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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., LTBI, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828 DN</p> <p>UNITED STATES' OBJECTIONS TO DEFENDANTS' EXHIBIT LIST FOR TRIAL</p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
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On February 23, 2018, Defendants disclosed their proposed list of exhibits for trial.¹

Pursuant to Fed. R. Civ. P. 26(a)(3)(B), the United States objects as follows:

EXHIBITS

Defendants intend to rely on the following documents or exhibits at the time of trial, scheduled to begin on April 2, 2108.

1. All documents obtained from Plaintiff in discovery, including but not limited to those documents identified on United States' Fed. R. Civ. P. 26(a)(3)(A)(iii) Exhibit List, dated February 9, 2018.

OBJECTION: The United States objects to the portion of this disclosure that identifies as trial exhibits “[a]ll documents obtained from Plaintiff in discovery.” Fed. R. Civ. P. 26(a)(3)(A)(iii) requires that the pretrial disclosure of exhibits identify “each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.” This Rule “requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting

¹ ECF No. 294.

and ending dates.”² Further, the Rule requires a disclosing party to “separately identify[] those items the party expects to offer and those it may offer if the need arises.”³

The United States provided Defendants with tens of thousands of pages in discovery, many of which came from subpoenaed third parties.⁴ Stating that Defendants “intend to rely” on all such documents at trial does not separately list each exhibit Defendants will or may use at trial, and does not fairly give the United States notice of any such exhibits. The United States cannot know how to prepare for trial using such documents.

2. All documents used or relied on by Plaintiff’s expert, Thomas R. Mancini, as disclosed in his expert report or any supplementation thereto.

OBJECTION: The United States objects to this disclosure. Fed. R. Civ. P. 26(a)(3)(A)(iii) requires that the pretrial disclosure of exhibits identify “each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.” This Rule “requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting

² Fed. R. Civ. P. 26(a)(3) advisory committee’s note (1993 amendment); *see also S.E.C. v. Badian*, 822 F. Supp. 2d 352, 367 (S.D.N.Y. 2011) *amended on reconsideration on other grounds by* No. 06 CIV. 2621 LTS, 2012 WL 2354458 (S.D.N.Y. June 20, 2012).

³ Fed. R. Civ. P. 26(a)(3)(A)(iii).

⁴ *E.g.* Excerpts from Pl. Ex. 453 at Response to Req. for Prod. of Docs. No. 1.

and ending dates.”⁵ Further, the Rule requires a disclosing party to “separately identify[] those items the party expects to offer and those it may offer if the need arises.”⁶

Dr. Mancini’s expert witness disclosure identified tens of thousands of pages of documents, videos, photographs, and other materials that he reviewed.⁷ Stating that Defendants “intend to rely” on all such documents at trial does not separately list each exhibit Defendants will or may use at trial, and does not fairly give the United States notice of any such exhibits. The United States cannot know how to prepare for trial using such documents.

3. Any document identified in Defendants’ pretrial disclosures, any document produced by Defendants in discovery and/or any document used, identified or referred to in any deposition, pleading, hearing or correspondence by either Plaintiff’s or Defendants’ counsel.

OBJECTION: The United States objects to this this disclosure. Fed. R. Civ. P. 26(a)(3)(A)(iii) requires that the pretrial disclosure of exhibits identify “each document or other exhibit, including summaries of other evidence--separately identifying those items the party expects to offer and those it may offer if the need arises.” This Rule “requires a separate listing of each such exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting

⁵ Fed. R. Civ. P. 26(a)(3) advisory committee’s note (1993 amendment).

⁶ Fed. R. Civ. P. 26(a)(3)(A)(iii); *Badian*, 822 F. Supp. 2d at 367.

⁷ Excerpts from Pl. Ex. 644 at Appendix II, List of Facts and Data Considered.

and ending dates.”⁸ Further, the Rule requires a disclosing party to “separately identify[] those items the party expects to offer and those it may offer if the need arises.”⁹

The documents and materials referred to in this disclosure constitute tens of thousands of pages, perhaps hundreds of thousands. Stating that Defendants “intend to rely” on all such documents at trial does not separately list each exhibit Defendants will or may use at trial, and does not fairly give the United States notice of any such exhibits. The United States cannot know how to prepare for trial using such documents.

4. Defendant specifies the individual exhibits listed on the attached schedule of exhibits and the following specific categories of document which have previously been provided to counsel or will be provided to counsel before trial.

OBJECTION: The United States objects to the following exhibits, for the reasons identified below:

Ex. No.	Objection
3	Hearsay, Fed. R. Evid. 801(c) , 802.
15	Hearsay, Fed. R. Evid. 801(c) , 802.
18	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
22	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802. Defendants Johnson, IAS, RaPower-3, and LTB1 did not disclose reliance on this practitioner in response to the United States’ the United States’ Interrogatory on that topic. ¹⁰
31	Hearsay, Fed. R. Evid. 801(c) , 802.

⁸ [Fed. R. Civ. P. 26\(a\)\(3\)](#) advisory committee’s note (1993 amendment);

⁹ [Fed. R. Civ. P. 26\(a\)\(3\)\(A\)\(iii\)](#); [Badian](#), 822 F. Supp. 2d at 367.

¹⁰ Pl. Ex. 449 at Resp. to Interrog. No. 18; Pl. Ex. 450 at Resp. to Interrog. No. 22; Pl. Ex. 451 at Resp. to Interrog. No. 18; Pl. Ex. 452 at Resp. to Interrog. No. 18.

Ex. No.	Objection
33	Hearsay, Fed. R. Evid. 801(c), 802.
143	Hearsay, Fed. R. Evid. 801(c), 802.
150	Hearsay, Fed. R. Evid. 801(c), 802.
160	Hearsay, Fed. R. Evid. 801(c), 802. Defendants did not disclose reliance on this practitioner in response to the United States' Interrogatory on that topic. ¹¹
185	If offered for truth, hearsay, Fed. R. Evid. 801(c), 802.
188	No objection to the check. For all other text, If offered for truth, hearsay, Fed. R. Evid. 801(c), 802.
190	Relevance, Fed. R. Evid. 401, 402. For the handwritten note: if offered for truth, hearsay, Fed. R. Evid. 801(c), 802.
210	Hearsay, Fed. R. Evid. 801(c), 802.
211	Hearsay, Fed. R. Evid. 801(c), 802.
224	Hearsay, Fed. R. Evid. 801(c), 802.
225	Hearsay, Fed. R. Evid. 801(c), 802.
231	Hearsay, Fed. R. Evid. 801(c), 802.
236	Hearsay, Fed. R. Evid. 801(c), 802.
241	Hearsay, Fed. R. Evid. 801(c), 802.
248	Hearsay, Fed. R. Evid. 801(c), 802.
250	Hearsay, Fed. R. Evid. 801(c), 802.
255	Hearsay, Fed. R. Evid. 801(c), 802.
261	Hearsay, Fed. R. Evid. 801(c), 802.
262	Hearsay, Fed. R. Evid. 801(c), 802.
264	Hearsay, Fed. R. Evid. 801(c), 802.
271	Hearsay, Fed. R. Evid. 801(c), 802.
275	Hearsay, Fed. R. Evid. 801(c), 802.
276	Hearsay, Fed. R. Evid. 801(c), 802.
278	Hearsay, Fed. R. Evid. 801(c), 802.
283	Hearsay, Fed. R. Evid. 801(c), 802.
284	Hearsay, Fed. R. Evid. 801(c), 802.
287	Hearsay, Fed. R. Evid. 801(c), 802.
288	Hearsay, Fed. R. Evid. 801(c), 802.
289	Hearsay, Fed. R. Evid. 801(c), 802.
290	Hearsay, Fed. R. Evid. 801(c), 802.

¹¹ Excerpts from Pl. Ex. 411 at Resp. to Interrog. No. 16; Pl. Ex. 449 at Resp. to Interrog. No. 18; Pl. Ex. 450 at Resp. to Interrog. No. 22; Pl. Ex. 451 at Resp. to Interrog. No. 18; Pl. Ex. 452 at Resp. to Interrog. No. 18.

Ex. No.	Objection
293	Hearsay, Fed. R. Evid. 801(c) , 802.
335	Hearsay, Fed. R. Evid. 801(c) , 802.
340	Hearsay, Fed. R. Evid. 801(c) , 802.
355	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
359	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
360	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not disclose reliance on this practitioner in response to the United States' Interrogatory on that topic. ¹²
366	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
367	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
368	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
374	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not disclose any reliance on this practitioner response to the United States' Interrogatory on that topic. ¹³
376	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not disclose any reliance on this practitioner response to the United States' Interrogatory on that topic. ¹⁴
377	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not disclose any reliance on this practitioner response to the United States' Interrogatory on that topic. ¹⁵
405	Hearsay, Fed. R. Evid. 801(c) , 802.
421	Hearsay, Fed. R. Evid. 801(c) , 802.
439	Hearsay, Fed. R. Evid. 801(c) , 802.

¹² Excerpts from Pl. Ex. 411 at Resp. to Interrog. No. 16; Pl. Ex. 449 at Resp. to Interrog. No. 18; Pl. Ex. 450 at Resp. to Interrog. No. 22; Pl. Ex. 451 at Resp. to Interrog. No. 18; Pl. Ex. 452 at Resp. to Interrog. No. 18.

¹³ Excerpts from Pl. Ex. 411 at Resp. to Interrog. No. 16; Pl. Ex. 449 at Resp. to Interrog. No. 18; Pl. Ex. 450 at Resp. to Interrog. No. 22; Pl. Ex. 451 at Resp. to Interrog. No. 18; Pl. Ex. 452 at Resp. to Interrog. No. 18.

¹⁴ Excerpts from Pl. Ex. 411 at Resp. to Interrog. No. 16; Pl. Ex. 449 at Resp. to Interrog. No. 18; Pl. Ex. 450 at Resp. to Interrog. No. 22; Pl. Ex. 451 at Resp. to Interrog. No. 18; Pl. Ex. 452 at Resp. to Interrog. No. 18.

¹⁵ Excerpts from Pl. Ex. 411 at Resp. to Interrog. No. 16; Pl. Ex. 449 at Resp. to Interrog. No. 18; Pl. Ex. 450 at Resp. to Interrog. No. 22; Pl. Ex. 451 at Resp. to Interrog. No. 18; Pl. Ex. 452 at Resp. to Interrog. No. 18.

Ex. No.	Objection
442	Hearsay, Fed. R. Evid. 801(c) , 802.
453	Relevance, Fed. R. Evid. 401 , 402; even if marginally relevant, any probative value this document may have is outweighed by a danger of confusing the issues, undue delay, and wasting time, Fed. R. Evid. 403 .
488	Relevance, Fed. R. Evid. 401 , 402. Hearsay, Fed. R. Evid. 801(c) , 802.
536	Hearsay, Fed. R. Evid. 801(c) , 802.
542	Hearsay, Fed. R. Evid. 801(c) , 802.
543	Hearsay, Fed. R. Evid. 801(c) , 802.
576	Hearsay, Fed. R. Evid. 801(c) , 802.
586	Lacks authentication, Fed. R. Evid. 901 .
607	Hearsay, Fed. R. Evid. 801(c) , 802.
611	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
612	If offered for truth, hearsay, Fed. R. Evid. 801(c) , 802.
621	Hearsay, Fed. R. Evid. 801(c) , 802.
631	Hearsay, Fed. R. Evid. 801(c) , 802.
643	Hearsay, Fed. R. Evid. 801(c) , 802.
651	Hearsay, Fed. R. Evid. 801(c) , 802.
659	Hearsay, Fed. R. Evid. 801(c) , 802.
1004	Relevance, Fed. R. Evid. 401 , 402. Hearsay, Fed. R. Evid. 801(c) , 802.
1008	Hearsay, Fed. R. Evid. 801(c) , 802.
1050	Relevance, Fed. R. Evid. 401 , 402. Hearsay, Fed. R. Evid. 801(c) , 802.
1051	Relevance, Fed. R. Evid. 401 , 402. Hearsay, Fed. R. Evid. 801(c) , 802.
1500	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1501	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.

Ex. No.	Objection
1502	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1503	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1504	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1505	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1506	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1507	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.

Ex. No.	Objection
1508	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1509	Defendants have not identified specifically which video or clip this exhibit is, and have not yet produced a copy to the United States. Therefore, the United States does not know whether this video was disclosed or produced in discovery. Authentication, Fed. R. Evid. 901 . To the extent any commentary within the video is offered for the truth of the matter asserted, hearsay, Fed. R. Evid. 801(c) , 802.
1510	Hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not produce this document in discovery, although it is responsive to the United States' document requests. ¹⁶
1511	Hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not produce this document in discovery, although it is responsive to the United States' document requests. ¹⁷
1512	Hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not produce this document in discovery, although it is responsive to the United States' document requests. ¹⁸
1513	Hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not produce this document in discovery, although it is responsive to the United States' document requests. ¹⁹
1514	Hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not produce this document in discovery, although it is responsive to the United States' document requests. ²⁰

¹⁶ Excerpts from Pl. Ex. 789 at Request Nos. 8, 10, 11, 12, 13, 30.

¹⁷ Excerpts from Pl. Ex. 789 at Request No. 20.

¹⁸ Excerpts from Pl. Ex. 789 at Request No. 20.

¹⁹ Excerpts from Pl. Ex. 789 at Request No. 20.

Ex. No.	Objection
1515	Relevance, Fed. R. Evid. 401 , 402. Hearsay, Fed. R. Evid. 801(c) , 802.
1516	Hearsay, Fed. R. Evid. 801(c) , 802. Defendants did not produce this document in discovery, although it is responsive to the United States' document requests. ²¹

Dated: March 9, 2018

Respectfully submitted,

/s/ Erin Healy Gallagher

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ATTORNEYS FOR THE

UNITED STATES

(...continued)

²⁰ Excerpts from Pl. Ex. 789 at Request No. 20.

²¹ Excerpts from Pl. Ex. 789 at Request No. 20.

CERTIFICATE OF SERVICE

I hereby certify that on March 9, 2018, the foregoing document 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. I also served the document on the following by email:

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