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

UNITED STATES OF AMERICA, *Plaintiff*, vs. RAPOWER-3, LLC, *et al*, *Defendants*.	**MOTION TO BIFURCATE** Case No. 2:15-CV-0828 DN Judge: Honorable David Nuffer Magistrate Judge Brooke Wells

Defendants RaPower-3, LLC; International Automated Systems, LLC; LTB1, LLC; and Neldon Johnson, ("Defendants") by and through their counsel of record, Justin D. Heideman, of the law firm Heideman & Associates, hereby submit this *Motion to Bifurcate*. The memorandum in support is attached herein.

In short, the crux of Plaintiff's claims in this matter is that the Defendants are using solar thermal lenses as an abusive tax shelter. In support of this allegation, Plaintiff claims that

"Defendants' technology is actually a sham . . . ." Specifically, Plaintiff claims Defendants' technology "is not now, and has never been, operational for any purpose that Congress intended to encourage through tax deductions or credits." [See Doc. 85, 2:1-8]. Furthermore, Plaintiff alleges that one of the "key" issues in this matter is whether Defendants are making fraudulent statements regarding a "material matter" and that a "material matter" is "the nature and viability of Defendants' purported solar energy technology." *Id*. Acting from this premise, Plaintiff has and is performing a massive amount of discovery - including issuing subpoenas requesting large amounts of information to over one hundred (100) people - and requesting Defendants provide information, which potentially jeopardizes the subject technology.

ARGUMENT

As Plaintiff asserts, a material matter in this case is the nature and viability of Defendants' purported solar energy technology. [See Doc. 85, 2:1-8]. Plainly, this is the threshold question that, if answered, could save hundreds of people countless hours and resources. Accordingly, this Court should bifurcate this case to permit the threshold answer regarding the viability of the technology so as to preserve Defendants' confidentiality, as well as to further judicial economy.

I. THIS COURT SHOULD BIFURCATE THIS CASE TO PERMIT THE THRESHOLD QUESTION OF THE TECHNOLOGIES' VIABILITY TO BE ANSWERED BECAUSE BIFURCATION WILL BE MORE CONVENIENT, AVOID PREJUDICE, AND BE CONDUCTIVE TO EXPEDITION AND ECONOMY.

Rule 42(b) of the Federal Rules of Civil Procedure states, "[f]or convenience, to avoid prejudice, or to expedite and economize, the court may order a separate trial of one or more separate issues, claims, crossclaims, counterclaims, or third-party claims. When ordering a

separate trial, the court must preserve any federal right to a jury trial." Fed. R. Civ. P. 42(b). In determining whether to try issues and claims separately, bifurcate the case, courts have broad authority and the decision should be based on the circumstances of particular litigation. See *M2 Software, Inc. v. Madacy Entm't,* 421 F.3d 1073, 1088 (9th Cir. 2005)(district court had broad discretion to bifurcate case); see also *Ecrix Corp. v. Exabyte Corp*. 191 F.R.D. 611 (10th Cir. 2000)(trial court has discretion to decide whether to bifurcate a trial); see also *Easton v. City of Boulder*, 776 F.2d 1441 (10th Cir. 1985).

In exercising its discretion to bifurcate, "a court should consider the following factors: (1) judicial economy; (2) convenience to the parties; (3) expedition; and (4) avoidance of prejudice and confusion." *Ecrix*, 191 F.R.D. at 613; see also *In re Innotron Diagnostics*, 800 F.2d 1077, 1085 (Fed. Cir. 1986). As discussed below, Bifurcation of this matter will further judicial economy, convenience the parties, expedite the case, and will not prejudice either party.

A. Bifurcation Will Further Judicial Economy And Expedite The Case

Courts often employ bifurcation when there is a chance that it will speed the resolution of the case. See *Amato v. City of Saratoga Springs*, 170 F.3d 311 (2d Cir. 1999); see also *Ecrix*, 191 F.R.D. at 613. In *Ecrix*, the court held that bifurcation generally furthers judicial economy "as antitrust and unfair competition claims need not be heard by a court if patent infringement is proved." *Ecrix*, 191 F.R.C. at 613. Although the instant matter is not a patent infringement case, the same basic logical principles apply. Plaintiff alleges that the key issue in this case is whether Defendants are promoting sham technology. [See Doc. 85, 4:1-8]. The logical extension

therefrom is whether the Defendants have made false or fraudulent statements regarding the viability of the solar energy technology. Accordingly, the question of whether the technology is viable is plainly the threshold question, which if answered in the affirmative, obviates the need to review Defendants' statements with respect to such technology.

Like in *Ecrix*, claims need not be heard, or tried, if the threshold question regarding the viability of the technology is answered. Plaintiff has alleged that "*Defendants' technology is actually a sham: it is not now and has never been operational for any purpose*." [See Doc. 85, 4:1-2]. Furthermore, in the event the threshold question of viability is answered in the negative, this Court can then focus on whether Defendants statements are fraudulent, and if those statements led to an abusive tax shelter. Accordingly, however the threshold question is answered, and this matter will be expedited thereby. Therefore, Bifurcation of this case has the potential to end this seemingly endless litigation, and further judicial economy.

B. Bifurcation of This Case Will Convenience The Parties And All Those Involved With This Litigation.

Convenience may justify bifurcation when counterclaims or similar matters involve issues that could alleviate protracted or extensive discovery. See *Carlisle Corp. v. Hayes*, 635 F. Supp. 962, 967 (S.D. Cal. 1986). Furthermore, bifurcation is justified and held convenient when it helps to keep separate issues clear and avoid confusion. See *SCFC ILC, v. Visa, Inc*., 801 F. Supp. 517, 528-29 (D. Utah 1992).

Much of the Plaintiff's discovery in this case seeks gross receipts from Defendants' sale of solar thermal lenses and solar towers. Furthermore, Plaintiff has sought information about the

names of Defendants' customers and how many lenses the customers have purchased. [See Doc. 85, 4:14-20]. Plaintiff has subpoenaed documents from more than one hundred (100) of Defendants' customers. The customer subpoenas request 13 categories of documents including:

> 1) copies of correspondence between the customer and any Defendant, such as documents that the customer received containing information about the technology or tax benefit; 2) documents reflecting any professional advice or opinions that the customer received about participating in the solar energy scheme; 3) copies of tax returns submitted to the IRS by the subpoenaed individuals claiming any tax benefit as a result of participating in the solar energy scheme; 4) documents that purportedly substantiate any deduction, credit, claim or other tax item related to a solar lens or other equipment in Defendants' purported solar energy technology; and documents reflecting payments made by any client to Defendants related to the solar energy scheme.

[See generally Pl.'s Ex. 118].

Oddly and notably, none of Plaintiff's requests involve the viability of the technology. However, the fact that information has been requested from over one hundred (100) individuals creates a substantial workload for many people. Furthermore, these subpoenas have sparked motions to quash as well as disagreements between the parties. If the threshold question, whether the technology is viable, was answered in the affirmative, there would be no logical or legally significant need for this protracted and extensive discovery.

Apart from the potential of avoiding massive discovery and the disputes that come with it, this discovery is distracting given the central threshold question in this case. Between all the motions and oppositions being filed between the parties, this case is turning into a big discovery battle and convoluting the essence of the litigation. Already, the focus of the litigation has left the viability of the technology as evidenced by the protective order fight and the motions to quash; as

well as the fact that the discovery requests do not even address it. Continued, protracted discovery serves only to confuse the issues and further hinder this litigation. Plaintiff can hardly argue that a determination on the viability of the technology will not serve their interests, or that such a determination would fail to save countless man hours and resources.

C. Bifurcation Will Alleviate Prejudice Against Defendants And Will Assist The Avoidance Of Confusion

The longer this case is protracted the more Defendants will be prejudiced. At the heart of this matter is the technology utilized by Defendants. The technology is novel, ground breaking, and extremely sensitive. With every discovery request, the risk of Defendants' technology being jeopardized is threatened. If the information were released, even accidentally, the results would be catastrophic for Defendants' business model. To this point, Plaintiff argues the technology is a "sham" and thus concludes no trade secrets are in jeopardy. Plainly, this assertion also rests on the threshold of query. Bifurcation, therefore, is logically a sound alternative. By bifurcating the case, the threatened harm and prejudice to Defendants regarding the technology is alleviated.

Under the appropriate securities, Defendants can unequivocally prove the viability of the technology. By so doing, the burdensome, protracted discovery is unnecessary and Defendants' confidential trade secrets are no longer jeopardized. Further, as mentioned *supra*, bifurcation will not only help avoid the confusion that attends the already lengthy discovery, but will facilitate a settlement of this entire litigation. When the consequences attending a disclosure of confidential, trade secret information are weighed with the effect of a determination the technology is viable, bifurcation almost becomes necessary.

CONCLUSION

The foregoing demonstrates that bifurcation furthers (1) judicial economy; (2) convenience to the parties; (3) expedition; and (4) avoidance of prejudice and confusion. For these reasons, Defendants respectfully request this Court bifurcate this case and settle the material, essential matter of whether the technology is viable.

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., LTB1, and Neldon Johnson

CERTIFICATE OF SERVICE

On this 16th day of September, 2016, I hereby certify a true and correct copy of the forgoing **MOTION TO BIFURCATE** was served on the following:

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