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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' MOTION IN LIMINE TO EXCLUDE TESTIMONY REGARDING DAMAGES RELATING TO DISGOREMENT OF FUNDS** Judge David Nuffer Magistrate Judge Evelyn J. Furse

Pursuant to Pursuant to Rule 37(c)(1) of the Federal Rules of Civil Procedure**,** Defendants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC., R. Gregory Shepard, Neldon Johnson, and Roger Freeborn, (hereinafter collectively "the Defendants") respectfully submit this motion to limit Plaintiff's proposed evidence regarding damages relating to disgorgement of funds. Plaintiff has failed to timely disclose any computation of any category of damages claimed or to make available for inspection or discovery any documents or other

evidentiary material on which any computation of damages or disgorgement is based. (See Rule 26(a)(1)(iii)). For the reasons stated herein, Defendants request that the Court preclude any attempt by Plaintiff to put on evidence of damages or disgorgement that Plaintiff failed to properly and timely disclose, rather than permit a trial-by-ambush as Plaintiff now seeks to achieve.

I. Background

1. On April 22, 2016, Plaintiff served its "Initial Disclosures to All Defendants" on Defendants and stated the following relating to its computation of damages:

   > The United States seeks 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.

2. Plaintiff did not provide any amended initial disclosures nor supplement the explanation given in the April 22, 2016, initial disclosures.

3. On February 9, 2018, Plaintiff served its pretrial disclosures pursuant to Fed. R. Civ. P. 26(a)(3) on Defendants and subsequently, on February 26, 2018, filed its pretrial disclosures with the court, *nunc pro tunc*. [See Doc. 308].

4. The pretrial disclosures also do not contain any calculation of damages or disgorgement sought nor do they identify any document or other exhibit Plaintiff expects to offer on the issue of damages or disgorgement.

5. Since April 2016 until the now, Plaintiff has not amended or supplemented its pretrial disclosures on the calculation of damages.

6. On February 23, 2018, 38 days before trial is scheduled to begin, Plaintiff sent for the first time an apparent summary of damages claimed. Exhibits 752, 734 and 750 had not been received from Plaintiff until they designated exhibits Plaintiff intends to use, or may use, at trial.
7. Defendants objected to the use of exhibits 752, 734 and 750. [Doc. 295].
8. In its recently filed motion to freeze assets and appoint a receiver in this case [Doc. 252], Plaintiff described its intention is to obtain "disgorgement of defendants' ill-gotten gains from their promotion of the abusive solar energy scheme." Id. at p. 5. And described for the first time, the calculation of disgorgement as the number of lenses multiplied by $1050 per lens. Id. at 9 and 13. This results in a damage calculation of $47,461.050.
9. A few days later, in its opposition to the motion to reinstate the jury [Doc. 309], Plaintiff changed its description of their damage claim. Plaintiff says, "in this case, however, we seek disgorgement to compensate the U.S. Treasury for the harm it has suffered. The United States is the 'aggrieved individual' that should be compensated." Id. at 8. And further explained as: "the primary goal for the disgorgement we seek is to compensate the U.S. Treasury for the millions of dollars it has lost due to Defendants' unlawful conduct that resulted in their unjust enrichment, . . . compensate the victim (the United States)."
10. The recently disclosed Exhibit 752 is described by Plaintiff as "Summary Chart: Tax Benefits Claimed for Tax Years 2013 through 2016". The exhibit consists of three pages of calculations with supposed summaries by a tax preparer for depreciation expense and solar energy credit, average tax rates, IRS SOI Tax Stats, and a conclusion captioned "Harm to Treasury". A copy of Plaintiff's newly prepared Exhibit 752 is attached hereto as Exhibit 1.

11. Exhibit 734 was never before produced during any phase of discovery, and it purports to include "combined gross receipts 2008-2016" with a table of numbers and a graphic representation of dollars vs. years. A copy of Exhibit 734 is attached hereto as Exhibit 2.
12. Exhibit 750 was never before produced during any phase of discovery, and it purports to summarize "gross receipts and harm to Treasury". Showing gross receipts, harm to Treasury and harm to Treasury plus interest for years 2008 to 2016 (leaving blank columns for 2017). There is no explanation describing how the "harm to Treasury" was calculated. A copy of Exhibit 750 is attached hereto as Exhibit 3.
13. Plaintiff's Exhibits 734-742 all appear to be summary charts containing complex analysis prepared for the purpose of trial and contain to some extent or other a summary of gross receipts apparently taken in whole or in part from Defendants' financial records.
14. Plaintiff's Exhibits 750-752 all appear to be summary charts containing complex analysis prepared for the purpose of trial to calculate the tax benefits claimed to be unlawfully claimed and included as Plaintiff's claimed damages.
15. Plaintiff has not designated a financial expert nor disclosed who the experts were that did the accounting analysis that preceded the preparation of these newly created financial trial exhibits.
16. On May 17, 2017, Defendants issued a Notice of 30(b)(6) party deposition seeking to take the deposition of the "party" suing Defendants on topics that included "any communications, research and information pertaining to the above-captioned case." [Doc. 170-1]
17. Plaintiff objected to the Notice of Deposition [Doc. 170] on grounds of attorney-client privilege and attorney-work product privilege and filed a motion for protective order. Id.

18. In their opposition to the motion for protective order, Defendants' counsel narrowed the intention of the deposition to an "authorized representative" (not legal counsel) knowledgeable about the case and able to testify about information known or reasonably available to the organization (ref. FRCP 30(b)(6)). [Doc. 180, p. 2]. The scope of the proposed deposition was narrowed to the "motivation, facts, circumstances and information upon which Plaintiff relied in making the decision to initiate the present action." Id. And included an offer to provide "a better description of the topics of inquiry" prior to the deposition. Id at 3.

19. Defendants intended to use the 30(b)(6) deposition to inquire as to the damages claimed in Plaintiff's Complaint, to determine if an expert was needed to counter the Plaintiff's claims, and in the hope of avoiding any surprise at trial. However, the court agreed with Plaintiff and struck the deposition notice stating, "Defendants shall not depose any representative of the USDOJ Tax Division." [Doc. 196].

II. Argument

A. Plaintiff has failed to disclose its damages calculation and had blocked all Defendants' efforts to obtain discovery of the damages claim asserting it would invade attorney-client and attorney-work product privilege. Because of their refusal to disclose, Plaintiff should be precluded from putting on evidence of damages at the time of trial.

Rule 26(a)(1)(C)(ii) requires all parties to disclose, without awaiting a discovery request, a computation of any damages claimed and a copy of all discoverable documents or evidentiary material on which such computation is based, including materials about the nature and extent of injuries suffered. In addition, a party must supplement its disclosures in a timely manner.[1]

[1] F.R.C.P. 26(e)(1)(A).

A party who fails to provide information required by Rule 26(a) is not allowed to use that information to supply evidence on a motion, at a hearing, or at a trial.[2] A party may only overcome exclusion if that party can show the failure was substantially justified or is harmless.[3] District courts are to consider the following factors[4] when determining whether the failure to disclose was substantially justified or is harmless:

> (1) the prejudice or surprise to the party against whom the testimony is offered;
> (2) the ability of the party to cure the prejudice;
> (3) the extent to which introducing such testimony would disrupt the trial; and
> (4) the moving party's bad faith or willfulness.

Each of these factors compel exclusion of the damages evidence the Plaintiff has withheld during discovery in this case. First, since April 22, 2016 (the date of Plaintiff's Rule 26 initial disclosures), Plaintiff has provided no calculation or computation of any damages or disgorgement amount. The only calculation of damages was provided as a surprise on February 23, 2018, a few weeks before trial. The late production of a damages computation comes as a complete surprise, for which Defendants have had no ability or time to prepare to meet, and thereby prejudices the Defendants. Further still, the source of information for the tables has yet to be disclosed. They include categories of "harm to Treasury", but do not disclose where those numbers came from.

Second, Plaintiff worked to block Defendants' efforts to inquire into the damages calculation in June of 2017 when it successfully obtained a protective order against Defendants taking the deposition of a party representative because Plaintiff claimed the information was

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[2] F.R.C.P. 37(c)(1); *see also* *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).

[3] *Id.*

[4] *Woodworker's Supply, Inc. v. Principal Mut. Life Ins. Co.*, 170 F.3d 985, 993 (10th Cir. 1999). *See also* *HCG Platinum, LLC v. Preferred Product Placement Corp.*, 873 F.3d 1191 (10th Cir. 2017), (holding that trial court abuses its discretion if it does not consider each *Woodworker's Supply* factor making a Rule 37(c) ruling).

protected as attorney work-product or attorney-client communication. Defendants' 30(b)(6) notice sought to depose an "authorized representative" (not legal counsel) knowledgeable about the case and able to testify about information known or reasonably available to the organization. [Doc. 180, p. 2]. Even after the scope of the proposed deposition was narrowed to include only topics relating to the "motivation, facts, circumstances and information upon which Plaintiff relied in making the decision to initiate the present action" the Plaintiff still refused to allow discovery. Id. Although Defendants offer included the willingness to provide "a better description of the topics of inquiry" prior to the deposition, the Plaintiff remained unwilling to disclose or participate in allowing Defendants this discovery. Id at 3.

Despite the clarification and offer to provide better descriptions, Plaintiff steadfastly resisted having an authorized representative of Plaintiff testify and therefore Defendants were unable to ask questions about damages, damage theories, methods, and computations.

As a result, Plaintiff withheld its calculation and computation of damages relating to disgorgement until now, when submitting its pretrial disclosures, which was long after the close of fact discovery in this matter. Defendants are thereby unable to cure the prejudice. The only conceivable remedy would be for the court to (1) order a continuance of the April 2018 trial, *and* (2) permit additional fact discovery into the damage theories and calculations of Plaintiff, *and* (3) permit Defendants to add an expert related to the damages computations for purposes of refuting the Plaintiff's theories. Defendants do not want the case continued and do not ask for the Court to delay trial and reopen discovery on damages. Plaintiffs have engaged in a deliberate course of excluding damages from discovery, and now ought to have damages excluded from trial.

Third, allowing the introduction of Plaintiff's damages calculations would disrupt the trial because the Defendants have had neither the time or means to prepare for the surprise testimony

and new exhibits. Defendants have already objected to the "surprise witnesses" that were only disclosed by Plaintiff on February 23, 2018 who are expected to testify in support of the damages computations (see Doc. 296). None of the witnesses or exhibits were provided to Defendants in supplementation to the disclosure obligation of Rule 26(a) until the trial is before us.

There is evidence of bad faith or at least willfulness related to Plaintiff's failure to disclose the computation of damages until now. Plaintiff's dubious, tactical timing of unveiling the surprise computation is clearly willful. The charts and summaries Plaintiff relies on and years addressed in the exhibits, together with the identities of the witnesses counsel for Plaintiff have announced they will call to lay foundation for the computations suggest the information and identity could hardly be unknown to Plaintiff through the 22 months since its initial disclosure in April 2016. To disclose the information now can only be interpreted as a willful and intentional trial tactic; therefore, exclusion is justified and the only appropriate remedy.

B. Plaintiff's damages theory is not supported by necessary expert testimony.

This court set a deadline for Rule 26(a)(2) reports from Plaintiff's experts for July 28, 2017. At that time, Plaintiff only designated Thomas Mancini, whose expert report only dealt with Defendants' technology. Plaintiff did not designate any other experts.[5]

Rule 701 of the Federal Rules of Evidence require expert testimony on scientific, technical or other specialized knowledge. Rule 702 controls whether a specified individual is qualified to testify as to evidence or facts at issue.

[5] See *Kassel v. United States*, 319 F. App'x 558, 560 (9th Cir. 2009) (District court erred in allowing a revenue agent not designated as an expert to "testify as to the legality of home-based business deductions" because his testimony in this regard "was as an expert witness, rather than a percipient witness, and the testimony should have been excluded.")

Plaintiff's proof of damages for disgorgement will require an expert witness, especially considering the kind of specialized knowledge and analysis of documents, codes, rules and procedures necessary to calculate those damages, such analysis is beyond the knowledge of lay people.[6] Disgorgement is purportedly an essential element of Plaintiff's claim. If Plaintiff has not designated an expert, and the time for such designation has passed, as a matter of law, Plaintiff will be incapable of proving its claim. Any new effort to admit information or evidence of damages should be excluded for failure to timely designate an expert.

Rule 37(c) provides that if a party fails to provide the information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing or at a trial, unless the failure was substantially justified or is harmless. Given the failure to disclose any computation of damages asserted until the eve of trial, Plaintiff should not be allowed to use that information at trail.

III. Conclusion

Rule 37 mandates exclusion of evidence not properly disclosed under the rules which nondisclosure was not substantially justified or harmless to the aggrieved party. The 10th Circuit factors articulated in *Woodworker's Supply* all preponderate in favor of Defendants' request to strike the surprise witnesses from Plaintiff's witness list, thereby excluding them from presenting evidence at trial. Additionally, the Defendants request an award of their reasonable attorney's fees incurred in preparing and prosecuting this motion pursuant to Rule 37(c)(1)(A).

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[6] See *id.*

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' 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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