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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 TO QUASH SUBPOENA TO IRS** 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 Subpoena to Internal Revenue Service" on counsel for the United States with an attached subpoena *duces tecum* dated May 17, 2017 with a

return date of June 1, 2017.[1] The subpoena should be quashed it improperly circumvents Rule 34,[2] and because it subjects the IRS to undue burden, requests the production of privileged and other protected materials, and fails to allow a reasonable time to comply.[3]

Discovery may be taken on "any nonprivileged material that is relevant to any party's claim or defense and proportional to the needs of the case."[4] 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 discovery not be had."[5] The subpoena is unduly burdensome because it is overly broad, requests documents that are not relevant or

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[1] Pl. Ex. 488. As of May 31, 2017, new counsel for defendants had not yet been able to verify whether the subpoena was actually issued. Because the date for compliance is June 1, 2017, plaintiff is filing the Motion to Quash to preserve its objections even though the Court stayed this action for the defendants who issued the subpoena until June 12, 2017, ECF Doc. 168, ¶ 4. *See* Fed. R. Civ. P. 45(d)(3); *HT S.R.L. v. Velasco*, 125 F. Supp.3d 211, 229 (D.D.C. 2015) (Generally, courts have interpreted "timely" as "within the time set in the subpoena for compliance.), and the cases cited therein.

[2] *See* Fed. R. Civ. P. 34, *see also, e.g., Mezu v. Morgan State Univ.*, 269 F.R.D. 565, 581-82 (D. Md. 2010) (defendant issued subpoena to plaintiff in circumstances where it was completely improper to do so because plaintiff had objected to producing them under Rule 34, and defendant had not moved to compel their production); *Thomas v. IEM, Inc.*, 2008 WL 695230 at *2 (M.D. La. 2008) (a subpoena is not necessary to obligate a party to produce documents that could – and should – be requested under Rule 34 especially when the Rule 45 subpoena was issued because a Rule 34 request would have fallen outside the discovery deadline). The Department of Justice Tax Division commenced this action at the request of the IRS. ECF Doc. 2, ¶ 3; 26 U.S.C. § 7401; 28 C.F.R. § 0.70. Courts are divided on whether Rule 45 subpoenas should be served on parties, but the Tenth Circuit has not ruled on the issue. *See Wagoner v. EMC Mortgage, LLC*, 2013 WL 12086643 (D. Wyo. 2013); *Tuttamore v. Allred*, 2013 WL 275566 (D. Colo. 2013). However, courts have refused to enforce Rule 45 subpoenas where they would effectively evade Rule 34. *McLean v. Prudential S.S. Co.*, 36 F.R.D. 421, 425 (E.D. Va. 1965); *Neel v. Mid-Atlantic of Fairfield, LLC*, 2012 WL 98558 (D. Md. 2012).

[3] *See* Fed. R. Civ. P. 45(d)(3). Generally, under Rule 45, only the person to whom the subpoena is issued has standing to quash. *See, i.e., Richards v. Convergys Corp.*, 2007 WL 474012, at *1 (D. Utah 2007) (Nuffer, M.J.). However, the Department of Justice represents the IRS in proceedings in federal district court and therefore has standing to move to quash the subpoena. *See* 26 U.S.C. § 7401; 28 C.F.R. § 0.70.

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

[5] *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.) (emphasis added).

proportional to the needs of the case, exceeds the topics of discovery agreed to by the parties,[6] and is largely duplicative of defendants' request for production of documents from the United States.[7]

On its face, the subpoena is overly broad and unduly burdensome.[8] The subpoena contains no time limits nor does it restrict the requests to the claims and defenses in this case.[9] The subpoena appears to request documents that could be in the possession of *any* of the IRS's thousands of employees.[10] Discovery burdens are all relative to the expected benefit to the case.[11] The burden to the IRS[12] of this subpoena far outweighs any benefits defendant might

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[6] *See* ECF Doc. 35 and 37.

[7] Compare defendants' March 31, 2017 request for production of "[a]ny and all documents that evidence, relate to, or refer to the claims in this case whether or not obtained by third-parties, governmental employees, or otherwise." at Pl. Ex. 453, at 12, with the subpoena requesting essentially all documents that "evidence, relate or refer" to any of the six defendants, communications with Kenneth Birrell, Kirton McConkie, and/or Todd Anderson, and "to the investigation of any kind relating in any aspect to the propriety of any of the defendants['] communication regarding potential tax benefits related to the products or services produced or offered for sale by any of the defendants." Pl. Ex. 488, at 7.

[8] *See e.g., SEC v. American Pension Services, Inc.,* 2014 WL 5513717, at *4 (D. Utah. 2014) (subpoena request for all documents relating to all assets of the subpoenaed persons, who were nonparties, regardless of whether the assets had any connection to the parties was found to be unduly burdensome and modified by the court) (Pead, M.J.); *U.S.E.E.O.C. v. Bank of America*, 2014 WL 7240134, at*6-7 (D. Nev. 2014) (subpoena with thirty-eight requests seeking documents from 1998 through 2014 was found to be unduly burdensome as a matter of law).

[9] *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."). 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. 453 and 457.

[10] Because the subpoena contains no time limits, this would presumably include the records of both former and current employees. Between 2009 and 2016, the number of full-time employees ranged from 94,711 to 77,924. *See* 2016 IRS Data Book at 66 (Table 29), *available at* www.irs.gov/uac/soi-tax-stats-irs-data-book. These figures do not include part-time and seasonal employees. *Id.*

[11] *See, e.g.*, *Glaxosmithkline Consumer Healthcare, L.P. v. Merix Pharmaceutical Corp.*, 2007 WL 1051759, at *4 (D. Utah) (discovery burdens are all relative to the expected benefit to the case; low relevance of deposition testimony supported finding that burden of deposition was excessive) (Nuffer, M.J.)

garner from the enforcement of it, particularly because Defendants' subpoena is largely duplicative of their request for production documents to the United States. The United States served its initial response to Defendants' request on May 1, 2017 and a supplemental response on May 15, 2017, and has produced to Defendants tens of thousands of pages of documents in its possession (including the possession of the IRS), and tens of thousands more pages of documents the United States has collected from third parties to this case.[13] For all of these reasons, this subpoena is not proportional to the needs of this case[14] and should be quashed.[15]

The subpoena also seeks documents and information that may be protected or privileged.[16] Particularly in light of the subpoena's sweeping breadth and the necessary review the IRS would be required to undertake to protect all privileges and taxpayer privacy, defendants' requested return date of June 1st – a mere 15 days after which the subpoena was

(…continued)

[12] For example, in January 2011, defendants claimed to have hundreds of "RaPower3 Team Members," *see* Pl. Ex. 189, at 2. To locate the documents of those hundreds of "Team Members" to identify whether they submitted any documents to the IRS that "refer" to any of the six defendants would require a significant amount of resources.

[13] Pl. Exs. 453 and 457.

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

[15] *Nunes v. Rushton*, 2015 WL 3537018 at *4 (D. Utah 2015) (although not specifically enumerated under Rule 45, limitations may be placed on subpoenas that are determined to be "unreasonably cumulative or duplicative" (citations omitted) (Pead M.J.)); *Burns v. Bank of America*, 2007 WL 1589437 at *14 (S.D.N.Y. 2007) (court quashed subpoena where the plaintiffs' Rule 45 subpoena clearly duplicative as it requested precisely the same documents plaintiffs had demanded in their First Request for Production of Documents.).

[16] In addition to a review for privileges (attorney-client, work product, deliberative process), the IRS must take into account Federal statutes and other considerations before it produces documents in response to a subpoena. *See, i.e.,* 26 U.S.C. §§ 6103, 6105, 6110; Privacy Act; Bank Secrecy Act; Grand Jury Secrecy (Fed. R. Crim. 6(e); *see also*, 26 C.F.R. § 301.9000-1 through § 301.9000-7.

noticed – is not a reasonable time within which to comply.[17] The last-minute nature of this subpoena suggests that it is an attempt to circumvent the discovery deadlines in this case.[18] The last day to serve written discovery, including requests for the production of documents, was March 31, 2017.[19] Defendants should not now be permitted to issue a subpoena to the IRS with a two-week return date as an end-run-around an expired discovery deadline.[20]

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. On May 31, 2017, counsel for the United States met and conferred with new counsel for defendants who indicated that they are still trying to get up to speed on the issues the United States raised, specifically, whether the subpoena has actually been issued and whether the documents were previously produced in discovery. The parties agreed to further meet and confer in seven days. The United States informed new counsel that it planned to file the motion to quash to preserve its timely objections.

Dated: May 31, 2017

Respectfully submitted,

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[17] "Although Rule 45 does not define 'reasonable time,' many courts have found that anything less than fourteen days from the date of service is not reasonable." *SEC v. Art Intellect, Inc.*, 2012 WL 776244, at *3 n.43 (D. Utah) (Nuffer, M.J.).

[18] ECF Doc. 37, ¶ 2.i.

[19] The fact that the subpoena itself was noticed (and possibly served as defendants' new counsel is trying to determine) after the written discovery deadline may be reason enough to quash it. *See, e.g.*, *Holmes v. Utah*, 2014 WL 1329352, at *1 (D. Utah) (motion to quash subpoena granted where Rule 45 subpoena request for documents was untimely because it failed to comply with the discovery cutoff date) (Wells, M.J.).

[20] *See,* supra, note 2.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 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 R. Hines
ERIN R. HINES
Trial Attorney