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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><b>DEFENDANTS' MOTION IN LIMINE TO STRIKE PLAINTIFF'S SUMMARY EXHIBIT 752 (JOANNA PEREZ)</b></p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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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 motion in limine to strike Plaintiff's Summary Exhibits. For the reasons explained below, Plaintiffs Exhibits 734 through 741, 742(a), 742(b), and 750 lack sufficient reliability and the Court should disallow Plaintiff to use rely on them at trial.

**I. Brief Summary of Facts**

In June 2017, the Court denied Defendants the opportunity to depose government witnesses, adopting the Plaintiff's argument that the information sought by Defendants was

privileged or attorney work product. On February 9, 2018, Plaintiff, in its pretrial disclosures, designated Joanna Perez as a witness. Defendants moved to strike her as a witness on the basis of untimely disclosure under Rule 37. In its opposition, Plaintiff represented that Ms. Perez would provide testimony as a summary witness relating 1,643 tax returns "demonstrating total depreciation and solar tax credits that the Defendants' customers claimed."<sup>1</sup> This information is summarized in Exhibit 752 and is the basis for Plaintiff's "harm to treasury" theory.

This Court denied Defendants' motion to strike but permitted Defendants to depose Ms. Perez prior to trial. On March 29, 2018, counsel for Defendants deposed Perez in Salt Lake City, Utah. In her deposition testimony, Defendants learned specifics for the first time regarding Plaintiff's flawed methodology for computing "harm to treasury."

In April 2017, trial attorney Ms. Hines tasked Ms. Perez to compare an Excel spreadsheet that included defendants' customer tax return information against the customers' tax return to provide a quality control that the information in the Excel spreadsheet was correct.<sup>2</sup> Ms. Perez completed this task within a few months.<sup>3</sup> Ms. Hines instructed Ms. Perez to "basically go through the tax return" looking at "specific lines to make sure the information was correct."<sup>4</sup> She then took specific columns from the main spreadsheet and "had Excel summarize the total of each column, which, for example, would be the depreciation expense amount."<sup>5</sup> She created Exhibit 752 in January 2018.<sup>6</sup> Ms. Perez testified that she did not know if there had been any changes to the Excel spreadsheet from the time she finished reviewing it to January 2018 when she used it to

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<sup>1</sup> Doc 329 n. 14.

<sup>2</sup> Deposition of Joanna Perez, (hereinafter "Depo") at 12:5-20; Plaintiffs have not disclosed the Excel spreadsheet that Ms. Perez reviewed and was the basis for creating Exhibit 752.

<sup>3</sup> [Depo 14:8-25].

<sup>4</sup> [Depo 15:17-16:4].

<sup>5</sup> [Depo 17:2-12].

<sup>6</sup> [Depo 17:17-19].

create Exhibit 752.<sup>7</sup> At the time of her deposition, Ms. Perez could not define "depreciation expense" "solar energy credit" or "harm to treasury," all terms that she used throughout her Exhibit 752.<sup>8</sup> These terms were supplied by trial counsel.

The scope of Ms. Perez assignment was limited to tallying the total number of depreciation expenses and solar tax credits. She did not provide any analysis on what effect the depreciation or tax credit actually had on any individual tax payers.<sup>9</sup>

## **II. Basis of Defendants' Objection**

Defendants object to the use of Exhibit 752 because the information is unhelpful to the trier of fact. First, Plaintiff's "harm to treasury" is not a proper measure of any defendants' gain in this matter.<sup>10</sup> Second, Exhibit 752 does not provide reliable numbers because it does not account for the actual benefit each individual taxpayer obtained and therefore does not accurately reflect the so-called "harm to treasury". The exhibit merely summarizes depreciation expenses and tax credits claimed without any regard to the effect, if any, those lines had on the tax payer's ultimate tax liability. Third, the exhibit is a summary of an Excel spreadsheet that Ms. Lopez did not prepare, nor was it ever disclosed in this matter.

Finally, since this document existed in January 2018, there is no excuse for withholding it until the final stages of trial preparation when this information was sought and withheld as "attorney work-product" or "attorney-client communication". In June 2017 this Court ordered that no deposition of any Department of Justice, Tax Division could be taken. But on the last business day before trial Defendants have learned of the scope and extent of the ambush they face for trial.

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<sup>7</sup> [Depo 17:20 – 18:1].

<sup>8</sup> [Depo 18:15-19:6; 21:17-23].

<sup>9</sup> [Depo 23:19-25:13].

<sup>10</sup> Both sides have briefed this issue and both agree harm to the Treasury is not a valid measure for disgorgement.

This could and should have been disclosed in an orderly manner long ago, and Defendants should not be required to address this kind of unreliable and improper material being added to the trial record of this case.

### **III. Conclusion**

For the reasons stated above, Defendants respectfully request that Plaintiff's Exhibit 752 be stricken.

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 STRIKE PLAINTIFF'S SUMMARY EXHIBITS 734, 735, 736, 737, 738, 739, 740, 741, 742(A), 742(B), AND 750 (AMANDA REINKEN)** was sent to counsel for the United States in the manner described below.

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