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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-EJF **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE (Doc. 319) TO EXCLUDE TESTIMONY REGARDING DAMAGES RELATING TO DISGOREMENT O FUNDS** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Plaintiff has objected to Defendants' motion to limit evidence of damages relating to disgorgement. Despite the government's bombast, nothing in the opposition justifies the failure to disclose any computation of damages under Rule 26, failure to identify its theory of damages, failure to supplement its disclosures under Rule 26 or justify the production of previously undisclosed documents and new witnesses for the first time just before trial to support Plaintiff's previously undisclosed theory of damages.

Plaintiff incorrectly argues Rule 26 does not require disclosure of disgorgement damages. The plain language of Rule 26 says otherwise – and Plaintiff's disclosure from April 22, 2016 demonstrates Plaintiff does not believe its argument either. In its Initial Disclosures, Plaintiff identifies its theory and computation of damages as:

> . . . disgorgement of the proceeds that all defendants received for the gross receipts (the amount of which is to be determined by the Court) that they received from any source as a result of their conduct in furtherance of the abusive solar energy scheme described in the complaint, together with prejudgment interest thereon. The amount to be disgorged will be based on income information available to the IRS, income information in the possession of all defendants, and the financial records and accounts of all defendants and any business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme described in the complaint.

Plaintiff excuses its failure claiming it did not receive the "raw data" with which it calculated the disgorgement until February 28, 2018. This is utterly untrue. Plaintiff was given documents and financial information directly from Defendants' and also obtained business and banking records from third parties throughout the discovery period. Plaintiff delayed any reciprocal disclosure of information until its pretrial filing on February 23, 2018. Plaintiff wrongly claims that since Defendants already had access to their own records, and because Plaintiff provided Defendants' counsel with copies of new documents obtained from third parties, Defendants could have done their own damages calculation. Plaintiff withheld witnesses claiming attorney work-product or attorney-client privilege protected them from discovery.[1]

Providing information to the opposition party and expecting it to compute damages does not satisfy Rule 26(a)'s disclosure requirement. Instead, "by its very terms Rule 26(a) requires more than providing-without any explanation-undifferentiated financial statements; it requires a 'computation' supported by documents."[2] Further, because Plaintiff provided a description of the

[1] Doc. 319 at pg. 7.
[2] *Design Strategy, Inc. v. Davis*, 469 F.3d 284, 295 (2d Cir. 2006).

damages it intended to pursue, it had an obligation under Rule 26(e) to supplement its disclosure of damages and elaborate on the "income information available to the IRS, income information in the possession of all defendants, and the financial records and accounts of all defendants and any business or agent that any defendant used as a conduit to collect, transfer, or store any funds relating to the abusive solar energy scheme."[3]

Rule 26(e) mandates supplementation of initial disclosures throughout the case. It is mandatory, "A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—**must** supplement or correct its disclosure"[4] The timing of such supplementation is critical to the decision as to whether it is allowable.[5]

Plaintiff over-generalized its damages in its Initial Disclosures, but never returned to that calculation or otherwise supplemented its computation to enable Defendants to analyze the claim and be prepared to confront the claims at trial. Similarly, the plaintiff in *Design Strategy*, infra, was barred from putting on evidence at trial when it attempted to rely on generalized initial disclosures using a broad categorical description such as "all monies paid to [Defendant] . . . based upon breach of fiduciary relationship".[6] Such a category based description of damages was insufficient to satisfy Rule 26 and was not adequately supplemented before trial.[7] Likewise the Plaintiff here has provided nothing to equip Defendants to respond at trial, and without the opportunity to hire an expert witness to rebut the Plaintiff's calculations.

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[3] Plaintiff's Initial Disclosures, attached as Exhibit 1.
[4] Rule 26(e) (emphasis added).
[5] *AVX Corp. v. Cabot Corp., 252 F.R.D.*, 70, 79 (D. Mass. 2008) (finding a supplemental calculation untimely when made after the close of discovery leaving the opposing party without the means to explore and challenge its basis).
[6] *Design Strategy*, 469 F.3d at 292.
[7] *Id.* at 293. See also, *Silicon Knights, Inc., v. Epic Games, Inc.*, 2012 WL 1596722 (E.D.N.C. May 7, 2012) (the court held that the description of "several million dollars" was not the specific computation required by Rule 26 because it lacked precision and analysis.)

Plaintiff cannot circumvent Rule 26(a)'s disclosure requirement by referring to discovery documents as the basis for calculations and arguing the computation is merely "summary calculations."[8]

Exclusion of evidence is the proper remedy for untimely disclosure, in particular, at this late stage in the proceedings on the eve of trial. Generally, given this kind of surprise, disclosure just before trial and other similar delays results in courts precluding the damages evidence rather than impose alternative sanctions.[9] Courts reason the late disclosure prejudices the opposing party because it requires scheduling changes, reopening of discovery or other delays and costs of litigation.[10]

If Plaintiff is allowed to introduce its late-filed trial exhibits and to elicit testimony from previously undisclosed witnesses, Defendants will be prejudiced because they have not been afforded the time, ability, or opportunity to investigate the summaries and calculations and examine the witnesses.

Lastly, Rule 26(a)(2)(B) requires persons retained or specially employed to provide expert testimony must be identified. There is no question Plaintiff failed to identify any expert on financial calculations, summaries, charts, or explanations. Plaintiff claims the evidence relating to disgorgement does not require expert testimony. Plaintiff claims its witness did nothing more than review deposits into Defendants' bank accounts and review depreciation and solar tax credits claimed in customers' tax returns.[11] But Defendants have been robbed of the opportunity to have

[8] *See Design Strategy*, 469 F.3d at 292 (finding inadequate the disclosing party's assertion that calculating damages was "simple arithmetic").
[9] *See CQ, Inc. v. TXU Mining Co.*, 565 F.3d 268, 280 (5th Cir. 2009).
[10] *Id.*; *see also Bean v. Pearson Educ., Inc.*, 949 F. Supp. 2d 941, 953 (D. Ariz 2013).
[11] (See Doc. 332, p. 4).

an expert witness examine and prepare to refute the Plaintiff's "summary calculations" and "arithmetic".

Plaintiff claims its witnesses will testify as to "a reasonable approximation of the Defendants' gross receipts"[12] and "the harm to the government that resulted from the Defendants' scheme."[13] The witness identified by Plaintiff is intending to testify to much more than simply tallying numbers. There are summaries and also summaries of summaries.[14] There are mathematical comparisons of different summaries (gross receipts vs. harm to government)[15], which necessarily will entail making assumptions and drawing conclusions.

The information and documentation is beyond the ken of the ordinary layman. For example, Plaintiff intends to call witness Perez to testify as to 1,643 tax returns including the total depreciation and total solar tax credits claimed, then "appl[y] the average tax rate to the depreciation to demonstrate the tax loss (harm to the Government) from Defendants' scheme."[16] The tax loss (harm to the Government) was not included in the Rule 26 Disclosures. Such a calculation is not even alluded to during discovery. The new theory of "harm to government" is specifically not included.

Because Plaintiff never disclosed its computation of damages, Plaintiff was never made aware of how Plaintiff was calculating what it believed constitutes disgorgement. What Plaintiff has planned is an ambush leaving Defendants unable to prepare to confront Plaintiff's witnesses' calculations and computations. For example, Defendants do not know and if Plaintiff has its way will not learn until trial what tax rates were applied by Ms. Perez. Defendants do not know and if

[12] (Doc. 329, p. 4)
[13] Id.
[14] *Id*. fn 11.
[15] *Id*. fn 13
[16] *Id*. fn 14.

Plaintiff has its way will not learn until trial what the individual tax situation was for those 1,643 taxpayers. Tax returns are not simple math. They are very complex. To truly understand the alleged harm to the Treasury, each individual tax return would have to be compared to a hypothetical tax return recalculated without the solar business deductions for depreciation or solar tax credits. Plaintiff has not done that and Defendants have no ability now to accomplish that using an expert before trial. Plaintiff has merely taken the tax refunds received by taxpayers and lump-summed those numbers into a summary of "harm" to the Treasury and attributed that harm to Defendants. Common sense dictates that if the solar energy equipment is withdrawn from the tax calculations, there would be taxes owed or taxes overpaid with refunds owed or deficiencies paid by each taxpayer based on their unique return.

Those complex calculations have been assumed and put into summaries and charts. Plaintiff should not be allowed to circumvent its duty to disclose expert witnesses and produce expert reports timely so as not to surprise Defendants weeks before trial and without the ability to designate their own experts. The tax code and its implication in this case requires specialized knowledge subject to Rules 701 and 702 and the Plaintiff has failed to comply.

CONCLUSION

Rule 37(c) provides that a party is not allowed to use information or witness at trial that were not timely disclosed pursuant to Rule 26(a). Given Plaintiff's failure to disclose any computation of its disgorgement damages, the names of witnesses to testify as to the disgorgement damages, and the need for expert testimony in support of its disgorgement theory, Plaintiff should not be allowed to use any of that information during trial.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING DAMAGES RELATING TO DISGOREMENT OF FUNDS** was sent to counsel for the United States in the manner described below.

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