Eppich is an Internal Revenue Service Employee. We disclosed Eppich and Perez, by category, in our initial disclosures.⁷ We timely disclosed Reinken’s role as a summary witness.⁸ These witnesses are primarily summary, not fact witnesses, and will only summarize voluminous information we already produced, and authenticate the defendants’ own statements. The disclosure of their names is inconsequential because we timely disclosed the information and documents these witnesses will testify about.⁹

⁵ [BanxCorp v. Costco Wholesale Corp.](#), 978 F. Supp. 2d 280, 323 (S.D.N.Y. 2013) (citing Wright & Miller, Federal Practice and Procedure § 2049.1 (3d ed.2010)).

⁶ [ECF Doc. No. 296](#), ¶ 6.

⁷ Pl. Ex. 783, p. 6, ¶19 (attached). Perez is not an IRS employee, however she will testify as a summary witness about the IRS’ records and documents that prove the Defendants’ conduct harms the government, the exact topic identified in our initial disclosures. Eppich, an IRS employee, will establish the admissibility of the IRS’ records.

⁸ Pl. Ex. 782, p. 2 (attached).

⁹ See [S.E.C. v. Badian](#), 822 F. Supp. 2d 352, 367 (S.D.N.Y. 2011) (amended on reconsideration in part on other grounds, [2012 WL 2354458](#)) (because a summary witness is not a fact witness, there is no prejudice from the post-discovery disclosure of the summary witness’ name.”)

In order to streamline the presentation of evidence at trial and assist the trier of fact, Reinken and Perez prepared summaries of voluminous evidence,¹⁰ including Pl. Ex. 734,¹¹ Pl. Ex. 742-A&B,¹² Pl. Ex. 750,¹³ and Pl. Ex. 752.¹⁴ Eppich is a custodian of records concerning the tax returns that are summarized in Pl. Ex. 752 and will establish admissibility under [Fed. R. Evid. 803\(b\)\(6\)](#). We offer these exhibits to demonstrate a reasonable approximation of the Defendants' gross receipts and the harm to the government that resulted from the Defendants' scheme.¹⁵

The Defendants were well aware that we intended to use summary witnesses to prove our disgorgement claim using their gross receipts and customer's tax returns. On April 22, 2016, we made our initial disclosures, and stated that we would use information about the Defendants' gross receipts, information derived from banks, and information from the IRS (including a

¹⁰ [Fed. R. Evid. 1006](#).

¹¹ [ECF Doc. No. 320-2](#). Reinken prepared Pl. Ex. 734, a summary of voluminous bank statements that show the Defendants' gross receipts between 2008 and 2016. Pl. Ex. 734 is a composite of Pl. Exs. 735-741, which summarize, by defendant, the gross receipts each defendant, and their associated entities (Cobblestone Center LLC, Xsun Energy, LLC, and SOLCO I, LLC) received. In other words, Pl. Ex. 734 is a summary of several summaries. Reinken prepared each summary.

¹² Reinken prepared Pl. Exs. 742-A & 742-B which summarize information the defendants provided from their own customer database regarding the number of lenses the Defendants sold. Reinken simply tallied the numbers of lenses defendants reported having sold. Redacted copies are attached to this opposition because the information underlying Pl. Ex. 742-A & B was sealed by the Court. See [ECF Doc. No. 246](#); [ECF Doc. No. 247](#), p.13. Defendants have copies of these exhibits, and we will file a Motion for leave to file exhibits 742-A&B under seal in accordance with DUCivR 5-3(a).

¹³ [ECF Doc. No. 320-3](#). Reinken prepared Pl. Ex. 750, which compares the summaries in Pl. Ex. 734 (gross receipts) with the summaries in Pl. Ex. 752 (harm to the government).

¹⁴ [ECF Doc. No. 320-1](#). Perez prepared Pl. Ex. 752, which summarizes the contents of at least 1,643 tax returns that the Defendants' customers filed with the IRS. Pl. Ex. 752 demonstrates the total depreciation and solar tax credits that the Defendants' customers claimed, applied the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government) from the Defendants' scheme. No tax rate was applied to the credit because a tax credit is a dollar for dollar reduction to the taxpayer's liability.

¹⁵ [S.E.C. v. Curshen](#), 372 F. Appx. 872, 883 (10th Cir. 2010).

summary witness and a records custodian) to support our claims and defenses. On June 13, 2016 we notified the Defendants that we were issuing documents subpoenas to their banks.¹⁶ On March 30, 2017, we provided copies of the documents we received from their banks and specifically stated that “consistent with [Fed. R. Evid. 1006](#), we may use a *summary chart and/or summary witness* to present the information in the voluminous bank records to the court.”¹⁷ On May 15, 2017,¹⁸ September 5, 2017,¹⁹ and September 15, 2017,²⁰ we disclosed at least 1,643 tax returns associated with the Defendants’ customers.

Because we timely disclosed the supporting/underlying documents, the nature of each witness’ testimony, and Perez and Reinken will only testify about information that we disclosed several months ago, we satisfied Rule 26 and should be allowed to present testimony from Eppich, Perez, and Reinken at trial. Even if there was a late disclosure – which there was not – there is no prejudice to the Defendants because these witnesses are available for cross-examination.²¹ Since the defendants had the underlying information for several months, they had enough time to prepare their own summaries and develop their cross-examination questions.

Reinken will also authenticate recently discovered evidence. In December 2017, Reinken downloaded copies of the Defendants’ websites, and audio clips of their statements on a local

¹⁶ [ECF Doc. No. 73-1](#).

¹⁷ Pl. Ex. 782, p. 2. (emphasis added).

¹⁸ Pl. Ex. 784 (attached).

¹⁹ Pl. Ex. 785 (attached).

²⁰ Pl. Ex. 786 (attached).

²¹ See [Fed. R. Civ. P. 37\(c\)\(1\)](#); [Woodworker’s Supply, Inc. v. Principal Mut. Life Ins. Co.](#), 170 F.3d 985, 993 (10th Cir. 1999); see also [Badian](#), 822 F. Supp. 2d, at, 367; [Mozingo v. Oil States Energy Servs., L.L.C.](#), 2017 WL 5195251, at *3 (W.D. Pa. Nov. 8, 2017) (overruling an objection to a custodian of records testifying because the objector had access to the underlying records).

radio show.²² We offer the websites and audio clips as evidence that the Defendants continue to make false or fraudulent statements about taxes. Since the website content and audio clips constitute Defendants' own statements, made 3 months ago, they are not prejudiced by the recent disclosure or Reinken's testimony. To be sure, defendants should stipulate to authenticity and admissibility of their own statements.

II. The “forensic computer expert” will authenticate information from the Defendants’ own computer systems, which we only recently obtained.

As the Court is aware, throughout this case, the Defendants obstructed the United States' efforts to learn the identities of all of their customers, and the number of “lenses” purchased.²³ Because the Defendants did not produce this information, even after entry of an order compelling them to do so, the Court sanctioned the Defendants and permitted the United States' vendor to access the Defendants' computer database collect the information.²⁴ On **February 28, 2018**, Lamar Roulhac, a forensic computer expert, collected the information from the Defendants' database in accordance with the Court's order.²⁵ At trial, Mr. Roulhac will testify about the method by which he collected data from the Defendants' database. Counsel for the United States provided the subset of Defendants' data it anticipates Roulhac will testify about to counsel for Defendants on March 8, 2018, just six working days after the data was collected. We anticipate

²² Pl. Exs. 547, 714-730.

²³ [ECF Doc. No. 53](#); [ECF Doc. No. 53-1](#), [ECF Doc. No. 59](#), [ECF Doc. No. 143](#), [ECF Doc. No. 156](#); [ECF Doc. No. 210](#), [ECF Doc. No. 218](#); [ECF Doc. No. 226](#).

²⁴ [ECF Doc. No. 235](#); [ECF Doc. No. 283](#).

²⁵ [ECF Doc. No. 235](#); [ECF Doc. No. 283](#).

providing a copy the final exhibit(s) for Roulhac's testimony to Defendants as soon as possible during the week of March 12.

The Defendants' resistance to discovery – which the Defendants knew about – and the Court's orders – which Defendants received in writing while resisting discovery about their customer database, was still ongoing – is the only reason that Roulhac's testimony is even necessary. Had the Defendants voluntarily provided accurate information about their customers and their lenses, and stipulated to its admissibility, when we asked for it in April 2016, there would have been no need for Roulhac to collect the data as ordered by the Court or for him to testify. Because the Defendants themselves caused the need for Roulhac to testify, he should be permitted to testify. Further, there is no prejudice to Defendants if Roulhac testifies at trial. The database from which he obtained information is *their database*. They have all of the information they require to both cross-examine him and present different evidence about the database, if they choose.

III. The remaining fact witnesses were “made known” to the Defendants when the witnesses were deposed.

Defendants' objection to the remaining witnesses rings even more hollow. Following proper notice to all parties, the United States deposed each remaining witnesses to which the Defendants now object.²⁶ Defendants had the opportunity to question these witnesses at

²⁶ See [ECF Doc. No. 265-6](#) (Excerpts from Jessica Anderson's deposition, attended by Mr. Steven Paul, Defendants' current attorney); [ECF Doc. No. 129-1](#) (Notice of Todd Anderson's deposition, sent to Messrs. Heideman, Austin & Reay, Defendants' former counsel); [ECF Doc. No. 265-4](#) (Excerpts from Todd Anderson's Deposition); [ECF Doc. No. 140-3](#) (Excerpts from Ken Birrell's first deposition, attended by Mr. Austin, Defendants' former attorney); [ECF Doc. No. 265-7](#) (Excerpts from Kenneth Birrell's second deposition, attended by Mr. Steven Paul, Defendants' current attorney); [ECF Doc. No. 290-1](#) (Notice of the depositions of Cody Buck and Ken Oveson, sent to Messrs. Heideman, Austin & Reay); [ECF Doc. No. 256-34](#) (Excerpts from Preston Olsen's deposition, attended by Messrs. Austin and Reay); [ECF Doc. No. 256-35](#) (Excerpt from Robert Rowbotham's deposition,

(continued...)

depositions, and in most cases they did. Since the witnesses themselves were deposed (following a notice of deposition that revealed all of the witnesses' pertinent information), these witnesses have "otherwise been made known" in accordance with [Fed. R. Civ. P. 26\(e\)\(1\)\(A\)](#).

Defendants' objection to Jessica & Todd Anderson, Birrell, Buck, and Oveson are particularly troubling given all of the discovery disputes (attorney-client privilege, tax practitioner privilege under 26 U.S.C. § 7525) and motion practice regarding their deposition testimony.²⁷ To claim we did not disclose these names is simply preposterous.

For the foregoing reasons, the defendants' request to strike our witnesses should be denied. Defendants should not be awarded fees because, as discussed above, the United States properly disclosed each of the witnesses, and the defendants' request to strike our witnesses is without basis in fact or law."

(...continued)

attended by Messrs. Heideman and Reay); [ECF Doc. No. 256-36](#) (Excerpt from Lynette Williams' deposition, attended by Messrs. Austin, Sorenson and Reay); [ECF Doc. No. 256-29](#) (Excerpt from Robert Aulds' deposition, attended by Mr. Austin); [ECF Doc. No. 256-32](#) (Excerpt from Roger Halverson's deposition, attended by Mr. Heideman); [ECF Doc. No. 256-33](#) (Excerpt from Frank Lunn's deposition, attended by Mr. Heideman); Pl. Ex. 787 (attached) (United States' Notice of PacifiCorp's deposition, sent to Messrs. Heideman, Austin and Reay on September 20, 2016); Pl. Ex. 788 (attached) (United States' Notice of Mike Penn, Robert Aulds, and John Howell's depositions, sent to Messrs. Heideman, Austin and Reay on February 1, 2017); [ECF Doc. No. 256-37](#) (Excerpt from Brian Zeleznik's deposition, attended by Mr. Heideman).

²⁷ [ECF Doc. No. 137](#); [ECF Doc. No. 138](#); [ECF Doc. No. 140](#); [ECF Doc. No. 203](#); [ECF Doc. No. 206](#); [ECF Doc. No. 209](#); [ECF Doc. No. 213](#); [ECF Doc. No. 219](#).

Dated: March 9, 2018

Respectfully submitted,

/s/ Christopher R. Moran
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 March 9, 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/ Christopher R. Moran
CHRISTOPHER R. MORAN
Trial Attorney