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**IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF UTAH, CENTRAL DIVISION**

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;"><i>Plaintiff,</i></p> <p>vs.</p> <p>RAPOWER-3, LLC, <i>et al,</i></p> <p style="text-align: center;"><i>Defendants.</i></p>	<p>REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO QUASH (ECF DOC. 83)</p> <p>Case No. 2:15-CV-0828 DN</p> <p>Judge: Honorable David Nuffer Magistrate Judge Brooke Wells</p>
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Defendants, RaPower-3, LLC; International Automated Systems, LLC; LTBI, LLC; and Neldon Johnson, by and through their counsel of record, Justin D. Heideman of the law firm Heideman & Associates, hereby submit *Reply Memorandum in Support of Defendants' Motion to Quash* (ECF Doc. 83).

INTRODUCTION

On August 19, 2016, the above named Defendants filed a motion to quash subpoenas

issued by Plaintiff. On September 2, 2016, Plaintiff responded, and in its response, Plaintiff attempts to justify the subpoenas largely on the basis that “among the key issues in this case is whether Defendants are promoting sham technology as the basis for an abusive tax shelter” and that therefore “information about the names of Defendants’ customers, and how many lenses they claim to have ‘purchased’ is highly relevant to this issue.” [See ECF DOC. 85, 4, ¶ 1; see also ECF DOC. 85, 4, ¶ 2]. Furthermore, Plaintiff identifies the nature and viability of Defendants’ purported solar technology is a material matter justifying its extensive discovery. *Id.*

ARGUMENT

Plaintiff’s response alleges (1) Defendants’ motion to quash should be denied because the subpoenas seek relevant information that Defendants did not keep confidential, and that customers were not required to keep confidential; and (2) Defendants’ motion to quash failed to meet substantive and procedural requirements. Plaintiff’s motion should be (1) stricken because it is approximately twelve pages over-length, and (2) should be denied pursuant to the following:

I. THE SUBJECT SUPOENAS SHOULD BE QUASHED BECAUSE THE THRESHOLD QUESTION OF WHETHER THE TECHNOLOGY IS VIABLE SHOULD BE RESOLVED BEFORE THE EXTENSIVE DISCOVERY SOUGHT IS PERMITTED; AND THE INFORMATION SOUGHT JEOPARDIZES CONFIDENTIAL, TRADE-SECRET INFORMATION.

Plaintiff’s response makes abundantly clear that the crux of Plaintiff’s claims in this matter culminate in whether the Defendants are using solar thermal lenses as an abusive tax shelter. In support of this allegation, Plaintiff has maintained its baseless accusation that Defendants’ technology is actually a “sham”; specifically, Plaintiff claims Defendants’

technology is not now, and has never been, operational for any purposes that Congress intended to encourage through tax deductions or credits. [See ECF DOC. 85, 4, ¶ 1; see also ECF DOC. 85, 4, ¶ 2]. Furthermore, Plaintiff alleges that one of the “key” issues is whether Defendants are making fraudulent statements regarding the “material matter” of whether “the nature and viability of Defendants’ purported solar energy technology [is accurate].” *Id.* Acting from this premise, Plaintiff has, and is, performing a ridiculously large amount of discovery including, issuing subpoenas requesting vast quantities of information to over one hundred (100) people, and requesting Defendants provide information, which potentially jeopardizes the subject technology.

A. The Viability Of The Technology Should Be Determined Before Plaintiff Is Permitted to Seek Additional Technology.

Given Plaintiff’s response’s emphasis on the viability of the technology; and the alleged relevancy of information sought *via* the subpoenas with respect to whether Defendants promoted “sham” technology; the subpoenas should be quashed until the threshold question of whether the technology is in fact viable has been addressed. Filed contemporaneously with this Reply is Defendants’ *Motion to Bifurcate*. In essence, Defendants’ *Motion to Bifurcate* suggests the extensive, protracted and openly abusive discovery practice that is plaguing this litigation can be easily resolved through bifurcation. If the technology is not a “sham,” as Plaintiff suggests, then Defendants by logical extension cannot be promoting “sham” technology. Defendants refer this Court to Defendants’ *Motion to Bifurcate* and the arguments contained therein. Accordingly, this Court should quash the subject subpoenas pursuant to the *Motion to Bifurcate*, or in the alternative suspend compliance and further discovery until such motion has been decided.

B. The Possible Harm Of Disclosed Confidential Information Far Outweighs The Plaintiff's Present Need For Such Information.

A court may quash, or modify, a subpoena that requires the disclosure of trade secrets or confidential research, development, or commercial information. See *Innovative Therapies Inc. v. Meents*, 302 F.R.D. 364, 380 (D. Md. 2014). Furthermore, Rule 45(d)(3)(b) of the Federal Rules of Civil Procedure states, “to protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify a subpoena if it requires: (i) disclosing a trade secret or other confidential research, development, or commercial information ...” Fed. R. Civ. P. 45(d)(3)(b).

This Circuit has defined a trade secret as “commercial information relating to business which is secret of value, and which the owner has treated confidentially. See *R&D Business Sys. V. Xerox Corp.* 152 F.R.D. 195, 197 (D. Colo. 1993). In making a determination on whether to quash a subpoena, “the court must balance the need for the confidential information against the possible injuries resulting from disclosure.” See *Fanjoy v. Calico Bands, Inc.*, 20006 U.S. Dist. LEXIS 55158 at 7 (emphasis added). If [the court finds] disclosure of confidential research is absolutely necessary to the litigation, then the subpoenaed party must comply but protection may be implemented to ameliorate potentially harmful effects. *Id* (emphasis added).

Plaintiff's response suggests that the customer subpoenas seek documents relevant to the Plaintiff's claims, that Defendants do not have any confidential information regarding the solar energy scheme, and that Defendants themselves publicize the features of their confidential technology. In support of this, Plaintiffs identify, among other things, information contained on

the websites hosted by Defendants and presentations given on the development site. Defendants heavily dispute these allegations. Specifically, demonstrations can be performed regarding the products and the basics of the technology without disclosing the novel formulas behind such. However, given the extent of the information sought, by its nature, there is an inherent risk confidential information has been, and subsequently could be, jeopardized. Furthermore, even if Plaintiff's allegations that Defendants have no real confidential information and that Defendants have publicized all pertinent information are true, Plaintiff cannot show the information sought is absolutely necessary. Specifically, as mentioned *supra*, the information is not necessary until the threshold question of viability has been answered. Moreover, Plaintiff's argument ignores the fact that most of its information is password protected and segmented to specific users.

Plaintiff has made unequivocally clear that it believes the technology is a sham, and is material to this matter. [See ECF DOC. 85, 4, ¶ 1; see also ECF DOC. 85, 4, ¶ 2]. Ironically, Plaintiff has offered NOTHING to support this belief. Therefore, if the technology can be verified, by its own admission, the subject subpoenas do not request necessary information. This Court should note that where a risk of highly sensitive technology could be accidentally disclosed, Defendants absolute willingness to prove the viability of such technology completely obviates the need for the subject subpoenas at this time. *See Fanjoy v. Calico Bands, Inc.*, 20006 U.S. Dist. LEXIS 55158 at 7. Therefore, the potential harm outweighs Plaintiff's need, and this Court should rule accordingly.

II. DEFENDANTS' MOTION MEETS BOTH SUBSTANTIVE AND PROCEDURAL REQUIREMENTS

A. Defendants Have Standing To Move to Quash Or Modify The Customer Subpoenas Because Defendants Have An Interest In The Documents Requested.

Plaintiff errs in its analysis by stating conclusively, with no corresponding analysis, that Defendants do not have a personal right or privilege in their customer's documents. The subpoenas request the personal tax information of the third-parties and documents from the Member Office area on www.rapower3.com.

Rule 45(d)(3)(b) of the Federal Rules of Civil Procedures allows the Court to protect a party affected by a subpoena to third-parties if it requires "(i) disclosing a trade secret or other confidential research, development, or commercial information . . ." Fed. R. Civ. P. 45(d)(3)(b)(i) (emphasis added). The private business dealings and information shared with the third-parties is "commercial information", which is not public information, and should remain confidential and private. Plaintiff fails to recognize that disclosing private business dealings, and negotiations, and contracts generally, is likely to injure Defendants in ways that cannot fully be understood or articulated. Additionally, there should be no doubt that the personal tax information is confidential.

Further, Defendant has an interest in the personal tax information of the third-parties because it will specifically reflect the income the subpoenaed individuals have been paid by RaPower-3. This information is confidential to both the third-party and to RaPower-3.

Defendant also has an interest in the information available in the Member Office area of

www.rapower3.com because this information is proprietary confidential company information that is not available to the general public. If the company wished to make this information public it would not have protected it with a registration and login. Plaintiff has suggested it has not been protected, however, if that were true, Plaintiff would presumably already have access to the information, and would not have to issue a subpoena to get the information.

Thus, Defendants have a personal interest in the information sought, and have standing to move to quash the subpoenas and protect the information sought.

B. Defendants Do Keep the Information Confidential

Plaintiff has erred by alleging that Defendants do not keep the subpoenaed information confidential. The very nature of personal tax information should be presumed confidential. In fact, the law requires that the IRS keep the information confidential, and unless the third-parties or Plaintiff has disseminated their own tax records, it should be presumed it is confidential.

Further, as stated above, the information in the Member's Office area of the RaPower-3 website has been protected by a registration and login, and thus Defendants can show that it has historically protected the information. If this information was public information, the information would not be protected with a registration and login. Additionally, Plaintiff would already have the information if it had not been protected, so apparently the registration and login procedure has been successful in keeping the information confidential, contrary to Plaintiff's allegations that anyone could register and get the information. If that were true, why would Plaintiff not register itself and obtain the information.

Clearly, the information sought has been protected by the third-parties and by RaPower-3 and thus, it should be presumed confidential.

C. Defendants' Motion Should Not Be Denied For Procedural Failures

1. Defendants' Motion should not be dismissed as untimely.

Under Rule 6 of the Federal Rules of Civil Procedure, "When an act may or must be done within a specified time, the court may, for good cause, extend the time." Fed. R. Civ. P. 6(b)(1). If the time for compliance is passed, the court may extend the time for excusable neglect. Fed. R. Civ. P. (b)(1)(b). Here, nearly 30 subpoenas have been issued in the past couple months and at least one extension for compliance was granted, and Defendants' Motion was timely pursuant to that extension. Furthermore, if the subpoenas at issue are at least modified, as requested in Defendants' motion, Plaintiff will not be unfairly prejudiced. Specifically, in Defendants' motion, Defendants have requested the subpoenas at least be modified until this Court has decided the issue surrounding the protective order. Here, in light of this, the Court should exercise its discretion under Rule 6 of the Federal Rules of Civil Procedure and not deny Plaintiff's Motion on the grounds of being untimely.

2. The issuing district court is the correct forum for Defendant to move to quash subpoenas issued to third-parties requested to comply in out-of-state districts.

Plaintiff erroneously argues that under Fed. R. Civ. P. 45(d)(3)(B), Defendant should have to quash or modify the subpoenas issued to third-parties in the district court where compliance is required. Plaintiff's argument on this point is in err for two reasons. First, Fed. R.

Civ. P. 45(d)(3)(B) does not apply to Defendant because Defendant is not the person from who production is sought. Further, Plaintiff's argument is contradictory to the rationale behind Fed. R. Civ. P. 45(d), which is to avoid undue burden and expense.

Fed. R. Civ. P. 45(d) is meant to provide a shield to the "person commanded to produce," in order "to avoid imposing undue burden and expense on a person subject to the subpoena." See, 45(d)(2)(B); Fed. R. Civ. P. 45(d)(1). Presently, Plaintiff is attempting to use Fed. R. Civ. P. 45(d) as a sword to inflict undue burden and expense on Defendant. Defendant has motioned this Court to quash subpoenas issued to third-parties. Requiring Defendant, who is present in this District, to quash the subpoenas in multiple out-of-state jurisdictions would undoubtedly result in undue burden and expense to Defendant. Interpreting, Fed. R. Civ. P. 45(d) in this manner, as suggested by Plaintiff, simply flies in the face of the intent and goal sought to be accomplished by Fed. R. Civ. P. 45(d). Plaintiff simply should not be allowed to inflict undue burden or expense upon Defendant this way.

Thus, this Court should dismiss Plaintiff's argument on this point. This District Court, where the case is pending and where Defendant is located, is the correct venue for Defendant to move to quash subpoenas issued to third-parties residing out-of-state.

3. Defendants had no duty to meet and confer because they were not the parties seeking to compel discovery, and even in the event they were required to meet and confer, the parties discussed issues regarding discovery on numerous occasions.

Plaintiff suggests Defendants' motion should be denied because the parties failed to "meet-and-confer" regarding Defendants' objections. However, because Defendants were not the

parties seeking to compel discovery, they were not required to meet and confer. Rule 37 of the Federal Rules of Civil Procedure states that when a party is moving to compel discovery, “[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.” Fed. R. Civ. P. 37(a)(1).

DUCivR 37-1(a) states that a court will not entertain a discovery motion “unless counsel for the moving party files with the court, at the time of filing the motion, a statement showing that counsel making the motion has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion.” In a recent case, *Am. Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 2015 U.S. Dist. LEXIS 103814, 2015 WL 4693468 (D. Utah Aug. 5, 2015), the court stated that before the court would consider a motion to compel, the meet and confer requirements must be made. Moreover, and perhaps more importantly, Rule 45 of the Federal Rules of Civil Procedure, governing the quashing of subpoenas, does not include any requirement to meet and confer. Fed. R. Civ. P. 45(d)(3)(a). Here, Defendants are neither the party attempting to obtain discovery nor are they seeking a motion to compel. Defendants are simply attempting to quash a subpoena that contravenes the agreement the parties made concerning confidential information. Because Defendants were not seeking discovery, they are not required to meet and confer. Even in the event Defendants were required to meet and confer, the parties have for all intents and purposes done so on multiple occasions.

This Court is fully aware of the issues plaguing this litigation with respect to discovery. Specifically, Plaintiff sought relief from the Utah Standard Protective Order and

Defendants objected to Plaintiff's motion on the grounds the Standard Protective Order provides Defendants with the protection needed to ensure their technology, practices, and procedures remain confidential and proprietary. As a result of this, the parties entered into an agreement whereby the Defendants could refrain from producing information they believed would be subject to any applicable protective order.

Defendants feel that since the government decided not to bring criminal charges against them that now, in lieu of a criminal action, the government has brought this civil action. In light of the parties' history and the agreement entered into, the parties have extensively disagreed on what information should be discoverable at this time. Specifically, whether certain information is confidential, trade secret, or proprietary. As a result of these disagreements, the parties have had numerous teleconferences to discuss concerns over what information will be presently produced. Defendants have made Plaintiff aware that any information that could possibly disclose confidential information will be provided subject to the outcome of the hearing on the protective order. Therefore, even though the parties are not required to meet and confer either under the Federal Rules of Civil Procedure or Utah's local rules, the parties have substantially done so.

CONCLUSION

The foregoing demonstrate how the subpoenaed information is unnecessary given Defendants' desire and willingness to bifurcate this matter and how Defendants' motion was otherwise appropriate and should be granted.

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SIGNED and DATED this 16th day of September, 2016.

HEIDEMAN & ASSOCIATES

/s/ Justin D. Heideman _____

JUSTIN D. HEIDEMAN

*Attorney for RaPower-3, LLC, International Automated
Systems, Inc., LTBI, and Neldon Johnson*

CERTIFICATE OF SERVICE

On this 15th day of September, 2016, I hereby certify a true and correct copy of the forgoing **REPLY MEMORANDUM SUPPORTING DEFENDANTS’ MOTION TO QUASH (ECF DOC. 83)** was served on the following:

Party/Attorney	Method
<p><i>Former Attorneys for Defendants</i></p> <p>James S. Judd Richard A. Van Wagoner Rodney R. Parker Samuel Alba Snow Christensen & Martineau 10 Exchange Place 11th FL P.O. Box 45000 Salt Lake City, Utah 84145 Tele: (801) 521-9000 Email: jsj@scmlaw.com rvanwagoner@scmlaw.com rparker@scmlaw.com sa@scmlaw.com</p>	<p>Hand Delivery U.S. Mail, postage prepaid Overnight Mail Fax Transmission <input checked="" type="checkbox"/> Electronic Filing Notice</p>
<p><i>Attorney for Defendants</i></p> <p>R. Gregory Shepard Roger Freeborn</p> <p>Donald S. Reay Reay Law PLLC 43 W 9000 S Ste B Sandy, Utah 84070 Tele: (801) 999-8529 Email: donald@reaylaw.com</p>	<p>Hand Delivery U.S. Mail, postage prepaid Overnight Mail Fax Transmission <input checked="" type="checkbox"/> Electronic Filing Notice</p>

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