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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 **REPLY TO DEFENDANTS' OPPOSITION TO THE UNITED STATES' MOTION FOR RELIEF FROM STANDARD PROTECTIVE ORDER AND DUCIVR-26-2** Judge David Nuffer

The United States moved the Court to issue an order suspending application of DUCivR 26-2(a) to this case as the United States' substantive rights are violated under the terms of the

District of Utah's Standard Protective Order.[1] Defendants Ra-Power 3, LLC, International Automated Systems, Inc. ("IAS"), LTB1, LLC ("LTB"), and Neldon Johnson opposed the United States' motion.[2] Defendants assert that the government's concerns are adequately protected and that the exceptions it seeks are so broad that it would eviscerate any protection the order provides. Defendants specifically assert that they are concerned that the government is seeking relief "precisely to allow disclosure obtained to other governmental agencies in order to assist such agencies to build their respective cases against defendants and others" and that "[a]llowing the government to disclose confidential information in that fashion without demonstrating a need for disclosure thus has the potential to result in substantial harm and prejudice to defendants."[3]

ANALYSIS

As an initial matter, defendants mischaracterize the relief we seek. The United States asked this Court to suspend the Standard Protective Order and DUCivR 26-2; the United States has *not* asked for the Court to modify the Standard Protective Order. Rather than propose specific changes to the Standard Protective Order we cited specific examples of how the United States' substantive rights are violated under the literal terms of the Standard Protective Order. Because the United States' substantive rights are violated by the Standard Protective Order, the

[1] Doc. No. 39
[2] Doc. No. 41. To date, defendants R. Gregory Shepard and Roger Freeborn have not filed a response or otherwise joined in the objection by Ra-Power3, LLC, IAS, LTB and Neldon Johnson. The United States will refer to the four defendants who have objected as "Defendants" within this Reply.
[3] Doc. No. 41, p. 3

United States seeks to suspend the Standard Protective Order in this case.[4] If the parties subsequently determine that a protective order is required, the parties could negotiate an appropriate protective order that would address the needs of the case, allow the United States to comply with its statutory and regulatory duties, and adequately craft language that does not impact the United States' substantive rights.

We identified four particular concerns with the language of the Standard Protective Order and showed how it violates the United States' substantive rights.[5] Defendants do not deny that the United States' substantive rights are violated, but instead attempt to argue that the United States' concerns lack merit because they are already addressed by the Standard Protective Order or because the United States could seek to modify the Standard Protective Order later. Defendants further argue that granting the United States' motion would cause substantial harm and prejudice to defendants, specifically with respect to allowing Department of Justice employees to comply with their statutory, regulatory and ethical obligations and departmental policy. However, defendants have failed to establish any prejudice or harm other than asserting vague, premature claims of harm, have failed to establish any prejudice that suspension of the

[4] As noted in the United States' Motion, the United States proposed changes to the Standard Protective Order and defendants rejected those changes without attempting any negotiation of terms to address the United States' concerns.

[5] Doc. No. 39, at 5. Those four concerns are: (1) whether employees of the Department of Justice can comply with statutory, regulatory, and ethical obligations to report violations or suspected violations of law; (2) whether the Department of Justice can share necessary information with all persons the Department of Justice deems necessary to litigate the case, including contractors and employees of the Internal Revenue Service; (3) requiring the United States to disclose the identity of an expert prior to disclosures provided for in the Fed. R. Civ. P. or unnecessarily disclose the identity of a consulting expert; and (4) whether the Department of Justice can comply with its recordkeeping requirements.

Standard Protective Order might cause them, and have failed to disprove that our substantive rights are violated.

I. Modifying the Standard Protective Order later does not minimize or eliminate the violation of the United States' substantive rights.

Defendants assert that "the parties' arguments presume the confidential nature of the information"[6] and thus the burden is on the government to establish that the Standard Protective Order is too restrictive. The United States does not presume that any of the information defendants possess is confidential. If the defendants wish to designate some information confidential, they are free to do so within the confines of Rule 26. It is the defendants who presume that their solar energy technology and financial information are confidential, and claim that they would suffer harm and prejudice because their proprietary information would be put at risk.[7] This argument however, is premature and speculative in nature. Defendants claim that their technology information is confidential and proprietary. Defendants will apparently attempt to designate a substantial portion of discoverable information in this case as confidential. We seek prospective relief *before* the parties exchange documents and information. Regardless of the outcome of this Motion, the United States is not forfeiting its right to challenge any designation by defendants that it believes is improper and does not meet the standards for being protected information under the terms of any applicable protective order or under Fed. R. Civ. P. 26. [8]

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[6] Doc. 41, at 3.
[7] Doc. No. 41, at 2.
[8] For example, to the extent that defendants attempt to designate any information as "confidential" that are publicly available the United States would likely challenge that designation. See, e.g. http://www.rapower3.com/#!patents/c67d which links to patent documents and information on file with the United States Patent and Trademark Office which includes figures, specifications, and claims with respect to patents filed by Neldon Johnson.

The burden on the United States is to establish that the Standard Protective Order violates its substantive rights; not that it is too restrictive.[9] We met that burden. Defendants try to disprove the United States' claims by citing to the exact same problematic provisions of the Standard Protective Order that the United States has cited in its Motion. For example, defendants point to paragraph 17 as allowing the Department of Justice employees to fulfill their obligations and duties as employees to report violations or suspected violations of law. Paragraph 17 states:

> Modification of Standard Protective Order. This Order is without prejudice to the right of any person or entity to seek a modification of this Order at any time either through stipulation or Order of the Court.

Paragraph 17 fails to address the United States' concerns of how the other terms of the Standard Protective Order violate its substantive rights. While this provision envisions that changes to the order may be needed, requiring the United States to wait until some later time to seek modification could result in an actual violation of the United States' substantive rights for which it has no remedy. In particular, there is no guarantee that the Court would grant a motion to modify, especially if defendants rely upon the Standard Protective Order to disclose information. This could create a situation in which Department of Justice employees would be forced either to violate a Court order to comply with statutory and/or regulatory requirements or else violate those duties and risk dismissal, fine, or imprisonment.[10] This Court should not permit

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[9] The United States is aware that seeking to modify a protective order already in place may place a higher burden on the party seeking to modify the order. *See Callister Nebeker & McCullough v. United States*, 2016 WL 1089242, at *2-*3 (D. Utah, Mar. 18, 2016) (Pead, Magistrate Judge). However, such is not the case here. Further, the United States did not stipulate or agree to the language in the Standard Protective Order and the Tax Division generally agrees to protective orders in rare circumstances as it believes all civil litigation should be as transparent as possible.

[10] *See* 26 U.S.C. § 7214(a)(8); 5 C.F.R. § 2635.101(b)(11); 71 FR 11446-02 (2006 WL 535646, Mar. 7, 2006); *see also Callister Nebeker & McCullough v. United States*, *supra*, (finding that

(continued...)

this result when the United States has identified specific substantive rights that are violated by the literal terms of the Standard Protective Order and is seeking prospective relief *before* any party has relied upon the Standard Protective Order in disclosing information.[11]

Defendants propose that the United States could use paragraph 17 at a later date to modify the Standard Protective Order or receive permission from the Court to disclose specific information obtained during discovery. This proposal misses the mark and imposes a much higher burden on the United States. First, the United States would likely be required to satisfy a higher legal standard to modify the protective order, and would also likely face a challenge from the defendants in which they may be able to articulate a specific example of harm or prejudice. [12] The United States would also be required to follow this procedure any time it wishes to disclose information to Internal Revenue Service employees who may be assigned to this case. Defendants' proposal does not alleviate the United States' concerns and in fact continues to violated the United States' substantive rights.

(…continued)

the United States was entitled to relief from the Standard Protective Order as its substantive rights were violated under the terms of the Standard Protective Order).

[11] *See United States v. Elsass*, 2011 WL 335957 at *5 (S.D. Ohio, Jan. 31, 2011) (King, Magistrate Judge) (rejecting a restriction that would have prevented counsel from sharing information with the IRS except for use in that case, and finding that the requested order would unjustifiably restrict the ability of the government to enforce laws); *Bayer-Onyx v. United States*, 2010 WL 2925019 at *2-3 (W.D. Pa., Jul. 20, 2010) (rejecting effort to require the United States to apprise the disclosing party of any referral to law enforcement authorities); *SEC v. AA Capital Partners*, 2009 WL 3735880, at *3 (E.D. Mich., Nov. 3, 2009) (Whalen, Magistrate Judge) (rejecting protective order because it "would impede the SEC's law enforcement function" by limiting its ability to "share information with [other] law enforcement agencies.").

[12] *See Callister Nebeker & McCullough v. United States*, *supra*, citing, *S.E.C. v. Merrill Scott & Associates, Ltd.*, 600 F.3d 1262, 1272-73 (10th Cir. 2010 (unusual or extraordinary circumstances) and *Brigham Young Univ. v. Pfizer, Inc.*, 281 F.R.D. 507, 510 (D. Utah 2012) (good cause).

Defendants also imply that the United States will be acting in bad faith by sharing information with other agencies or for purposes of related cases. The United States and the Internal Revenue Service are currently engaged in litigation regarding the solar energy tax scheme on multiple fronts, specifically, in this proceeding in District Court, and in related proceedings in the United States Tax Court. [13] In Tax Court, defendants' customers are challenging their tax liability based on tax deductions and tax credits they claimed from participating in defendants' solar energy tax scheme. [14] To the extent that there are ongoing cases in District Court and the Tax Court, the United States should be permitted to share information and conserve resources. Numerous courts have recognized situations where sharing of information conserves judicial economy and resources as well as time and resources of the parties where parties requesting information subject to a protective order could otherwise obtain the same information.[15]

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[13] *See* Complaint, Doc. No. 2.

[14] Counsel for the United States in this case is not the same as counsel in the Tax Court proceedings. The Office of Chief Counsel for the IRS represents the IRS in Tax Court proceedings. The United States also understands that the promoters are not the taxpayer parties in those Tax Court proceedings and that the taxpayer parties in the Tax Court are not represented by defendants' counsel in this proceeding. The United States objects to FN 1 of defendants' objection as it is hearsay and does not accurately reflect what is occurring in the Tax Court proceedings.

[15] *See, e.g., United States v. Chevron*, 186 F.3d 644, 650-51 (5th Cir. 1999) (where Department of the Interior and Department of Justice were engaged in simultaneous investigations of whether defendant had violated the False Claims Act, it was not an abuse of discretion for the district court to enter a protective order which permitted the Department of the Interior to share material with other agencies, in particular the Department of Justice); *S.E.C. v. Dresser Industries, Inc.*, 453 F.Supp. 573, 576 (D.D.C. 1978) (the fact that a criminal prosecution might result and that information obtained through a civil subpoena issued by the SEC may later be used in a criminal proceeding did not render the civil subpoena unenforceable); *see also*, *United States v. AT&T*, 461 F.Supp. 1314, 1338-39, 1339 n.75 (D.D.C. 1978); *Williams v. Johnson and Johnson*, 50 F.R.D. 31 (S.D.N.Y. 1970).

Finally, defendants claim that the United States may be using this case as a "pretext for trying to rebuild the government's criminal case against defendants."[16] Defendants are incorrect. This is a legitimate civil case to stop defendants from promoting an abusive tax scheme and to disgorge their ill-gotten gains from it. If during the course of this legitimate civil action the United States finds a suspected violation of law it must refer that to the appropriate agency. That permits the United States to enforce the law.[17]

Defendants' claims of prejudice and their prescription turn the law on its head. Defendants seek to prohibit us from disclosing disclose information to the Internal Revenue Service or other law enforcement agencies or require us to seek permission before disclosing any information. This does not allow the Department of Justice employees assigned to this case to meet their statutory, regulatory and ethical obligations or to comply with departmental policy. It also impairs the United States to litigate this case effectively and consult with its client, the Internal Revenue Service.

II. Defendants fail to address the United States' concerns regarding how its substantive rights are violated.

Defendants do not specifically address the United States' concern about how the literal language of the Standard Protective Order prohibits it from sharing information with employees of the Internal Revenue Service, including Internal Revenue Service, Office of Chief Counsel

[16] Doc. No. 41, at 7.

[17] The civil and regulatory laws of the United States frequently overlap with criminal laws, creating the *possibility* of parallel civil and criminal proceedings, either successive or simultaneously. *Dresser Industries*, 628 F.2d at 1374. To the extent that defendants believe there are criminal implications from any discovery responses or deposition testimony in this civil case, defendants have the right to assert their Fifth Amendment privilege regardless of any applicable protective order. *United States v. Hubbell*, 530 U.S. 27, 35–36 (2000).

employees, who may be assigned to the case. Rather, defendants seem to equate this concern with the issue of whether the United States may refer violations or suspected violations of law to the appropriate agencies/officials. Nor do defendants address the fact that the literal language of the Standard Protective Order would prohibit persons with managerial responsibility or contractors of the Department of Justice (which include paralegal contractors and litigation support contractors) from handling or reviewing designated information. Instead, defendants state that the United States can seek modification of the protective order. This argument ignores the fact that the United States may not be able to convince this Court to later modify the Standard Protective Order once it has been relied upon, creating a situation where Department of Justice employees cannot fulfill their statutory, regulatory and ethical obligations or even litigate this case effectively and efficiently.

Defendants similarly attempt to address how a "Technical Advisor" is defined and how the United States (and all the parties) would be required to prematurely identify any "Technical Advisor." The United States is concerned with prematurely disclosing any expert, especially disclosing a consulting expert whom defendants are otherwise not entitled to know. Defendants essentially try to disprove the United States' claims that its substantive rights are violated by arguing that the United States is no different than any other private litigant in this context. The United States has recognized that this provision may also create concern for other parties in this case, including the defendants. The fact that the provision may violate multiple parties' substantive rights in no way lessens the impact on the United States' substantive rights.

Finally, with respect to the United States' concerns about whether it can comply with its recordkeeping requirements, defendants cite to paragraph 13(c) of the Standard Protective Order.

However, as noted in our motion, the language in the Standard Protective Order requires the Department of Justice to notify the party in writing to determine if the matter can be resolved by the parties. The Department of Justice has done this; prior to our 26(f) meeting, the United States sent a proposed modified protective order to defendants which they flatly rejected. The United States is thus seeking relief from the Standard Protective Order. Defendants' claims that recordkeeping requirements are satisfied fall short given their outright rejection of any proposed modification and given the United States' specific claims of how it will be unable to meet recordkeeping requirements given the terms of the Standard Protective Order. [18]

CONCLUSION

Defendants fail to address most of the United States' specific concerns. Instead they point to the provisions that violate the United States' substantive rights, or otherwise do not adequately address the United States' unique statutory, regulatory, and ethical obligations or required compliance with departmental policy. The United States' substantive rights are violated under the District of Utah's Standard Protective Order. Defendants cite speculative and unspecified prejudice that they believe would result from granting the Motion. Defendants have the ability to negotiate a protective order with the United States that does not violate the United States' substantive rights, or seek protection under Fed. R. Civ. 26. As the United States has established that its substantive rights are violated by the terms of the Standard Protective Order and the application of DUCivR 26-2, the United States seeks relief in the form of suspension of the Standard Protective Order in this case.

[18] *See* 44 U.S.C. § 3101, 28 C.F.R. § 0.75(j)

Dated: May 9, 2016

/s/ Erin R. Hines

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2016. 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 the following:

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