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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' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING DAMAGES RELATING TO DISGORGEMENT OF FUNDS** Chief Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants move, in limine, to exclude testimony regarding "damages" relating to disgorgement of funds because, according to them, (1) we did not disclose our "damages calculation," and (2) our "damages theory" is not supported by expert testimony.[1]

I. Rule 26(a)(1) does not require disgorgement calculations to be disclosed, and we disclosed all information that supports our disgorgement calculations.

Defendants incorrectly equate damages with disgorgement, which are two distinct remedies.[2] Unlike damages, Fed. R. Civ. P. 26(a)(1) does not require disclosure of disgorgement calculations.[3] The difference is logical. Damages are a purely legal remedy in the form of "money … as compensation for loss or injury."[4] Disgorgement is an equitable remedy that "compensate[s] the victim (the United States), bring the parties back to their original starting point[;] and ensure that wrongdoers are not enriched by their ill-gotten gains."[5] In this case, the disgorgement figure (Defendants' gross receipts), is uniquely in Defendants' possession.[6] They

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[1] ECF Doc. No. 319. Defendants' motion in limine is 8 pages long, in violation of the Court's Order that motions in limine, and objections thereto, be limited to 3 pages. ECF Doc. No. 288, ¶ 2. We comply with the Court's Order.

[2] *SEC v. First Jersey Sec., Inc*., 101 F.3d 1450, 1475 (2d Cir. 1996) (disgorgement is "unlike an award of damages"); *In re Lorazepam & Clorazepate Antitrust Litig.*, 202 F.R.D. 12, 21 (D.D.C. 2001; see also *SEC v. Commonwealth Chem. Sec., Inc*., 574 F.2d 90, 96-102 (2d Cir. 1978)("[w]hile from the standpoint of a defendant … there may be no great difference between paying money in response to a private suit for damages [than an SEC suit for disgorgement]" … "[u]nlike damages, [disgorgement] is a method of forcing a defendant to give up the amount by which he was unjustly enriched"); accord ECF Doc.No. 322.

[3] *United States v. Stinson*, 2016 WL 8488241, at *7 (M.D. Fla. Nov. 22, 2016) ("Rule 26 does not apply to a disgorgement claim" and the defendant "was well-aware that the Government sought a disgorgement remedy calculated from "ill-gotten" fees he received."); *SEC v. Razmilovic*, No. 2:04-cv-2276-SJF-WDW, at *7-8 (E.D. N.Y. 2010) ("the disclosure required by Rule 26(a)(1)(A)(iii) is inapplicable.") (unpublished, copy attached).

[4] Black's Law Dictionary (10th ed. 2014). A plaintiff presumably knows their damages at the outset of the case.

[5] ECF Doc. No. 322 (Court's Order Denying Defendant's Motion to Reinstate Jury Trial); *Great-West.*, 534 U.S. at 215; *c.f.* ECF No. 289 at 3, n.8; *see also SCO Group, Inc. v. Novell, Inc.*, 2007 WL 2684537, at *5 (D. Utah 2007).

[6] Unlike "damages," which a plaintiff knows, or can approximate at the outset of the case. Here, we will likely never know the true extent of Treasury harm because it is impractical for the IRS to audit every single customer, nor could it, because the statute of limitations generally expires 3 years after the return is filed. 26 U.S.C. § 6501.

knew how many lenses they sold, how much money they derived, and they intentionally prevented us from learning this information,[7] until we collected the raw data on **February 28, 2018**.[8] It is nonsensical to claim prejudice because we did not disclose information *they possess*.

Further, we did not "change [our] description" of our damage claim.[9] We disclosed estimates of the harm to the Treasury[10] to prove disgorgement is appropriate.[11] Defendants' scheme caused money to flow from the Treasury, through customers, to Defendants.[12] At customer depositions, we identified, and inquired about, the depreciation and tax credits where Defendants' promoted tax benefits appeared the customer's tax returns.[13] We timely disclosed the bank records and tax returns underlying our calculations.[14] Defendants can easily prepare cross-examination questions, or their own summary calculations. Again, Defendants are not prejudiced.

II. Defendants never requested disgorgement calculations, and we disclosed all supporting information.

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[7] 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. We also estimate the defendants' gross proceeds using their bank records, and we timely disclosed this information. See ECF Doc. No. 329, pp.3-4; ECF Doc. No. 329-3.

[8] ECF Doc. No. 235; ECF Doc. No. 283.

[9] ECF Doc. No. 319, ¶ 9. As discussed supra, *we do not claim damages*.

[10] Our estimates of harm to the Treasury include only customers who used a known RaPower-3 return preparer and who claimed a solar tax credit and depreciation on a Schedule C that could be identified as connected with the solar energy scheme. Our calculations do not include customers who prepared their own tax return, used other preparers, or claimed Defendants' promoted tax benefits on a tax return that could not be facially linked to the solar energy scheme, nor does it include depreciation and credits claimed on 2017 tax returns.

[11] See ECF Doc. No. 309, pp. 6-8 (discussing the difference between disgorgement for violating public laws, and disgorgement to compensate an aggrieved individual); ECF Doc. No. 322, p. 4. "To the extent the monetary loss to the government [ ] is less than Defendants' gross receipts [we] will seek compensation only for the amount of [our] loss." ECF Doc. No. 309, pp. 9-10. Harm to the Treasury is one of the factors a court may consider in evaluating the need for an injunction. *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1105 (9th Cir. 2000).

[12] ECF Doc. No. 255-44 (Pl. Ex. 496); ECF Doc. No. 255-45 (Pl. Ex. 497); ECF Doc. No. 309-2 (Pl. Ex. 777).

[13] Defendants' current counsel attended the most recent depositions. Pl. Ex. 683-A (attached), excerpts from Howell Dep., 188:4-200:20; Pl. Ex. 666-A (attached), excerpts from Jameson Dep. 187:2-199:25.

[14] ECF Doc. No. 329-3; ECF Doc. No. 329-5, pp. 2-3, 7-8 of 14; ECF Doc. No. 329-6; 329-7.

Defendants' eleventh hour[15] attempt to depose the Tax Division was not "to inquire into the damages calculation"[16] as they now claim. They sought to depose us on "[a]ny communications, research, and information," "the determination to prosecute" the case; and "[t]he decision to issue a press release."[17] In other words, they tried to take an improper 30(b)(6) deposition.[18] If Defendants wanted the information and figures we would rely on to support the disgorgement claim, they should have sent an appropriate interrogatory, and we would have provided the information available, but as discussed, *they* withheld critical information, *not us*.

III. No specialized expertise is required to perform the calculations.

We will present our evidence on disgorgement through summary witnesses who reviewed the same voluminous documents that we timely disclosed to Defendants, and who will be available for cross-examination.[19] These summary witnesses did nothing more than review (1) deposits into Defendants' bank accounts (Reinken) and (2) depreciation and solar tax credits that customers' returns claimed (Perez). They put the information into Excel spreadsheets, and used Excel to perform basic arithmetic to calculate Defendants' gross receipts and estimate the harm to the Treasury. No special expertise is required. [20]

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[15] The 30(b)(6) Dep. Notice was served May 17, 2017. ECF Doc. No. 170-1. The discovery deadline was 6/2/17.

[16] ECF Doc. No. 319, p. 6; ECF Doc. No. 170-1 (Deposition Notice).

[17] ECF Doc. No. 170-1.

[18] *S.E.C. v. Buntrock*, 217 F.R.D. 441, 445 (N.D. Ill. 2003); ECF Doc. No. 196 (Order granting Protective Order).

[19] See generally, ECF Doc. No. 329, discussing how we will summarize Defendants' gross receipts and the harm to the Treasury through the testimony of summary witnesses, DOJ paralegals Ms. Reinken and Ms. Perez.

[20] *United States v. Lemire*, 720 F.2d 1327, 1347 (D.C. Cir. 1983) (allowing non-expert summary witness to testify about documents they reviewed); accord *Qwest Corp. v. City of Santa Fe*, 2013 WL 12239494, at *1 (D.N.M. 2013); *United States v. Barwick*, 2018 WL 1135414, at *1 (M.D. Fla. 2018) (citing Reinken's testimony).

Dated: March 12, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 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
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Trial Attorney