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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' MOTION FOR PROTECTIVE ORDER PROHIBITING DEFENDANTS FROM DEPOSING UNITED STATES' TRIAL COUNSEL** Judge David Nuffer Magistrate Judge Evelyn J. Furse

On May 17, 2017, Defendants Johnson, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC, served a "Notice of 30(b)(6) Party Deposition of U.S.

Department of Justice, Tax Division"[1]. Tax Division attorneys are counsel for the plaintiff in this case, the United States.[2] Defendants wish to depose a representative of the Tax Division "who [was] involved in the decision to prosecute the above-captioned case" on May 30, 2017.[3] The proposed topics for deposition are: "[a]ny communications, research, and information" about this case; "[a]ny communications, research, and information that the representative(s) used when making the determination to prosecute" this case; and "[t]he decision to issue a press release regarding the initiation of this action."[4]

Discovery may be taken on "any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case."[5] But the Court "may limit discovery 'for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense' including that the discovery not be had."[6] This Court should enter a protective order prohibiting Defendants from deposing the United States' trial

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[1] Pl. Ex. 455.

[2] 26 U.S.C. § 7401. Because the Tax Division is not a party to this case, a notice of "party" deposition is insufficient to compel a representative of the Tax Division to appear and testify. *See Sec. & Exch. Comm'n v. Zufelt*, No. 2:10-CV-00574-DB-DBP, 2015 WL 7281608, at *1 (D. Utah Nov. 17, 2015) (granting in part and denying in part a motion to quash a *subpoena for deposition* to the opposing party's attorney) (Pead, M.J.). Defendants' attempt to notice the deposition of the Tax Division fails on this ground alone, but the United States files this motion in an abundance of caution.

[3] Pl. Ex. 455 at 1. The Court has stayed this action "for the parties represented by Mr. Heideman," the Defendants who noticed the Rule 30(b)(6) deposition, until Monday, June 12, ECF Doc. 168 ¶ 4, which is after the date for the deposition. The United States files this motion in an abundance of caution under DUCivR 26-2(b), with an understanding that Defendants are not required to respond until at least June 12, 2017.

[4] *Id.* at 2.

[5] Fed. R. Civ. P. 26(b)(1).

[6] *Unit Drilling Co. v. E.E.O.C.*, No. 2:14MC436, 2014 WL 2800755, at *2 (D. Utah June 19, 2014) (quoting Fed. R. Civ. P. 26(c)(1)) (Warner, M.J.).

attorneys because Defendants cannot show that the information sought is 1) both relevant *and crucial* to the preparation of the case and 2) not privileged.[7]

None of the topics in the notice is relevant to any claim or defense in this litigation, much less "crucial to the preparation of the case."[8] As the parties agreed in March 2016, this case is about Defendants' conduct, statements Defendants have made to customers and others about the tax consequences of purportedly buying a "solar lens," Defendants' state of mind as they made such statements, the actual value of a "solar lens" relative to its price, and the gross receipts Defendants have collected as a result of the sale of "solar lenses" or any other activity related to their statements.[9] Counsel's work product, attorney client communications and the Department's decision to issue a press release when it filed the complaint are not at issue. The topics on which Defendants seek to depose the United States' trial counsel are irrelevant to the claims and defenses here.[10]

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[7] Fed. R. Civ. P. 26(c)(1); DUCivR 26-2(b); *Boughton v. Cotter Corp.*, 65 F.3d 823, 829 (10th Cir. 1995) *citing Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986); *Zufelt*, 2015 WL 7281608, at *1-2. The third prong of the test articulated in *Boughton* and *Shelton* is that "no other means exist to obtain the information than to depose opposing counsel." *Boughton*, 65 F.3d at 829. Because the information Defendants seek is not relevant (much less crucial to the preparation of the case) and is privileged, the United States will not address whether the information is available from another source.

[8] *See Boughton*, 65 F.3d 823, 829.

[9] *E.g.*, ECF Doc. 2; ECF Doc. 35 ¶ 1(a).

[10] *See United States v. Elsass*, No. 2:10-CV-336, 2011 WL 3900846, at *3-5 (S.D. Ohio Sept. 6, 2011); *id.* at 5 ("Actions or positions [taken by IRS employees] of which Defendants had no knowledge are simply irrelevant to Defendants' state of mind or to the reasonableness of Defendants' conduct."). Because the information sought is not relevant (much less "crucial to the preparation of the case"), it follows that it is also not "proportional to the needs of the case." *See* Fed. R. Civ. P. 26(b)(1). All information relevant to the claims and defenses in this case is within Defendants' own possession, custody, and control. To the extent that the United States knows of documents or individuals with information it may use to support its claims, the United States has made all appropriate disclosures to Defendants throughout the course of discovery. *See* Pl. Ex. 456, letter from Erin Healy Gallagher to Justin Heideman (without attachment), May 12, 2017; Pl. Ex. 457, United States' Supplemental Objections and Responses to Defendants' First Discovery Requests to Plaintiff United States. The notice itself shows that Defendants are not trying to use the deposition to understand the United States' contentions in this case – but even if they were, this

(continued...)

The information Defendants seek is information that is protected by the attorney work-product doctrine and by attorney-client privilege. The work performed by trial counsel for the United States has been in anticipation of litigation or in actual litigation.[11] The first two topics proposed for the deposition seek information about counsel's preparation for litigation and trial in this matter, including information about the trial attorneys' mental impressions, thoughts, strategy, and legal research. "[T]he work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case."[12] To the extent the "communications, research, and information" sought by Defendants involves United States' trial counsel's communications with the IRS or IRS Counsel, such

(…continued)

Court should nonetheless prohibit it. *Bishop Hill Energy LLC v. United States*, No. 14-251 C, 2016 WL 7373890, at *6 (Fed. Cl. Dec. 20, 2016) ("as a general rule, a contention deposition is disfavored when a contention interrogatory would suffice"); *S.E.C. v. Goldstone*, 301 F.R.D. 593, 664 (D.N.M. 2014); *BB & T Corp. v. United States*, 233 F.R.D. 447, 448 (M.D.N.C. 2006), (a "contention deposition will likely involve the deposition of a party's attorney, which is not favored").

[11] *See* 26 U.S.C. § 7401; *U.S. ex rel. (Redacted) v. (Redacted)*, 209 F.R.D. 475, 480 (D. Utah 2001) ("In general, materials are not discoverable under the doctrine of attorney work product if such were prepared in anticipation of litigation.") (Greene, J.).

[12] *United States v. Nobles*, 422 U.S. 225, 238 (1975); *accord with respect to documents and tangible things* Fed. R. Civ. P. 26(b)(3)(a) ("Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative[,]including the other party's attorney."); *Goldstone*, 301 F.R.D. at 651.

communications are protected by attorney-client privilege.[13] For this reason, too, this Court should prohibit this deposition.[14]

Additionally, a deposition imposes an undue burden upon counsel. The notice is breathtakingly broad.[15] It is highly unreasonable to expect that government's counsel should testify or prepare a Rule 30(b)(6) witness to testify on these matters.

Defendants' notice has no proper purpose. Accordingly, the Court should prohibit Defendants from deposing trial counsel for the United States.

CERTIFICATION IN ACCORDANCE WITH FED. R. CIV. P. 37(a)(1) & THE SHORT FORM DISCOVERY MOTION PROCEDURE (Doc. No. 115)

The United States made reasonable efforts to resolve this dispute, including sending an email on May 18, 2017, requesting to meet and confer about the notice of deposition. In the email, counsel for the United States informed then-counsel for Defendants of their intention to file a motion for protective order under DUCivR 26-2 no later than Monday, May 22, 2017. On May 19 at 11:30 a.m. MDT, counsel for the United States called Christian Austin, then-counsel

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[13] 26 U.S.C. § 7401; *In re County of Erie*, 473 F.3d 413, 418 (2d Cir. 2007) ("In civil suits between private litigants and government agencies, the attorney-client privilege protects most confidential communications between government counsel and their clients that are made for the purpose of obtaining or providing legal assistance."); *United States v. Mesadieu*, 166 F. Supp. 3d 1275, 1278 (M.D. Fla. 2015) ("Federal courts have recognized and protected from disclosure, based upon the attorney-client privilege, communications between the IRS and the DOJ.").

[14] *See Goldstone*, 301 F.R.D. at 663-64 (granting a motion for protective order barring a defendant from taking a Rule 30(b)(6) deposition of the SEC on topics like its communications concerning its investigation of the defendant and the facts of the case because the defendants' "deposition topics would invade the SEC attorneys' work product, and the Defendants have not demonstrated substantial need for the information or that they cannot obtain substantially the same information without undue hardship"). This is not a situation in which the attorney to be deposed was directly involved in the subject matter of the litigation, and therefore may also be a fact witness. *C.f. S.E.C. v. Art Intellect, Inc.*, No. 2:11-CV-00357-TC-DN, 2012 WL 776244, at *4 (D. Utah Mar. 7, 2012) (Nuffer, M.J.). Accordingly, this is not a situation in which the deposition should occur, with the understanding that objections will be made if privileged and/or protected information is called for by any question. *C.f. id.*

[15] *See, e.g., Gossar v. Soo Line R. Co.*, 2009 WL 3570335, at *2-3 (S.D. Ind. 2009) (five-year period was too long).

for Defendants Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc. After discussion of the United States objections to the notice of deposition to its trial counsel under *Boughton v. Cotter Corp.*, Mr. Austin agreed to withdraw, in writing, the notice of deposition. The United States has not received a written withdrawal.

Dated: May 22, 2017

Respectfully submitted,

/s/ Erin Healy Gallagher

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CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2017, the foregoing document and its supporting exhibits were 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