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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>UNITED STATES’ OPPOSITION TO DEFENDANTS’ MOTION IN LIMINE TO STRIKE PLAINTIFF’S SUMMARY EXHIBITS 734, 735, 736, 737, 738, 739, 740, 741, 742A, 742B and 750 (AMANDA REINKEN)</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 Exhibits 734 through 741, 742A, 742B, and 750¹ and the testimony of Amanda Reinken.² This is Defendants' third attempt to strike Reinken's testimony and the exhibits about which she will testify.³ Defendants object to the testimony and exhibits arguing: (1) the exhibits were produced untimely;⁴ (2) Pl. Ex. 734 through 741 do not accurately reflect the receipt from lens sales and are unhelpful; and (3) Pl. Ex. 742A and 742B are not reliable or helpful to the trier of fact.

I. Reinken is a summary witness and Pl. Exs. 734 through 741 are admissible under Fed. R. Evid. 1006.

The court has broad discretion in determining the admissibility of summaries under Rule 1006.⁵ 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.⁶ The United States can satisfy these requirements with respect to Pl. Exs. 734 through 741. First, Reinken will testify that she reviewed over 30,000 pages of bank records.

¹ Plaintiff no longer intends to offer Pl. Ex. 750 and as a result, does not address it in this opposition.

² [ECF Doc. No. 365](#).

³ [ECF Doc. No. 296](#), [ECF Doc. No. 319](#), [ECF Doc. No. 320](#)

⁴ [ECF Doc. No. 365](#), at 2-4. The United States incorporates by reference the reasons why disclosure was timely from its opposition to Defendants' previous motions ([ECF Doc. No. 329](#), [ECF Doc. No. 332](#)) and the Court's order on this issue ([ECF Doc. No. 338](#), ECF Doc. No. 342).

⁵ *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).

⁶ Fed. R. Evid. 1006; see also, *United States v. Miller*, 2010 WL 235034, at *2 (D. Kan. 2010).

Second, the United States produced the bank records to Defendants on March 30, 2017.⁷ Finally, the United States can produce the bank records in court if so ordered.

Given that Defendants and their related entities – RaPower-3, Solco I, XSun Energy, and IAS – only sell solar lenses, it is reasonable to assume that all deposits and credits items used by Reinken in her summary are attributable to Defendants’ solar energy scheme, and no further analysis was needed.⁸ Regardless, Defendants’ dispute with how Reinken chose what items to include in her summaries is more appropriately addressed on cross-examination and goes to the weight of the summaries, not their admissibility.⁹ Ultimately, whether the summaries compiled by Reinken are a reasonable approximation of Defendants’ unjust enrichment is for the Court to determine after Reinken testifies and is subject to cross-examination.¹⁰

Finally, the United States was not required to disclose the Excel spreadsheet Reinken used in creating her summary charts.¹¹ Defendants never issued any discovery request relating to

⁷ [ECF Doc. No. 329-3](#) (Pl. Ex. 782).

⁸ [ECF Doc. No. 302-5](#), Pl. Ex. 682, RaPower-3 Dep., 32:22-33:3; [ECF Doc. No. 302-2](#), Pl. Ex. 581, IAS Dep., 45:7-22, 47:2-19, 55:13-21; [ECF Doc. No. 302-1](#), Pl. Ex. 579, Johnson Dep., vol. 1, 82:8-10; 83:13-22.

⁹ 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.). Plaintiff’s requested the books and records and other accounting information from Defendants in April 2016. Pl. Ex. 789, ¶ 36. Defendants did not provide the requested information.

¹⁰ See ECF Doc. No. 359, Order on Disgorgement.

¹¹ *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.)

the United States' disclosed use of bank records.¹² Defendants received the underlying documents and *could* have produced their own summaries but chose not to. Further, Defendants deposed Reinken and will have the opportunity to cross-examine her.¹³

II. Pl. Ex. 742A and 742B are helpful and reliable.

Defendants argue that because Reinken did not complete a line-by-line input or a line-by-line check Pl. Ex. 742A and Pl. Ex. 742B, that they should be excluded. Again, Defendants' arguments more appropriately address to the weight of Pl. Ex. 742A and 742B, not the admissibility. Reinken created 742A and 742B after Defendants refused to provide their database – instead, choosing to unilaterally decide what they wanted to disclose rather than abide by the Court's order. Defendants provided the print-outs from their database to plaintiff in a PDF format which could not be manipulated in PDF to add the total number of lenses sold. Because of this, Reinken converted the PDFs into a format wherein she could manipulate the data, export it to Excel, and use the formulas in Excel to arrive at the total of lenses recorded as being sold in Defendants' database. Reinken checked the accuracy of 742A and 742B against the original documents produced by Defendants by doing a random check of specific lines. However, given that Pl. Ex. 742A and 742B derive directly from Defendants' own database, Defendants can in fact check the accuracy of the exhibits and cross-examine of any inaccuracies they may find. Pl. Ex. 742A and 742B admittedly do not contain any information about the amounts paid for the

¹² 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](#).

¹³ 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).

lenses – that is because Defendants did not produce that information on the source documents from which Pl. Ex. 742A and 742B derive. That information is in the possession, custody, or control of Defendants and has been since the initiation of this case, and Defendants could have prepared their own summaries in advance of trial with that information. Defendants did not do so. Just because Defendants may wish that information was contained in Pl. Ex. 742A and 742B does not render the exhibits inaccurate or unreliable.¹⁴ As such, Defendants’ motion should be denied.

Dated: April 2, 2018

Respectfully submitted,

/s/ Erin R. Hines
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**ATTORNEYS FOR THE
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¹⁴ See *Anderson Living Trust v. WPX Energy production, LLC*, 2015 WL 7873715, at *8, *supra*.

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