

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS

UNITED STATES OF AMERICA,	)	Misc. No. 17-
	)	
Plaintiff,	)	
	)	
v.	)	(pending in the United States District
	)	Court for the District of Utah, Civil No.
	)	2:15-cv-00828-DN-EJF)
RAPOWER-3, LLC, INTERNATIONAL	)	
AUTOMATED SYSTEMS INC.,	)	
LTB1, LLC, R. GEGORY SHEPARD,	)	
NELDON JOHNSON, and	)	
ROGER FREEBORN,	)	
	)	
Defendants.	)	
_____	)	

**BRIEF IN SUPPORT OF UNITED STATES' MOTION TO COMPEL THE  
DEPOSITION OF THIRD-PARTY JOHN HOWELL**

Third party witness John Howell (“Howell”) has information relevant to the claims and defenses at issue in the above-captioned case. The United States issued a subpoena for Mr. Howell’s testimony. Mr. Howell appeared, but declined to answer any questions because his attorney was not present. The United States attempted to reschedule Mr. Howell’s deposition for a time that he and his attorney are available, but the parties cannot reach agreement. Accordingly, the United States asks the Court to compel Mr. Howell to attend a deposition and answer the United States’ questions.

**BACKGROUND**

On November 23, 2015, the United States filed a complaint against RaPower-3, LLC, International Automated Systems, Inc. (“IAS”), LTB1, LLC, Neldon Johnson, R. Gregory Shepard, and Roger Freeborn seeking to enjoin defendants pursuant to 26 U.S.C. §§ 7402 and 7408 from organizing, promoting, and selling the “solar energy scheme.” (See ECF No. 2 in

Case No. 2:15-cv-00828-DN-EJF (D. Utah)). The “solar energy scheme” is based on technology purportedly invented by Neldon Johnson which uses “solar thermal lenses” on IAS’s “solar towers” on a parcel of land in Millard County, Utah. (*Id.*) IAS permits RaPower-3, LLC to sell the lenses to customers who purportedly lease to the lenses to LTB1, LLC. (*Id.*) The United States alleged in its Complaint that a key component of the “solar energy scheme” is the financing of the scheme through tax deductions and credits defendants claim are available to them and their customers for participating in the scheme. (*Id.*) An important part of the defendants’ solar energy scheme is finding tax return preparers who are willing to claim the tax benefits the defendants promote on customers’ federal tax returns.

Mr. Howell is a tax return preparer, with offices at 4708 K Mart Dr., St. B, Wichita Falls, Texas. (Excerpt from Pl. Ex. 448, Deposition of Mike Penn (“Penn Dep.”) 12:1-5, APPX0016; Pl. Ex. 242, APPX0004.) Mr. Howell also purports to be an enrolled agent.<sup>1</sup> (Pl. Ex. 242, APPX0004.) Mr. Howell solicits RaPower-3 lenses to his customers. (Penn Dep. 11:21-26:8, APPX0016-APPX0020.) Mr. Howell assists his customers in claiming tax benefits related to their RaPower-3 lenses. (*Id.* 37:17-46:19, APPX0022-APPX0025.) Since at least February 2012, the defendants have promoted Mr. Howell as a “RaPower tax preparer” who could prepare tax returns for RaPower-3, LLC customers in all fifty states. (*See* Pl. Exhibit 242, APPX0004; Pl. Exhibit 244, APPX0005).

At the United States’ direction, on August 9, 2016, a process server personally served Mr. Howell with a subpoena *duces tecum* requiring him to produce documents in the above-captioned case. (Declaration of Erin Healy Gallagher (“Healy Gallagher Decl.”), ¶ 4,

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<sup>1</sup> Enrolled agents are individuals who are authorized to practice before the United States Treasury Department. *See generally*, Treasury Department Circular 230, available at <https://www.irs.gov/pub/irs-pdf/pcir230.pdf> (last accessed May 1, 2017.)

APPX0001) After serving Mr. Howell with the subpoena *duces tecum*, counsel for the United States learned that Mr. Howell had obtained counsel, John Teakell, to represent him in connection with the subpoena *duces tecum*. (“Healy Gallagher Decl.”, ¶ 5, APPX0002.) On or about October 3, 2016, Mr. Howell produced 9,668 pages of documents in response to the subpoena *duces tecum*. (Healy Gallagher Decl. ¶ 6, APPX0002.)

On January 12, 2017, counsel for the United States contacted Mr. Teakell by email regarding his availability for a deposition for Mr. Howell during the week of March 13, 2017 through March 17, 2017 in Wichita Falls, Texas. (Pl. Ex. 408, APPX0009.) Mr. Teakell did not respond to Ms. Hines’ email of January 12, 2017. (Healy Gallagher Decl. ¶ 8, APPX0002.) On February 7, 2017, a process server personally served Mr. Howell with a deposition subpoena that commanded Mr. Howell to appear for a deposition at the IRS Office in Wichita Falls, Texas on March 15, 2017 at 9:00 am. (Pl. Ex. 406, APPX0006-APPX0007; Pl. Ex. 407, APPX0008.)

On March 13, 2017, counsel for the United States received a voicemail from Mr. Teakell stating that he was in trial in Northern District of Texas and asked to reschedule the deposition. (Healy Gallagher Decl. ¶ 10, APPX0002.) Counsel for the United States was already in Wichita Falls to depose other third-party witnesses in *RaPower-3*. Therefore, counsel for the United States informed Mr. Teakell, in communications over March 13 and March 14, that they would be present at the scheduled location and time for Mr. Howell’s deposition on March 15, 2017 and expected Mr. Howell to appear. (Healy Gallagher Decl. ¶ 11, APPX0002.) Mr. Howell did not file a motion to quash or move for a protective order with respect to his deposition. (Healy Gallagher Decl. ¶ 12, APPX0002.)

On March 15, 2017 at 9:00 am, Mr. Howell appeared at the IRS office in Wichita Falls, TX without Mr. Teakell. (Healy Gallagher Decl. ¶ 13, APPX0003.) Mr. Howell refused to

answer any questions because Mr. Teakell was not present. (Pl. Ex. 447, Deposition of John Howell, APPX0011-APPX0012.)

On March 16, 2017, counsel for the United States contacted Mr. Teakell by email requesting that he contact counsel for the United States to discuss rescheduling Mr. Howell's deposition so that the issue could be resolved without the need for court intervention. (Healy Gallagher Decl. ¶ 14, APPX0003.) On March 21, 2017, counsel for the United States again contacted Mr. Teakell by email requesting he contact counsel for the United States to discuss rescheduling Mr. Howell's deposition so that the issue could be resolved without the need for court intervention. (Healy Gallagher Decl. ¶ 15, APPX0003.) In a final effort to reschedule Mr. Howell's deposition without court intervention, counsel for the United States emailed Mr. Teakell again on May 3, 2017. (Healy Gallagher Decl. ¶16, APPX0003.) Although Mr. Teakell and counsel for the United States exchanged emails, they did not reach an agreement to reschedule Mr. Howell's deposition. (Healy Gallagher Decl. ¶¶ 17-18, APPX0003.)

Fact discovery in the case pending in the District of Utah ends on June 2, 2017. *See* ECF No. 37 in Case No. 2:15-cv-00828-DN-EJF (D. Utah).

### **ARGUMENT**

Discovery may be obtained on any nonprivileged matter that is relevant to a claim or defense in the case. Fed. R. Civ. P. 26(b)(1). Fed. R. Civ. P. 30 permits a party to take the deposition of "any person." When a non-party is properly served with a subpoena for a deposition, the non-party is required to either object to the subpoena or attend the deposition and answer questions. *Rose v. Enriquez*, 2013 WL 5934365, at \*3 (W.D. Tex. 2013). Fed. R. Civ. P. 37(a)(2) permits a party to move the district court where the discovery will be taken for an order compelling discovery from a non-party. When a deponent fails to answer questions at a properly

noticed deposition, the court can compel deposition testimony of a nonparty witness within 100 miles of his home or workplace. *Evolutionary Intelligence, LLC v. Apple, Inc.*, 2013 WL 8360309, at \*5 (E.D. Tex. 2013); *Rose*, at \*3 (citing Fed. R. Civ. P. 37(a)(3)(B)(i)). Fed. R. Civ. P. 45(g) provides that the court for the district where compliance is required may hold a person in contempt who fails to obey a subpoena or order related to it. Since it is “rare for a court to use contempt sanctions without first ordering compliance with a subpoena” (advisory committee notes to 2013 revisions to Fed. R. Civ. P. 45(g)), at this time, the United States only seeks an order compelling Mr. Howell to attend a deposition and answer the United States’ questions, thereby giving Mr. Howell an opportunity to comply without necessitating a hearing on a contempt motion.

Defendants promote Mr. Howell as a “RaPower accountant” (Pl. Ex. 244, APPX0005) who is available to prepare tax returns for RaPower-3 customers. The documents Mr. Howell produced and other discovery the United States has taken to date demonstrate that Mr. Howell has knowledge about the claims in this case, including knowledge of the manner in which the defendants advise their customers to claim tax credits and depreciation deductions for their solar lenses; statements the defendants have made to Mr. Howell; how he claimed tax benefits related to RaPower-3 lenses on his customers’ federal tax returns, and other relevant information.

The subpoena issued to Mr. Howell complied with the Federal Rules of Civil Procedure. He was personally served with the subpoena. He did not object to the subpoena or file a motion for protective order. On the date and time for his deposition, Mr. Howell declined to answer questions. Counsel for Mr. Howell and the United States have not been able to reach an agreement to reschedule the deposition so that the United States may take the discovery

permitted by the Federal Rules of Civil Procedure. Therefore, Mr. Howell should be compelled to appear and be deposed at a time, date, and place set by counsel for the United States.

Dated: May 5, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on May 5, 2017 the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system. I sent copies of the foregoing document to the following counsel of record via U.S. Mail and electronic mail.

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