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IN THE UNITED STATES DISTRICT COURT
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.

No. 2:15-cv-00828-DN-BCW

**MEMORANDUM IN OPPOSITION TO
MOTION FOR RELIEF FROM
STANDARD PROTECTIVE ORDER**

Defendants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC, and Neldon Johnson submit this Memorandum in Opposition to Motion for Relief from Standard Protective Order.

INTRODUCTION

The United States claims that application of DUCivR 26-2(a) would violate the government's "substantive rights" to share information internally, to share information with the IRS and other agencies or contractors, and to maintain secret the identities of the recipients of confidential information. It also claims that the order violates the government's record-keeping requirements.

This is a civil case, and the government's concerns regarding identification of consulting experts ("technical advisors")—internal or external—are no different than concerns that might be raised by any private litigant. The government's other concerns, regarding reporting suspected violations of law, are already adequately protected. The exceptions the government seeks are so broad that they would eviscerate any protection the order provides. For example, the government wants to be allowed to disclose evidence of fraud, yet the whole premise of this case is alleged fraud. If the government is to be the sole judge of what is or is not covered by the order, then the protection of the order disappears. The Court's standard order already protects the government's interests by allowing it to seek relief from the order as necessary and appropriate, and by explicitly recognizing and protecting the government's record-keeping requirements.

If the Court were to grant the government's motion, defendants would be the parties harmed and prejudiced, because their proprietary information would be put at risk. Defendants

are concerned that the government is seeking relief from the Standard Protective Order precisely to allow disclosure obtained to other governmental agencies in order to assist such agencies to build their respective cases against defendants and others. Allowing 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.

ARGUMENT

DUCivR 26-2(a) provides that “good cause exists to provide a rule . . . entering a Standard Protective Order.” “Unless the court enters a different protective order, pursuant to a stipulation or motion, the Standard Protective Order available on the Forms page of the court’s website <http://www.utd.uscourts.gov> shall govern and discovery under the Standard Protective Order shall proceed.” DUCivR 26-2(a). If a party believes that its substantive rights are being impacted by the application of the Standard Protective Order, that party may seek relief. *Id.*

“[A] party seeking protection [from a protective order] has the burden of demonstrating good cause under [Federal Rules of Civil Procedure 26](#).” *Callister Nebeker & McCullough v. United States*, No. 2:14-CV-00919-TC-DBP, 2016 WL 1089242, at *2 (D. Utah Mar. 18, 2016). In *Callister*, Magistrate Judge Pead held that the parties retain the respective burdens that they would have under [Fed. R. Civ. P. 26](#), meaning that the party seeking to assert confidentiality has the burden. *Id.* In the present case, however, the parties’ arguments presume the confidential nature of the information, so the burden is on the government to establish that the Standard Protective Order is too restrictive.

A district court has inherent authority to grant a motion to modify a protective order where good cause is shown. *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 201 (N.D. Cal.

2009). Although the government has described circumstances where the Standard Protective Order may conflict with certain internal governmental procedures, the government's requested modification jeopardizes defendants' proprietary information and substantially prejudices defendants by allowing various government agencies to coordinate tax, civil, and criminal attacks against them.

As conceded by the government, subjects of discovery will include "solar energy technology" as well as financial information of defendants. (*See* Motion ([Dkt. 39](#)), p. 4.) Defendants allege that they have invented solar energy technology and that they employ confidential procedures and practices in regards to the solar energy technology. Defendants have an interest to keep their technology, practices, and procedures confidential. The Standard Protective Order provides defendants with the protection needed to ensure their technology, practices, and procedures remain confidential and proprietary.

The government's motion requests several changes to the standard order. First, the government seeks permission to disclose defendants' technology to consulting experts without the requirement of identifying those experts in advance. This particular request has nothing to do with the government's status as government. It simply objects to the disclosure of the identities of consulting experts on the same basis that any private litigant would do so. This is an issue that has been litigated many times, and in every instance the parties have legitimate competing interests—the owner of the information has an interest in ensuring that the discovery process is not used, intentionally or otherwise, as a mechanism for transfer of its private information to a competitor or someone who is not entitled to use it; and the requesting party has an interest in keeping its consultants secret. The Standard Protective order resolves these competing interests

in favor of disclosure of the consultant's identity. The government offers no special circumstances that should persuade this Court that special reason exists to diverge from standard practice on this issue.

Next, the government's motion seeks permission to disclose defendants' secrets to other government agencies. Here, the government is situated differently from private litigants, in that under certain circumstances it may have a statutory duty of disclosure. The Standard Protective Order, however, protects the government's special need for potential disclosure in paragraph 17, which provides, "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." It seems plain that, if the government perceives that its statutory disclosure duty has been triggered in some specific way, it can present the circumstances to the Court for resolution.

The alternative is to place the defendants' confidential information in the hands of the government without any restriction on disclosure. The government's complaint in this case already alleges, "In short, Defendants' purported 'disruptive' and 'revolutionary' technology is a sham." (Complaint ([Dkt. 2](#)), ¶ 55.) With the government already believing the technology is a "sham," there is no reason to believe that it would not rely on a "fraud" exception to immediately disclose all confidential information it accumulates in this case. The exception the government seeks would therefore render the confidentiality protection illusory.

In support of its demand, the government cites [26 U.S.C. § 7214\(a\)\(8\)](#). That section applies to "[a]ny officer or employee of the United States acting in connection with any revenue law of the United States . . . having knowledge or information of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any

revenue law.” Here, however, the government has submitted the question of the existence of fraud to the Court for civil adjudication; thus, the statutory provision would not be triggered until after the triggering determination occurs. If this were not the case, the government would become the sole judge of when disclosure was permitted, and the entire protective order would become illusory.

The government also relies on [5 C.F.R. § 2635.101\(b\)\(11\)](#). That section, however, applies to public corruption and is inapposite. The title of the section is “Basic obligation of public service,” and subsection (b)(11) requires disclosure of “waste, fraud, abuse, and corruption.” In its memorandum, the government misleadingly deletes the word “corruption” (Motion ([Dkt. 39](#)), p. 6), which facilitates its incorrect argument that this section might be applicable to this case.

There are currently related tax court proceedings regarding defendants and the purchasers of products incorporating defendants’ technology. The government’s request to become the sole judge of whether disclosure is warranted based on “violations of revenue laws,” “violations of laws,” and “fraud, waste, or abuse” is an attempt by the government to open up avenues of disclosure among all branches of the government for the purpose of building these various cases.¹

¹ In the related tax case, Judge Albert G. Lauber of the United States Tax Court expressed concern regarding the problems associated with having the IRS’s expert witness agree to the restrictions of a nondisclosure agreement. The IRS informed Judge Lauber that it was using the same expert witness as the Department of Justice in the above-captioned matter to evaluate defendants’ technology. Judge Lauber voiced his concern as to whether the IRS and the DOJ could use the same witness in light of a nondisclosure agreement. Judge Lauber also voiced concern as to whether the expert would be evaluating the site as the official expert of the IRS or the DOJ, or both.

Additionally, in 2012, the government executed search and seizure warrants against defendants in an attempt to bring a criminal action against defendants. *See* Case No. 2:12.MJ-180BCW. Such warrants were authorized by this Court. The government decided not to bring criminal charges in that matter. Now, in lieu of a criminal action, the government has brought this civil action. Defendants are concerned that this action may be a pretext for trying to rebuild the government's criminal case against defendants. As such, the government's attempt to modify the Standard Protective Order to allow it to disclose possible "criminal violations" to other agencies would substantially prejudice defendants.

For those reasons, the better course of action would be to require the government to seek relief from the protective order when and if it feels its disclosure obligations have been triggered. At that point, the Court can make an impartial determination of the need for disclosure, and defendants' information will be protected to the maximum permissible extent.

Finally, the government argues that the Standard Protective Order interferes with its ability to comply with its record-keeping requirements. The Standard Protective Order, however, contains language in paragraph 13(c) specifically addressing this issue:

The provisions of this paragraph shall not be binding on the United States, any insurance company, or any other party to the extent that such provisions conflict with applicable Federal or State law. The Department of Justice, any insurance company, or any other party shall notify the producing party in writing of any such conflict it identifies in connection with a particular matter so that such matter can be resolved either by the parties or by the Court.


Based on this language in the Standard Protective Order, the government's claim that the order interferes with record-keeping is without merit.

CONCLUSION

For the reasons stated above, defendants respectfully request that this Court deny the Motion for Relief from Standard Protective Order and DUCivR 26-2, and order that the Standard Protective Order governs this case.

DATED: April 25, 2016.

SNOW, CHRISTENSEN & MARTINEAU

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CERTIFICATE OF SERVICE

I hereby certify that on April 25, 2016, the foregoing MEMORANDUM IN OPPOSITION TO MOTION FOR RELIEF FROM STANDARD PROTECTIVE ORDER 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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A handwritten signature in blue ink, appearing to be "JR", is written over a horizontal line.