

JOHN W. HUBER, United States Attorney (#7226)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
185 South State Street, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 524-5682
Email: john.mangum@usdoj.gov

ERIN HEALY GALLAGHER, *pro hac vice*
DC Bar No. 985670, erin.healygallagher@usdoj.gov
ERIN R. HINES, *pro hac vice*
FL Bar No. 44175, erin.r.hines@usdoj.gov
CHRISTOPHER R. MORAN, *pro hac vice*
NY Bar No. 5033832, christopher.r.moran@usdoj.gov
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2452

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 RAPOWER-3's RESPONSE TO UNITED STATES' MOTION TO COMPEL RAPOWER-3 TO SIGN AND SUPPLEMENT ITS RESPONSES TO PLAINTIFF'S FIRST INTERROGATORIES Judge David Nuffer Magistrate Judge Brooke C. Wells |
|--|---|

On July 14, 2016, RaPower-3, LLC (RaPower) filed its response to the United States' Motion to Compel RaPower-3 to sign and Supplement its Responses to Plaintiff's First Interrogatories. (Doc. No. 64.)

I. By failing to timely object, RaPower has waived all objections.

Pursuant to the parties' stipulations, all defendants' responses to the United States' first interrogatories were due on May 27, 2016. (Doc. No. 53.) But on May 27, the United States did not receive a response from RaPower. On June 2, 2016, the United States raised the issue of RaPower's failure to provide any response in a letter to its counsel. Doc. No. 59-2. Hours after the United States moved to compel RaPower to respond to the interrogatories on June 21, 2016, RaPower provided a response. (Doc. Nos. 53 & 59.) We amended our motion to compel, and argued that RaPower waived any objections it may have had. (Doc. No. 59, ¶ 4.) On July 14, 2016, RaPower provided supplemental interrogatory responses but every response raised objections. (Exhibit D.) Untimely objections to discovery requests are waived. *Kelatron v. Marlyn Nutraceuticals*, 2013 WL 4498722, at *3 (D. Utah 2013).

The Court may find "good cause" to excuse a party's failure to timely object. Fed. R. Civ. P. 33(b)(4). But RaPower does not even address its failure to timely object to the United States' interrogatories, or provide any excuse – much less "good cause" for its delay. RaPower was served with the interrogatories on April 8, 2016. Its first (and inadequate) response was made on June 21, long past both the 30-day window for objections to be made, and the agreed deadline for RaPower's responses. Fed. R. Civ. P. 33(b)(2). RaPower's decision to obtain new counsel during the time that the interrogatories were pending does not constitute "good cause" to excuse its failure to timely object – particularly when its co-defendants, Neldon Johnson, LTB1, LLC, and International Automated Systems, Inc., who are also represented by the same attorney, Mr. Justin Heideman, were all able to file timely interrogatory responses and objections.

The United States requests that the Court find that RaPower has waived all objections and order RaPower to fully answer the United States' interrogatories, as discussed below.

II. Even if RaPower had timely objected to the United States' interrogatories, its objections are invalid and therefore waived.

On July 14, 2016, RaPower provided a signed, supplemental response to the interrogatories directed to it. (Exhibit D.) The responses are inadequate for the reasons described below and RaPower should be compelled to supplement its responses.

- A. In response to each interrogatory, RaPower makes boilerplate objections that generally fail to specify the basis for the objection. A party resisting discovery must show specifically why the discovery request is objectionable. *Flying J Inc. v. TA Operating Corp.*, 2007 WL 2220584, at *2 (D. Utah 2007) (enforcement later denied with respect to unavailable documents, 2008 WL 5449714 (D. Utah Dec. 31, 2008)). Boilerplate objections are ineffective and result in waiver. *Cartel Asset Mgmt. v. Ocwen Fin. Corp.*, 2010 WL 502721, at *8 (D. Colo. 2010).
- B. Aside from the boilerplate RaPower's primary objection to answering the interrogatories in full at this time is that the protective order issue is yet unsettled. The United States' objection to the Standard Protective Order is set for hearing on July 27, 2016. (Doc. Nos. 39 & 50.) While the Standard Protective Order remains in effect unless, and until, the Court rules on the United States' motion, RaPower's reliance on the Standard Protective Order is misplaced.

The Standard Protective Order covers proprietary technical, scientific, financial, business, health, or medical information. (DUCivR 26-2 Standard Protective Order, ¶ 2(a).) Parties are required to avoid designating any documents or information as protected information

that is not entitled to such designation or which is generally available to the public.

(DUCivR 26-2 Standard Protective Order, ¶ 4(g)). The intent of the standard protective order is to avoid blanket designations. See DUCivR 26-2 Standard Protective Order, ¶ 4(g) (“The parties shall designate *only that part of a document or deposition* that is [confidential]” (emphasis added)).

The United States’ First Interrogatories seek information related to RaPower’s officers (Interrogatory No. 1); entities that RaPower owns (Interrogatory No. 2), the product that RaPower purportedly produces (Interrogatory No. 14), and quantity and dates that lenses placed in service (Interrogatory No. 15). RaPower makes a blanket objection that this information is subject to the protective order without explaining why its responses are subject to the protective order.

Furthermore, RaPower’s website states that it purportedly sells lenses “for a variety of industrial and commercial applications” including the generation of electricity generation and desalinizing water and the tax benefits purportedly available to its customer (which are contingent on the lenses being placed “in service”) (see

<http://www.rapower3.com/#!overview/c1t03>). RaPower has made a great deal of information related to its product very public, not confidential, and actively promotes the product to the public. RaPower’s invocation of the Standard Protective Order to avoid disclosing such information is inconsistent with the terms of the Standard Protective Order itself.

III. The answers RaPower has provided are inadequate.

Even when RaPower does not object based on the Standard Protective Order and provides some response, it still fails to substantively answer and claims it needs more time. *See* Ex. D, Resp. to Interrog. No. 19 (requesting information about RaPower's bank accounts) & No. 22 (requesting information about the attorneys and tax advisors RaPower relied upon). Notably, RaPower claims reliance on advice of a tax attorney as an affirmative defense (Doc. No. 22, Sixth Defense), yet it cannot identify these attorneys over three months after a discovery request. RaPower has had adequate time to answer these relatively simple questions and it should be compelled to fully respond.

The United States requests that RaPower be compelled to fully answer each of the United States interrogatories.

Dated: July 19, 2016

/s/ Christopher R. Moran
CHRISTOPHER R. MORAN
New York Bar No. 5033832
Email: christopher.r.moran@usdoj.gov
ERIN HEALY GALLAGHER
DC Bar No. 985670,
erin.healygallagher@usdoj.gov
ERIN R. HINES
FL Bar No. 44175
Email: erin.r.hines@usdoj.gov
Telephone: (202) 307-0834
Telephone: (202) 514-6619
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
FAX: (202) 514-6770
**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 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:

Justin D. Heideman
HEIDEMAN & ASSOCIATES
2696 North University Avenue, Suite 180
Provo, Utah 84604
jheideman@heidlaw.com
**ATTORNEY FOR RAPOWER-3, LLC,
INTERNATIONAL AUTOMATED SYSTEMS, INC.,
LTB1, LLC, and NELDON JOHNSON**

Donald S. Reay
MILLER, REAY & ASSOCIATES
donald@reaylaw.com
**ATTORNEY FOR R. GREGORY SHEPARD
AND ROGER FREEBORN**

/s/ Christopher R. Moran
Christopher R. Moran
Trial Attorney