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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, INTERNATIONAL
AUTOMATED SYSTEMS, INC., LTB1,
LLC, R. GREGORY SHEPARD,
NELDON JOHNSON, and ROGER
FREEBORN,

Defendants.

Civil No. 2:15-cv-00828 DN

**UNITED STATES' OBJECTION TO
"NEW EVIDENCE" PROFFERED IN
SUPPORT OF DEFEDANTS' REPLY
BRIEF REGARDING THEIR MOTION
FOR A STAY PENDING APPEAL**

Judge David Nuffer
Magistrate Judge Evelyn J. Furse

Because of Defendants' attempts to place their assets out of reach of the forthcoming disgorgement order, on June 22, 2018, the United States filed its second motion to freeze Defendants' assets and appoint a receiver.¹ On August 22, 2018, the Court granted that motion ("the Order").² The Court froze Defendants' assets and stated that it would appoint a receiver after further proceedings. Defendants filed a notice of appeal for the Order on August 27, 2018.³ Defendants moved to stay the Order pending appeal on September 6, 2018.⁴ We opposed the motion on September 20, 2018.⁵ Defendants replied on September 27, 2018, attaching alleged "new evidence." They incorporated by reference their arguments in support of their motion under [Fed. R. Civ. P. 59\(e\)](#) to alter or amend the court's current orders and pending findings⁶ and attached resumes from people Defendants claim are "qualified experts."⁷ Pursuant to DUCivR 7-1(b)(1)(B), the United States objects to this so-called "new evidence" in Defendants' reply. For all of the reasons stated in our opposition to Defendants' motion to alter or amend findings, incorporated here by reference, this "new evidence" is not new, is not admissible evidence, and does not change anything about the robust record established at trial or this Court's orders based

¹ [ECF No. 414](#).

² [ECF No. 444](#).

³ [ECF No. 445](#).

⁴ [ECF No. 448](#).

⁵ [ECF No. 455](#).

⁶ [ECF No. 451](#), at 1. Defendants specifically reference the Initial Order and Injunction after Trial, [ECF No. 413](#), and the Court's Memorandum Decision and Order Freezing Assets and to Appoint a Receiver, [ECF No. 444](#).

⁷ [ECF No. 458](#).

on that record.⁸ Here, Defendants have simply attempted to incorporate that so-called “new evidence (which is actually inadmissible hearsay⁹) in their reply on their motion to stay, rather than raising it in their opening motion.

The so-called “new evidence” attached to Defendants’ reply consists of unverified and unsworn statements, offered for the truth of the matters asserted,¹⁰ of individuals who have not been cross-examined or questioned. It is hearsay and should be excluded.¹¹ Defendants have essentially attempted to submit an expert report well past the expert deadlines in this case and only *after* expert disclosures, expert discovery, trial, and the Court’s oral ruling. Defendants have the burden to establish the admissibility of the “new evidence” and have failed to meet it. For all of the reasons stated in our opposition to Defendants’ motion to alter or amend findings, this “new evidence” should be rejected.¹²

Further, even if the “new evidence” were admissible, there is no reason Defendants could not have proffered it in support of their motion, rather than their reply. Defendants claim to have run a test on September 5, 2018 that “supports” the “new evidence” – which date is before they filed their motion to stay proceedings pending appeal. They chose not to introduce this (spurious) “new evidence” and argument in their opening motion, when we could have opposed it in our response. Instead, they waited until we filed our opposition to proffer “new evidence” and

⁸ ECF No. 460.

⁹ Fed. R. Civ. P. 801(c) & 802.

¹⁰ Fed. R. Evid. 801(c).

¹¹ Fed. R. Civ. P. 801(c) & 802.

¹² ECF No. 460.

argument on this motion. This Court should not consider the “new evidence” in ruling on the motion for a stay pending appeal.

Dated: October 3, 2018

Respectfully submitted,

/s/ Erin Healy Gallagher _____

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**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2018 the foregoing UNITED STATES' OBJECTION TO "NEW EVIDENCE" PROFFERED IN SUPPORT OF DEFEDANTS' REPLY BRIEF REGARDING THEIR MOTION FOR A STAY PENDING APPEAL 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