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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-EJF **DEFENDANTS' MOTION IN LIMINE TO LIMIT THE TESTIMONY OF LEMAR ROULHOC AT TRIAL** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Defendants move this Court to limit the testimony of Lemar Roulhoc at trial. Mr. Roulhoc has been identified by Plaintiff as a forensic computer expert who will provide testimony regarding information he obtained from Defendants' computer tracking program. Defendants request he not be allowed to offer any opinion testimony at the trial of this matter for 2 reasons: First, although he is an expert witness, he has never been designated as such. Second, during Pretrial the Court ordered that Plaintiff make him available for a 4 hour deposition. Plaintiff has refused to make him available at a location or time that is reasonable for Defendants.

I. Mr. Roulhoc is an Expert Witness.

Plaintiff identified in United States' Fed. R. Civ. 26(a)(3(A)(i) Witness List[1] a Forensic Computer Expert. During Pretrial, Plaintiff identified that generic witness as Mr. Roulhoc. This was the first time that Plaintiff ever identified any expert witness (besides Mr. Mancini) in this case. The Scheduling Order in this case required designation of expert witnesses be made by Plaintiff on or before July 28, 2017, with expert discovery closing on November, 3, 2017.[2] Defendants recognize that Plaintiff may argue the necessity of the use of this witness only became known in February of this year. The Court may excuse it being untimely, however, the Court cannot ignore that there has never been a designation made.

Federal Rule of Civil Procedure 26(a)(2) provides the requirements which must be followed in order to present expert witness testimony. The rule requires disclosure.[3] Plaintiff failed to provide any Notice of Expert Witness relating to Mr. Roulhoc. More importantly, the Rule requires an expert to provide a written report, unless otherwise stipulated or ordered by the Court.[4] There has been no stipulation or order of the Court that excludes Plaintiff from complying with this requirement. Even if there were, Plaintiff is still required to provide a disclosure that identifies "(i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and (ii) a summary of the facts and opinions to which the witness is expected to testify."[5] No report has been provided. No disclosure has been provided. The closest Plaintiff has come is a short statement on its witness list of expected testimony. This is not enough. These are not permissive requirements under the rule.[6] Even ignoring any

[1] ECF 314.
[2] ECF 205.
[3] See Fed. R. Civ. P. 26(a)(2)(A).
[4] *Id*. at 26(a)(2)(B), (C).
[5] *Id*. at 26(a)(2)(C).
[6] *Id*.

timeliness argument, Plaintiff is still required to provide the appropriate disclosure. Having failed to do so, Mr. Roulhoc must be limited from providing expert testimony in this case.[7]

II. Plaintiff Refuses to Make Mr. Roulhoc Available at a Reasonable Time or Place.

During the Pretrial of this matter, the issue of presenting Mr. Roulhoc as a witness was discussed. The Court ordered that Plaintiff produce him for deposition, which could last as long as 4 hours.[8] During the Pretrial, Plaintiff's counsel indicated that all of her team would be arriving in Salt Lake for trial on the Wednesday or Thursday before trial, implying that Mr. Roulhoc would also be arriving at that time. Acknowledging that timing, Defendants contacted Plaintiff for deposition dates for all 4 of the witnesses the Court ordered Plaintiffs to produce for deposition and suggested they all occur on March 29 and 30, in order for the witnesses not to make a special trip to Salt Lake. This timing already is pushing into Defendants' trial preparation, but the concession was made in an effort to be reasonable. This week, however, Plaintiff's counsel has refused to produce Mr. Roulhoc unless Defendants were willing to travel to Washington, D.C. to take the deposition, the deposition be taken over video conference, or the deposition occur after the trial had already started – and then, only if Defendants agreed to pay for an additional night for Mr. Roulhoc's hotel and a per diem amount. None of these terms are reasonable.

It is unreasonable to expect that Defendants' counsel spend a day traveling and away from trial preparation to take Mr. Roulhoc's deposition. He is designated as Plaintiff's witness. Plaintiff has the resources to make Mr. Roulhoc available whenever it wishes. Defendants do not.

It is unreasonable to take Mr. Roulhoc's deposition via video conference. While direct questioning could be done in this manner, Mr. Roulhoc has manipulated electronic information

[7] "(A) *In General.* In addition to the disclosures required by Rule 26(a)(1), a party **must** disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Fed. R. Civ. P. 26(a)(2)(A) (emphasis added.)

[8] See Minute Entry ECF 342.

from a database into a very large excel spreadsheet. Much of the questioning that must occur requires the ability to review and ask questions about that spreadsheet while maneuvering around the spreadsheet to question about its contents. Defendants do not have the practical capability to do that via videoconferencing.

It is unreasonable to take Mr. Roulhoc's deposition after trial has already started. Plaintiff's counsel has indicated she will be bringing Mr. Roulhoc to town the night before he is expected to testify. It is unreasonable to be required to take Mr. Roulhoc's deposition on a night after trial. It is unreasonable to expect that a transcript from that deposition could be available for the following day, or that it could be reviewed prior to his testimony. It is especially unreasonable to require Defendants to pay for Mr. Roulhoc's visit when the Court ordered Plaintiff to make him available for the deposition.

Given Plaintiff's refusal to comply with the Court's order in a reasonable manner, this Court should not allow Mr. Roulhoc to provide any opinion testimony.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MOTION IN LIMINE TO LIMIT THE TESTIMONY OF LEMAR ROULHOC AT TRIAL** was sent to counsel for the United States in the manner described below.

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