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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>DEFENDANTS' MOTION IN LIMINE TO STRIKE PLAINTIFF'S SUMMARY EXHIBIT 734, 735, 736, 737, 738, 739, 740, 741, 742(A), 742(B), AND 750 (AMANDA REINKEN)</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 or rely on them at trial.

I. Brief Summary of Facts

In June 2017, the Court denied Defendants the opportunity to depose government witnesses that would testify concerning Plaintiff's case theory, 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 Amanda Reinken 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. Reinken would provide testimony as a summary witness relating to Plaintiff's Exhibits 734 through 741, 742(a), 742(b), and 750. Exhibits 734 through 741 purport to summarize gross receipts from defendants and their entities. Exhibit 750 provides what is characterized as "Harm to the Treasury" and Defendants' "Gross Receipts." Exhibit 742(a) and Exhibit 742(b) purport to summarize total lens purchases by RaPower3 customers.

This Court denied Defendants' motion to strike but permitted Defendants to depose Ms. Reinken prior to trial. On March 29, 2018, counsel for Defendants deposed Reinken in Salt Lake City, Utah. In her deposition testimony, Defendants learned specifics for the first time regarding Plaintiff's methodology for computing (1) defendants' alleged gross receipts subject to disgorgement, and (2) harm to the treasury.

II. Basis of Defendants' Objection

A. Exhibit 734 through 741.

Ms. Reinken testified that she reviewed the bank statements that exhibits 734 through 741 purport to summarize. Plaintiff's trial counsel Ms. Erin Hines provided her with the statements in "roughly June of 2017."¹ When reviewing the bank records, Ms. Hines understood "gross receipts" to mean "any wire transfers, and deposits, ACH first transfers, and ACH transfers, and interest."²

¹ [Deposition of Amanda Reinken "Depo") at 17:25 – 18:13].

² [Depo at 14:10-12].

When calculating "gross receipts," Ms. did summarized all the transfers and did not distinguish where the money was coming from, and therefore could not state if any of the funds were derived from lens sales.³ She organized the information into a Microsoft Excel spreadsheet, which she completed sometime in October 2017.⁴ Plaintiffs has not disclosed this spreadsheet. From there, it was a matter of several hours to organize the information in a way that shows the "gross receipts" for the individuals and entities.⁵

First, Defendants renew their objection to admissibility of these exhibits based on untimely production. Ms. Reinken began her work in June 2017 and completed the work necessary to provide Defendants with this information no later than October 2017, yet these charts were not produced until February 2018. Moreover, Defendants did not learn until March 28, 2018 Plaintiff's method of computation because Defendants were prevented by court order from conducting meaningful discovery related to Ms. Reinken's work. They were specifically forbidden from deposing the individual responsible for summarizing this information until two business days before trial, providing 48 hours to craft a rebuttal of the information and criticism of how it was summarized. Moreover, the Excel spreadsheet Ms. Reinken relied on to form these summaries has never been disclosed. For these reasons, Defendants have been prejudiced by this late discovery.

Additionally, Defendants object to the summaries on the grounds that they do not accurately reflect the individuals and entities receipts from lens sales. When summarizing, Ms. Reinken was just concerned with money coming in (which is irrelevant) and not the source of the

³ [Depo 24:20 – 25: 7; 32:1-7].

⁴ [Depo 20:5 – 10].

⁵ [Depo at 17:3-13].

money.⁶ Therefore, Ms. Reinken cannot provide testimony that Defendants gross receipts, as gleaned from the bank statements she reviewed, were all related to activities which Plaintiff alleges are illegitimate and subject to disgorgement. Accordingly, Exhibits 734 through 741 are unhelpful to the trier of fact because no work was done to distinguish which of the individuals and entities receipts were unrelated to lens sales.

B. Exhibits 742(a) and 742(b).

To organize the information in Exhibits 742(a) and 742(b), Ms. Reinken relied on a "[a] PDF [the government] received" that Ms. Hines provided her in early 2018.⁷ To organize the information, Ms. Reinken converted the PDF into a Microsoft Word document relying on conversion software, and then converted the Microsoft Word document into a Microsoft Excel spreadsheet.⁸ She did not input line-by-line the information, instead relying solely on the accuracy of the conversion software.⁹ Once the information was in an Excel spreadsheet format, she did quality control checks to random rows, but doesn't remember on how many rows she performed this random quality control check.¹⁰ She did not check line-by-line to ensure the accuracy of the information.¹¹ Finally, the source document Ms. Reinken used she admitted did not have any data regarding the amount individuals paid for the lenses.¹²

Defendants object to the use of Exhibits 742(a) and 742(b) because they are neither reliable nor useful to the trier of fact. The exhibits are not reliable because Ms. Reinken did not check whether all the information that was transferred using file format conversion accurately

⁶ [Depo 32:1-7].

⁷ [Depo 30:20 – 31:19].

⁸ Depo at 36: 16-22; Plaintiff has not produced this Excel spreadsheet.

⁹ [Depo 35:9 – 36:12].

¹⁰ [Depo 35:9-17; 39:5-17].

¹¹ [Depo 36:9-12; 39:18-21].

¹² [Depo 38:6-12.].

transferred. Therefore, she cannot testify that summary charts accurately reflect the information she has summarized. Also, the exhibits are not helpful to the trier of fact in any event. No effort was made to determine whether the individuals listed in the exhibits either (1) paid for the lenses¹³ or (2) how much they paid.¹⁴ For these reasons, Defendants move to strike Plaintiff's exhibits 742(a) and 742(b).

C. Exhibit 750.

In Exhibit 750, Ms. Reinken ties the individuals' and entities' cumulative gross receipts with its respective "harm to treasury". Ms. Reinken testified that she did not come up with the term "harm to treasury" nor could she define what the term meant.¹⁵

Additionally, she relied on summaries that she did not prepare to arrive at her "harm to treasury" figures. Specifically, she relied on the summary chart Ms. Perez prepared, without reviewing any of the source material Ms. Perez reviewed.¹⁶

Defendants object to the use of Exhibit 750 for any purpose. Ms. Reinken did not review the source material for Exhibit 752 (the exhibit Ms. Lopez created), and instead relied solely on Ms. Lopez' numbers. Additionally, at the time Ms. Reinken prepared these exhibits (and at the time of her deposition), she did not know what the term "harm to treasury" meant.

III. Conclusion

For the reasons stated above, Defendants respectfully request that Plaintiff's Exhibits 734 through 741, 742(a), 742(b), and 750 be stricken.

¹³ Many signed agreements but did not pay for the lens purchases.

¹⁴ Payment amounts varied, and some were a fraction of others. It requires each purchase to be tracked to know.

¹⁵ [Depo 41:8-13, 42:2-17].

¹⁶ [Depo 41:16-23].

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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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