

JUSTIN D. HEIDEMAN (USB No. 8897)

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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, INTERNATIONAL
AUTOMATED SYSTEMS, INC., et al.,

Defendants.

MOTION TO QUASH SUBPOENA

Case No. 2:15-CV-0828 DN

Judge: Honorable David Nuffer

Defendants, RAPOWER-3, LLC; INTERNATIONAL AUTOMATED SYSTEMS, INC.; LTB1, LLC; and NELDON JOHNSON (collectively “Defendants”); by and through their attorney of record, Justin D. Heideman of the law firm of Heideman and Associates, and pursuant to DUCivR 7-1 and Fed. R. Civ. P. 45, request this Court quash or, in the alternative, modify the June 2, 2016, *Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action* (the “Subpoena”).

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ARGUMENT

I. THIS COURT SHOULD QUASH THE SUBPOENA BECAUSE THE INFORMATION DEFENDANTS ARE COMMANDED TO PRODUCE ARE CONFIDENTIAL PURSUANT TO FED. R. CIV. P. 45(D)(3)(B).

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). Rule 45(d)(3)(b) of The Federal Rules of Civil Procedure states, “[t]o 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 the 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).

The 10th 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). Furthermore, in making a determination on whether to quash or modify, “the court must balance the need for confidential information against the possible injury resulting from disclosure.” See *Fanjoy v. Calico Brands, Inc.*, 2006 U.S. Dist. LEXIS 55158 at 7. “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.

In *Centurion Industries v. Warren Steurer and Associates*, 665 F.2d 323 (10th Cir. N.M. 1981), a subpoena was issued for computer software trade secrets so experts could adequately form an opinion regarding patent infringement and to rebut any assertions of non-infringement in

the action. The court held the information outweighed potential injury but issued a protective order protecting the trade secrets from those outside of the litigation. *Id.*

Here, the information requested by the Subpoena falls squarely within 45(d)(3)(b). The essence of the information requested is directly related to the “lenses” as well as confidential and commercial communications and actions undertaken by Defendants. Similar to *Centurion*, the Subpoena requests information that if produced will expose trade secrets. Furthermore, disclosure by Defendants will expose confidential and commercial communications. However, unlike in *Centurion*, the requested documents are not directly related to understanding the technology of the lenses. Therefore, information involving the details of Defendants technology should receive a higher degree of protection than those documents in *Centurion*, and in *Centurion*, the documents were subject to a protective order.

Here, the documents requested contain highly sensitive and confidential information regarding the technology created and used by Defendants. The harm Defendants would suffer if the trade secrets were disclosed far outweighs the benefits received from such information. If this Court, however, finds the information “absolutely necessary to the litigation,” Defendant should at least maintain the protective order of such disclosed information to protect the information from making its way outside the litigation. *Fanjoy*, 2006 U.S. Dist. LEXIS 55158 at 7; see also *Industries*, 665 F.2d 323.

Defendant requests that if this Court determines not to quash the Subpoena, that this Court modify the Subpoena to allow Defendants to produce the requested documents following the July 27, 2016, hearing on the standard protective order. Because the information requested

involves highly confidential as well trade secret information, Defendant believes that modification of the subpoena, in the very least, is reasonable given the hearing on the standard protective order is only a few short weeks away.

II. PURSUANT TO THE STANDARD PROTECTIVE ORDER, DEFENDANTS SHOULD BE GRANTED ADDITIONAL TIME TO REVIEW AND DESIGNATE CONFIDENTIAL INFORMATION.

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, this Court has ordered the Standard Protective Order (“Protective Order”) which governs any designated record of information produced pursuant to required disclosures under any federal rule. Pursuant to the Protective Order, “Documents and things produced or furnished during the course of this action shall be designated as containing [Confidential Information] by placing on each page” Pursuant to this, if this Court denies quashing or modifying the Subpoena, Defendants should be granted additional time, or at least until this Court holds a hearing on the Protective Order, to review and properly designate the documents and information in Defendants’ possession.

CONCLUSION

For these reasons, Defendants request this Court quash or modify the June 2, 2016, Subpoena to allow production to occur after the hearing on the standard protective order and with enough time following such to provide accurate, complete responses.

DATED and SIGNED July 11, 2016.

HEIDEMAN & ASSOCIATES

/s/ Justin D. Heideman

Attorney for RAPower-3, LLC; International Automated Systems, Inc.; LTB1, LLC; and Neldon Johnson

CERTIFICATE OF SERVICE

On this 11th day of July 2016, I hereby certify a true and correct copy of the forgoing **MOTION TO QUASH SUBPOENA** was served on the following:

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

Suzanne Peterson, Legal Assistant