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

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,<br><br>Defendants. | Civil No. 2:15-cv-00828 DN<br><br>**UNITED STATES' OPPOSITION TO TODD AND JESSICA ANDERSON'S MOTION TO MODIFY TRIAL SUBPOENA**<br><br>Judge David Nuffer<br>Magistrate Judge Evelyn J. Furse |

On March 5, 2018, counsel for Todd and Jessica Anderson executed acknowledgments and waivers of service with respect to the subpoenas issued by the United States to Todd and Jessica Anderson. On March 19, 2018, the Andersons filed a motion to modify the subpoena and ask the Court for compensation for complying with the subpoenas in the form of: lost income/professional fees on days that either must appear ($1,600 for Todd Anderson per day and $400 for Jessica Anderson per day), travel-related costs, and child care costs. The United States and files this opposition in accordance with the Court's order dated March 19, 2018. [1]

## I. The Andersons are fact witnesses and not unretained experts.

The Andersons, as prior attorneys for RaPower-3, are fact witnesses in this case. The deposition testimony cited by the Andersons provides a preview of the testimony the United States expects to elicit from the Andersons at trial regarding their relationship with any of the Defendants, and what advice or services they provided to any Defendants.[2] The Andersons summarized certain tax provisions in response to Neldon Johnson's questions. Johnson and Shepard used a draft letter from the Andersons to promote the solar energy scheme. The Andersons' testimony about what facts Johnson told them (or did not tell them) and the advice they gave him directly relates to whether Defendants knew or had reason to know that the statements they made were false or fraudulent. Further, Defendants have raised a defense of reliance on advice of counsel, including the Andersons' advice. The United States will elicit facts about past events from the Andersons' testimony, not expert testimony and not results of any

[1] ECF Doc. No. 344

[2] ECF Doc. No. 343, at 3, ¶ 7 (citing excerpts from Depositions of Todd and Jessica Anders).

"study" by the Andersons as experts in law, taxes, or solar energy.[3] Because the Andersons are fact witnesses, the Court is not required to modify the subpoena to provide compensation in excess of the statutory witness fee for their attendance at trial.[4]

**II. The Andersons will not incur substantial expense in complying with the subpoenas.**

A subpoena may command a person to attend a trial if the trial is within 100 miles of where the person resides,[5] or within the state where the person resides or is employed and the person would *not incur substantial expense* in attending.[6] The Andersons live and work in Delta, Utah.[7] While the Andersons are correct that the distance to the courthouse from Delta is more than 100 miles, it is only 24 to 35 more miles, depending on the route taken.[8] This additional mileage does not result in substantial expense.[9] The Andersons allege, without any support, that the additional 24 to 35 miles will result in "substantial expense" in that they may be required to

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[3] Fed. R. Civ. P. (d)(3)(B)(ii); *see also, Glaxosmithkline Consumer Health, LP v. Merix Pharmaceutical Corp.*, 2007 WL 1051759, at *2-4 (D. Utah) (Nuffer, MJ) (doctor whose testimony was subpoenaed worked as a researcher and not as a participant in the industry and thus could not describe events which constitute the substance of the lawsuit).

[4] 28 U.S.C. § 1821; *Irons v. Karceski*, 74 F.3d 1262 (D.C. Cir. 1995), *cert. denied*, 517 U.S. 1189 (1996) (holding that an attorney fact witness was not entitled to be paid his hourly billing rate and not unduly burdened by being compensated $40 per day plus mileage for an expected three day deposition).

[5] Fed. R. Civ. P. 45(c)(1)(A)

[6] Fed. R. Civ. P. 45 (c)(1)(B)(ii) (emphasis added).

[7] ECF Doc. No. 343, at 2, ¶ 4 (citing Declaration of Todd Anderson, attached to their motion as Exhibit A, ¶¶ 3-6).

[8] As calculated by Google Maps using the addresses of 259 US-6, Delta, UT 84624 and 351 S W Temple, Salt Lake City, UT 84101 on March 21, 2018.

[9] *See, e.g., Bell v. Rosen*, 2015 WL 5595806, at *12 (S.D. Ga. 2015) (in deciding motion to transfer venue and the availability of compulsory process to secure the attendance of witnesses, court stated: "[w]hile the 122-mile drive [] would be inconvenient for these witnesses, [], it would not result in a 'substantial expense' so as to place them outside the Court's broadly defined subpoena power."); *see also, TDE Petroleum Data Solutions, Inc. v. Akm Enterprise, Inc.*, 2015 WL 11110603, at *2-3 (E.D. Tex. 2015) (in deciding motion to transfer venue and considering the availability of compulsory process to secure the attendance of witnesses, court found there was no allegation that a party would "incur substantial expense" because of an additional eight miles to travel to the district court within the state.). *Compare, Roundtree v. Chase Bank USA, N.A.*, 2014 WL 2480259, at *2 (W.D. Wash. 2014) (court declining to compel an Arizona-based corporate deponent to testify at trial in Washington State).

travel multiple days or stay overnight to comply with the subpoena. However, at this point, these allegations are merely conjecture. The Andersons are entitled to witness fees, travel costs and subsistence fees as permitted by statute.[10] Although the rule does not define "substantial expense," the alleged – but unsupported – expenses the Andersons claim are not "substantial" within the regular meaning of the word.[11] Additionally, the United States is willing to work with the Andersons to try and mitigate any costs the Andersons may incur. There are numerous options for this, including giving them a date certain for their testimony and not requiring them to testify on the same day. [12]

The Andersons are within the state of Utah and subject to the Court's broadly defined subpoena power.[13] They have not shown that their costs in complying with the subpoenas are "substantial," so there is no reason to treat the Andersons more favorably than other witnesses who may incur similar costs and yet be reimbursed only as permitted by statute. [14]

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[10] 28 U.S.C. § 1821,

[11] *Compare, Legal Voice v. Stormans, Inc.*, 738 F.3d 1178, 1184-85 (9th Cir. 2013) (finding "$20,000" cost of compliance to be significant and that district court should have shifted enough of the cost of compliance to render the remainder non-significant) (citing *Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. 2001) (noting that $9,000 may be sufficiently significant to justify cost-shifting.)).

[12] The Andersons have specifically raised an issue of child care costs without substantiating what these expenses may entail. As noted, the United States is willing to schedule their testimony on different days to ameliorate this concern – this accommodation should protect the Andersons from any expense of child care, regardless of whether it is "significant." *See also, Gabriel v. Superstation Media, Inc.*, 2014 WL 12796266, at *2-3 (D. Mass. 2014) (granting motion to compel depositions of third party witnesses who resisted depositions because it would be difficult to attend based on work schedules and child care obligations).

[13] *See also*, Fed. R. Civ. P. 45, Advisory Committee Notes 2013 Amendments, stating that when travel over 100 miles *could* impose substantial expense on the witness, the party that served the subpoena may pay that expense and the court *can* condition enforcement of the subpoena on such payment. (Emphasis added).

[14] *See, e.g., Demar v. United States*, 199 F.R.D. 617, 619-620 (N.D. Ill. 2001) (court declining to order witness fee in excess of $40 statutory witness fee for the testimony of plaintiff's treating physician, who was a fact witness and not an expert witness in light of split by district courts and court's view that singling out medical profession for special treatment was inappropriate in light of Fed. R. Civ. P. 26(b)(4)(C) and 28 U.S.C. § 1821).

## III. The subpoenas do not subject the Andersons to undue burden.

In deciding whether the subpoena imposes an undue burden on a witness, the court generally assesses the reasonableness of the subpoena.[15] Reasonableness is determined by balancing the interests served by demanding compliance with the subpoena against the interests furthered by quashing it.[16] Inconvenience alone will not justify an order to quash a subpoena that seeks potentially relevant testimony.[17] One of the key issues for trial in this case is whether Defendants knew or had reason to know that statements they made with respect to the solar energy scheme were false or fraudulent. The Andersons' testimony directly relates to that issue, and other than Defendants, the Andersons are the sole witnesses able to provide this testimony. Because of the importance of their testimony to this key issue, requiring the Andersons to comply with the subpoenas greatly outweighs the inconvenience to the Andersons. As such, this Court should decline to modify the subpoenas.

Dated: March 22, 2018

Respectfully submitted,

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[15] *Aristocrat Leisure Limited v. Deutsche Bank Trust Co. Americas*, 262 F.R.D. 293, 299-300 (S.D.N.Y. 2009) (citing 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2463.1 (3d ed. 2008)).

[16] *Id.*

[17] *Id.*; *see also*, *Swasey v. West Valley City*, 2016 WL 6090843, at *6 (D. Utah 2016) (requiring third party witness to pay half the cost of a third party search for responsive documents was not an "undue" burden).

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***ATTORNEYS FOR THE UNITED STATES***

**CERTIFICATE OF SERVICE**

I hereby certify that on March 22, 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.

*/s/ Erin R. Hines*
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