Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com
Steven R. Paul (#7423) spaul@nsdplaw.com
Daniel B. Garriott (#9444) dbgarriott@msn.com
Joshua D. Egan (#15593) Joshua.d.egan@gmail.com
NELSON, SNUFFER, DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070
Telephone: (801) 576-1400
Facsimile: (801) 576-1960

Attorneys for Defendants

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' MEMORANDUM TO EXCLUDE THE USE OF DEPOSITION TESTIMONY IN LIEU OF LIVE WITNESSES AT TRIAL** Judge David Nuffer Magistrate Judge Evelyn J. Furse

As directed by the Court, Defendants submit this memorandum in support of their objection to using Deposition Transcripts in lieu of live witnesses at the trial of this matter. After reviewing the cases provided by the government at pretrial, related cases and the rule, Defendants' position remains that this Court should require live testimony where witnesses are available.

Fed. R. Civ. P. 32(a) is controlling. It provides in pertinent part:

(a) Using Depositions.

- **(1)** *In General.* At a hearing or trial, all or part of a deposition may be used against a party on these conditions:

  - **(A)** the party was present or represented at the taking of the deposition or had reasonable notice of it;
  - **(B)** it is used to the extent it would be admissible under the Federal Rules of Evidence if the deponent were present and testifying; and
  - **(C)** the use is allowed by Rule 32(a)(2) through (8).
- **(2)** *Impeachment and Other Uses.* Any party may use a deposition to contradict or impeach the testimony given by the deponent as a witness, or for any other purpose allowed by the Federal Rules of Evidence.
- **(3)** *Deposition of Party, Agent, or Designee.* An adverse party may use for any purpose the deposition of a party or anyone who, when deposed, was the party's officer, director, managing agent, or designee under Rule 30(b)(6) or 31(a)(4).
- **(4)** *Unavailable Witness.* A party may use for any purpose the deposition of a witness, whether or not a party, if the court finds:
  - **(A)** that the witness is dead;
  - **(B)** that the witness is more than 100 miles from the place of hearing or trial or is outside the United States, unless it appears that the witness's absence was procured by the party offering the deposition;
  - **(C)** that the witness cannot attend or testify because of age, illness, infirmity, or imprisonment;
  - **(D)** that the party offering the deposition could not procure the witness's attendance by subpoena; or
  - **(E)** on motion and notice, that exceptional circumstances make it desirable—**in the interest of justice and with due regard to the importance of live testimony in open court**—to permit the deposition to be used. (Emphasis added).

The Tenth Circuit has noted that deposition testimony is "normally inadmissible hearsay" but that Fed.R.Civ.P. Rule 32(a) creates an exception to the hearsay rules.[1] "The preference for live testimony at trial rather than deposition testimony as a substitute is uniformly stressed in case law."[2] "This was long ago asserted by Judge Learned Hand, who stated: 'the deposition has always been, and still is, treated as a substitute, a second-best, not to be used when the original is at hand.'"[3] "This is the constant theme of courts which have dealt with the issue of the use of depositions in lieu of live testimony."[4] As typical of such cases, in *Hillman v. U.S. Postal Service*, 171 F. Supp.2d 1174, 1175 (D.Kan. 2001), the court said: "Parties or witnesses who will be present at trial are generally not permitted to testify by way of deposition in lieu of live

[1] *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 962-63 (10th Cir. 1993).
[2] *Young & Assocs. Pub. Rels. v. Delta Air Lines*, 216 F.R.D. 521 (D. Utah 2003).
[3] *Id*. (citing *Napier v. Bossard*, 102 F.2d 467, 469 (2d Cir. 1939)).
[4] *Id*.

testimony."[5] "The Tenth Circuit stressed in *Angelo* that the proponent has the burden of proving the deposition testimony admissible under either Fed.R.Civ.P. Rule 32 or Federal Rules of Evidence Rules 803 and 804.[6]

Plaintiff identifies in its Fed. R. Civ. P. 26(a)(3)(A)(i) Witness List[7], 14 witnesses it intends to use deposition designation as testimony evidence for the trial. Only some of those witnesses fall within exceptions to the rule. Robert Aulds, Peter Gregg, Roger Halverson, John Howell, Frank Lunn, Mike Penn, and Brian Zeleznik all reside further than 100 miles from the Courthouse, and therefore, the exception listed in Fed. R. Civ. P. 32(a)(4)(B) applies, though at the discretion of the Court. As Roger Freeborn is deceased, the exception in 32(a)(4)(A) applies to him. The remaining witnesses (International Automated Systems, Inc., Neldon Johnson, LTB1, LLC, PacifiCorp, RaPower-3, LLC, and R. Gregory Shepard) should be required to testify at trial.

There is no exception excusing Neldon Johnson or R. Gregory Shepard from being live witnesses. They are listed as "Will Call Live Witnesses" by Plaintiff.[8] The rule allows for a deposition transcript to be used to impeach these witnesses, but there is no exception that allows their testimony to be entirely replaced.

Plaintiff claims Fed. R. Civ. P. 32(a)(3) allows them to present deposition testimony in lieu of live witnesses for the entity witnesses (IAS, LTB1, Ra-Power3, PacifiCorp). Permission to do so is entirely at the discretion of the Court. In *Adams v. United States*, 2009 U.S. Dist. LEXIS 62810, an Idaho District Court stated: "The 'rules are based on the premise that live testimony is more desirable than a deposition.' *See* 8A Wright, Miller and Marcus, *Federal Practice &*

[5] *Id*. *See also U.S. v. IBM Corp.*, 90 F.R.D. 377, 382 [**5] (D.C.N.Y., 1981) (citing Circuit Court decisions standing for the same proposition) (additional citations omitted).
[6] *Id*. (citing *Angelo*, 11 F.3d at 963 *citing Allgeier v. United States*, 909 F.2d 869, 876 (6th Cir. 1990). *See also United States v. Torres*, 890 F.2d 266, 269 (10th Cir. 1989) (the proponent of evidence under Rule 804 bears the burden of demonstrating the unavailability of the declarant).
[7] ECF 314.
[8] ECF 314, pp. 3, 4.

Procedure, § 2146 at p. 172 (1994). If a witness is available to testify, the deposition 'cannot be used in lieu of live testimony (although it is available to impeach).'" *Id.* The treatment of the rule urged by Plaintiff (and as applied in *Colleti v. Cudd*[9], one of the cases relied on by Plaintiff) is not binding on this Court and not persuasive. It is not given broad application in the Tenth Circuit.[10]

In *Colletti*, plaintiff sought to introduce segments of depositions of defendant's employees as admissions.[11] While the court agreed plaintiff was entitled to do so under Rule 32, and it was immaterial that the witnesses were available to testify, it nevertheless considered admission of deposition testimony within the sound discretion of the trial court, and refused the request.[12] Though the trial judge in *Colletti* ignored the provisions of Rule 32, the Tenth Circuit found the record showed no abuse of discretion or prejudice to the plaintiff.[13] The trial court had offered to allow plaintiff to use the depositions for impeachment, but she failed to avail herself of that opportunity and apparently did not call the witnesses live.[14] While the plaintiff explained that calling the witnesses live would destroy her trial strategy, the court saw no reason to "allow[] her to utilize her own method of getting her point across, 'when another, at least equally effective method of getting that same point across was easily available.'"[15]

In this case, in not one of these depositions was it stated at the time of the deposition that it was being taken to replace their live testimony. Defendants' counsel was not alerted and did not cross-examine to the extent that it would have done so in a trial setting. Indeed, they couldn't. They were not allowed the time to do so. The Scheduling Order limited each deposition to only 7

[9] *Coletti v. Cudd*, 165 F. 3d 767, 773 (10th Cir. 1999)
[10] See the more recent case of *Young & Associates v. Delta Airlines*, 216 F.R.D. 521 (D.Utah 2003) (holding that where witnesses are available to testify, deposition may not be used to present direct testimony even if witness resides more than 100 miles from courthouse).
[11] *Coletti*, 165 F.3d at 773.
[12] *Id*. at 773-774.
[13] *Id*. at 774.
[14] *Id*.
[15] *Id*. (quoting *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1165 (10th Cir. 1981)).

hours.[16] The deposition of International Automated Systems, Inc. was more than 7 hours. The deposition of RaPower-3, LLC was more than 7 hours. Defendants were not allowed a sufficient opportunity to cross examine those witnesses during the time of the depositions. All questions asked were by the Plaintiff, and Plaintiff did not object or move to strike any of the testimony.

Finally, leading questions are allowed on cross-examination of witnesses without any limitation, even if they are the party counsel represents.[17] Rule 611(c)(1)-(2) specifically states, without exception, that "[o]rdinarily, the court should allow leading questions: (1) on cross-examination; and (2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party." Should any of the Defendants be called as witnesses by Plaintiff, in accordance with the rule, Defendants' counsel is entitled to cross-examine with leading questions.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Daniel B. Garriott
Attorneys for Defendants

[16] ECF 205.
[17] See Fed.R.Evid. 611(c)(1).

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' MEMORANDUM TO EXCLUDE THE USE OF DEPOSITION TESTIMONY IN LIEU OF LIVE WITNESSES AT TRIAL** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher
Erin R. Hines
Christopher R. Moran
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
_____ Mail
_____ Hand Delivery
_____ Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
christopher.r.moran@usdoj.gov
__X__ Electronic Service via Utah Court's e-filing program

/s/ Denver C. Snuffer, Jr.
Attorneys for Defendants