

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

<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</p> <p><b>UNITED STATES' OPPOSITION TO DEFENDANTS' MOTION IN LIMINE TO LIMIT THE TESTIMONY OF LAMAR ROULHAC AT TRIAL</b></p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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On March 30, 2018, Defendants filed a motion in limine to exclude the testimony of Lamar Roulhac at trial arguing that Roulhac is an “expert witness” who was not disclosed pursuant to [Fed. R. Civ. P. 26\(a\)\(2\)](#) and that plaintiff refused to make Roulhac available for a deposition pursuant to the Court’s order.<sup>1</sup> Defendants are incorrect on both grounds.

**I. Roulhac is a fact witness, not an expert witness.**

Because Defendants refused to produce their customer database, the United States retained Innovative Discovery to collect the database and extract information from it.<sup>2</sup> Lamar Roulhac works at Innovative Discovery as a manager of forensics and investigations,<sup>3</sup> and conducted the collection and data extraction. Roulhac will “testify regarding his work collecting the Defendant’s customer database on February 28, 2018, the circumstances of that collection, and his work extracting the data from the database into a more easily understandable Excel format.”<sup>4</sup> Roulhac, by virtue of his education, training, and experience, is capable of being qualified as an expert – but that is not the subject of his testimony in this case.<sup>5</sup> Roulhac is simply being offered to testify as to what steps he took to extract the data, to authenticate the data, and the summary of portions of the data he extracted and included in Plaintiff’s Exhibit

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<sup>1</sup> [ECF Doc. No. 362](#), Defendant’s Motion in Limine; ECF Doc. No. 342, Minute Entry from Pretrial Conference.

<sup>2</sup> *E.g.*, [ECF Doc. No. 235](#), [ECF Doc. No. 238](#), [ECF Doc. No. 247](#), [ECF Doc. No. 283](#)

<sup>3</sup> Pl. Ex. 791, Lamar Roulhac CV.

<sup>4</sup> Pl. Ex. 828, United States’ Witness List submitted to chambers via email on March 28, 2018.

<sup>5</sup> *See LifeWise Master Funding v. Telebank*, 374 F.3d 917, 929 (10th Cir. 2004) (in holding that CEO’s opinion testimony regarding lost profits based on a damages model that relied upon technical, specialized subjects was improper lay testimony under [Fed. R. Evid. 701](#) noted that CEO could have provided opinion testimony regarding lost profits based on his personal knowledge and experience including the company’s actual operating history); *see also, Hartzell Mfg., Inc. v. American Chemical Technologies, Inc.*, 899 F. Supp. 405, (D. Minn. 1995).

749. These are topics within his percipient knowledge, formed during his participation in the relevant events of the case, based on what he personally saw and did in the course of his duties. Therefore, Roulhac will not testify as an “expert” and no disclosure or report was necessary.<sup>6</sup>

## **II. Roulhac was available for a deposition pursuant to the Court’s order.**

Defendants assert that plaintiff’s counsel has refused to make Roulhac available for a deposition. Further, Defendants argue that the options for deposing Roulhac as proposed by plaintiff are “unreasonable”<sup>7</sup> and as a result, plaintiff has refused to comply with the Court’s order. However, contrary to Defendants’ assertions, Roulhac was available for a deposition – Defense counsel simply decided they would prefer to not take the deposition if it could not occur in the manner they insisted (which was itself unreasonable).

What is “reasonable” in terms of notice of a deposition or the method of taking a deposition is a case-specific and fact-intensive inquiry.<sup>8</sup> First, Defendants did not even attempt to coordinate Roulhac’s deposition until March 23 – four days after the Court granted them the deposition and nine total days before trial, when time was already in short supply.<sup>9</sup> They sought his deposition in Salt Lake City on March 30. But Roulhac lives in the DC area, and is not a party. Therefore, Defendants may not command his deposition in Salt Lake City.<sup>10</sup>

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<sup>6</sup> Fed. R. Civ. P. 26(a)(2)(B); *Alarid v. Biomet, Inc.*, 2015 WL 5833839 at \*3 (D. Colo. 2015) (Wang, MJ).

<sup>7</sup> [ECF Doc. No. 362, at 3-4.](#)

<sup>8</sup> *Neiufi v. Snow Garden Apartments*, 2013 WL 1857152, at \*1 (D. Utah) (Wells, MJ), and the cases cited therein.

<sup>9</sup> Pl. Ex. 826.

<sup>10</sup> Fed. R. Civ. P. 45; *see also, Stone v. Morton Intern, Inc.*, 170 F.R.D. 498, 500-501 (D. Utah 1997); *Goodyear Tire & Rubber Co. v. Kirk’s Tire & Auto Servicenter of Haverstraw, Inc.*, 211 F.R.D. 658, 662 (D. Kan. 2003).. Defendants are aware of this rule. They deposed the United States’ expert witness, Dr. Thomas Mancini, in Albuquerque, NM, where Dr. Mancini lives – *not* in Salt Lake City. *See* ECF No. 253-2 at 1.

On March 23, United States' counsel spoke with counsel for Defendants and informed them that Roulhac would need to be deposed in Washington, DC, or via web conference, if they wanted to depose him on March 30.<sup>11</sup> On March 26, Defendants asked when Roulhac would be arriving in Salt Lake City.<sup>12</sup> On March 27, we informed Defendants that he would be arriving on April 3. We informed Defendants that if they wanted to depose him at a time that would require his travel to change, they would need to pay the extra costs to accommodate their deposition.

On March 29, 2018, Roulhac started booking travel for his trial testimony and as we had not received any further information from Defendants. Again, we reached out to Defendants' counsel. At this point, Defendants informed us that "it does not appear that the time constraints of trial and preparation will allow us to take his deposition before he is called by you to testify."<sup>13</sup> During a phone call that day, Defendants' counsel represented that if Roulhac's testimony was limited to what he saw and what he did, and he did not opine on anything outside that scope, they would not object to his testimony and would choose not to depose him.

Despite that representation, Defendants filed their motion the following day, March 30, 2018. Defendants' continued obstruction of discovery required Roulhac's involvement to extract *Defendants' own data*. Defendants' short notice and proposed location of the deposition were unreasonable. They made the choice not to depose Roulhac. Their motion should be denied.

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<sup>11</sup> Pl. Ex. 826.

<sup>12</sup> *Id.*

<sup>13</sup> Pl. Ex. 827.

Dated: April 2, 2018

Respectfully submitted,

/s/ Erin R. Hines

ERIN R. HINES

FL Bar No. 44175

Email: erin.r.hines@usdoj.gov

Telephone: (202) 514-6619

ERIN HEALY GALLAGHER

DC Bar No. 985760

Email: erin.healygallagher@usdoj.gov

Telephone: (202) 353-2452

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 April 2, 2018, the foregoing document, along with its exhibits, was 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/ Erin R. Hines* \_\_\_\_\_

ERIN R. HINES

Trial Attorney