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IN THE UNITED STATES DISTRICT COURT FOR THE  
DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p style="text-align: center;">Defendants.</p>	<p style="text-align: center;">Civil No. 2:15-cv-00828 DN</p> <p><b>UNITED STATES’ OPPOSITION TO DEFENDANTS’ MOTION IN LIMINE TO STRIKE PLAINTIFF’S SUMMARY EXHIBIT 752 (JOANNA PEREZ)</b></p> <p style="text-align: center;">Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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On April 1, 2018, the eve of trial, Defendants filed a motion in limine to strike Plaintiff's Exhibit 752 (Pl. Ex. 752) and testimony of JoAnna Perez.<sup>1</sup> This is Defendants' third attempt to strike Perez and the exhibits to which she will testify.<sup>2</sup> In their motion, Defendants argue that: (1) Perez's summary charts, Pl. Ex. 752, are unhelpful to the trier of fact; and (2) Perez's testimony and Pl. Ex. 752 should be excluded because of the date of its production.

**I. Perez is a summary witness and Pl. Ex. 752 is admissible under Fed. R. Evid. 1006.**

Defendants allege that Pl. Ex. 752 is unhelpful because (1) "harm to treasury" is not a proper measure of any Defendants' gain in this matter and; (2) it does not provide the actual benefit each individual taxpayer obtained and therefore is not reliable or helpful. However, Defendants fail to provide any cases that support their position and their motion does not address the legal standard for the admissibility of a summary exhibit.

The court has broad discretion in determining the admissibility of summaries under Rule 1006.<sup>3</sup> To establish that a summary exhibit is admissible under Fed. R. Evid. 1006, the proponent must establish that the underlying documents: (1) are voluminous; (2) were produced or made available to the other side; and (3) the proponent must produce the underlying records in court if so ordered.<sup>4</sup> The United States can satisfy these requirements with respect to Pl. Ex. 752. First,

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<sup>1</sup> [ECF Doc. No. 364](#). Although Defendants indicate on page 1 of [ECF Doc. No. 364](#) that they wish to strike Plaintiff's Exhibits 734 through 741, 742(a), 742(b) and 750, Plaintiff believes this is an error as Ms. Perez's testimony and summary exhibits are wholly contained in Pl. Ex. 752.

<sup>2</sup> [ECF Doc. No. 296](#), [ECF Doc. No. 319](#), [ECF Doc. No. 320](#).

<sup>3</sup> *United States v. Thompson*, 518 F.3d 832, 858-59 (10th Cir. 2008); see also *United States v. Ray*, 370 F.3d 1039, 1046 (10th Cir. 2004) (explaining that summaries are often admissible in tax cases under Rule 1006), *vacated on other grounds*, 543 U.S. 1109 (2005).

<sup>4</sup> Fed. R. Evid. 1006; see also, *United States v. Miller*, 2010 WL 235034, at \*2 (D. Kan. 2010).

Perez will establish through her testimony she reviewed 1,634 tax returns with all schedules and forms that were attached to those returns when filed and that the records she reviewed were “voluminous.” Second, the United States produced the tax returns that Perez summarized on May 15, 2017, September 5, 2017, and September 15, 2017.<sup>5</sup> Finally, the United States can produce the underlying tax returns in court if so ordered.

Perez’s testimony and Pl. Ex. 752 are admissible and will be helpful to the court as an illustration of harm to treasury, which has been an element of this case since its initiation.<sup>6</sup> Pl. Ex. 752 summarizes the depreciation expenses and solar tax credits claimed on Defendants’ customers tax returns for 2013 through 2016 and applies simple mathematical computations to provide an illustration of the harm caused by Defendants’ conduct.<sup>7</sup> Defendants argue that further technical analysis and specialized knowledge should have been applied in creating Pl. Ex. 752 and the “harm to treasury.” However, Defendants’ desire to have additional analysis performed is appropriately explored in cross-examination and goes to the weight of the evidence, not its admissibility.<sup>8</sup> Further, given how Defendants’ scheme is structured – the goal of Defendants’ customers is to buy enough lenses to zero out taxes – it is reasonable to assume that

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<sup>5</sup> [ECF Doc. No. 329-5](#) (Pl. Ex. 784), [ECF Doc. No. 329-6](#) (Pl. Ex. 785), [ECF Doc. No. 329-7](#) (Pl. Ex. 786).

<sup>6</sup> [ECF Doc. No. 2](#), ¶¶ 79, 82, 93, 102, 110-118; *see also*, *United States v. Estate Pres. Servs.*, 202 F.3d 1093, 1105 (9th Cir. 2000) (harm to treasury is one of the factors a court may consider in evaluating the need for an injunction).

<sup>7</sup> [ECF Doc. No. 364](#), at 2-3; Pl. Ex. 752; *see also* *In re Furr’s Supermarkets, Inc.*, 373 B.R. 691, 703-04 (B.A.P. 10th Cir. 2007) (collecting cases and scholarly authority for the proposition that it does not take an expert to create graphs and summarize data).

<sup>8</sup> *See Anderson Living Trust v. WPX Energy production, LLC*, 2015 WL 7873715, at \*8 (D.N.M. 2015) (concluding that Defendants’ objections that because certain lease provisions were excluded from Plaintiff’s summary exhibit made the summary inaccurate go to the exhibits’ weight, not admissibility.).

all benefits claimed were in fact used. As a result, Pl. Ex. 752 is helpful to the court as an illustration of harm to treasury.

**II. Perez was timely disclosed and disclosure of the Excel spreadsheet is not required.**<sup>9</sup>

Defendants allege that Perez's testimony and Pl. Ex. 752 should be excluded because the Excel spreadsheet used by Perez was not disclosed.<sup>10</sup> However, the United States was not required to disclose the Excel spreadsheet Perez used in creating her summary charts.<sup>11</sup> Furthermore, Defendants never issued any discovery request relating to the United States' alleged harm to government, including the Excel spreadsheet.<sup>12</sup> Defendants received the underlying documents and *could* have produced their own summaries or hired an expert to prepare summaries. Further, Defendants deposed Perez and will have the opportunity to cross-examine her.<sup>13</sup> Defendants' arguments go to the weight to be given to the evidence, not the admissibility.

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<sup>9</sup> [ECF Doc. No. 364, at 3-4](#). The United States incorporates by reference the reasons why disclosure was timely from its oppositions to Defendants' previous motions (ECF Doc. Nos. 329 and 332) and the Court's orders on this issue (ECF Doc. Nos. 338 and 342).

<sup>10</sup> [ECF Doc. No. 364, at 3](#).

<sup>11</sup> *United States v. Lewis*, 594 F.3d 1270, 1281-82 (10th Cir. 2010) (finding that Rule 1006 did not require disclosure of a government's database (that government created based on a review of underlying voluminous bank records) that government used as an aid in creating the summary exhibit(s) and allowed the government to perform calculations from bank records. The Court found that the underlying documents were the bank records, not the database and that while access to the offering party's worksheets or database may make it easier for the opposing party to check the accuracy of the summary exhibit, there was no reason to give the opposing party the benefit of the offering party's labor in preparing such worksheets or database as long as the opposing party is given sufficient time to inspect the underlying documents.)

<sup>12</sup> Defendants' request for deposition of a representative of the US DOJ, Tax Division, was *not* an appropriate discovery request on this topic. See [ECF Doc. No. 170](#), [ECF Doc. No. 170-1](#), [ECF Doc. No. 196](#).

<sup>13</sup> See Fed. R. Civ. P. 37(c)(1); *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999); see also *Badian*, 822 F. Supp. 2d, at 367; *Mozingo v. Oil States Energy Servs., L.L.C.*, 2017 WL 5195251, at \*3 (W.D. Pa. Nov. 8, 2017) (overruling an objection to a custodian of records testifying because the objector had access to the underlying records).

Dated: April 2, 2018

Respectfully submitted,

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***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 Healy Gallagher  
ERIN HEALY GALLAGHER  
Trial Attorney