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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 **UNITED STATES' RESPONSE TO DEFENDANTS' MOTION TO QUASH SUBPOENA (ECF DOC. 62)** Judge David Nuffer Magistrate Judge Brooke C. Wells

On July 11, 2016, Defendants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC, and Neldon Johnson ("Defendants") filed a motion to quash or modify "the June 2, 2016" subpoena issued by the United States. (ECF Doc. 62). This motion should be denied

because 1) Defendants failed to even request, much less hold, a "meet-and-confer" with the United States regarding their objections, as required by DUCivR 37-1; 2) Defendants' motion was filed long past the appropriate deadline to object; 3) Defendants' motion does not apply to any subpoena which requires compliance outside the District of Utah; and 4) Defendants' arguments are meritless.

I. Background for "the June 2, 2016" subpoena.

The United States filed its complaint in this case on November 23, 2015 seeking to enjoin defendants pursuant to 26 U.S.C. §§ 7402 and 7408 from organizing, promoting, and selling the "solar energy scheme." (ECF Docs. 1 and 35). As described in the complaint, the solar energy scheme purportedly offers a "disruptive and revolutionary" approach to capturing and using solar energy. The technology underlying the solar energy scheme, purportedly invented by Neldon Johnson, uses "solar thermal lenses" on International Automated Systems, Inc.'s (IAS) "solar towers." IAS permits RaPower-3, LLC to sell the lenses to customers who purportedly lease the lenses to LTB1, LLC. In promoting and selling the solar energy scheme, the defendants make statements to customers regarding the technology and the applicability of federal tax benefits (deductions and credits) based on the customers' purchase and participation in the solar energy scheme. (ECF Docs. 1 and 35). The parties agreed that discovery would be needed on statements made by defendants regarding the technology and about any federal tax deductions, credits or benefits as well as the extent to which the United States Government has been harmed by their statements (which in part relies upon tax benefits claimed by defendants and/or their customers). (ECF Doc. 35, ¶ 2). The United States has been issuing routine, proportional discovery in

attempts to ascertain this information, including issuing the subpoena(s) that are the subject of this motion.

On May 26, 2016, the United States sent notice it intended to issue 14 subpoenas to individuals who had prepared one or more federal tax return that is linked to Defendants' "solar energy scheme." (*See* Ex. A, a true and correct copy of emails dated May 26, 2016, from counsel for the United States to counsel for Defendants with such notice.) Some subpoenaed individuals reside in Utah, but others reside in Florida, California, Georgia, Kentucky, or Illinois. A true and correct copy of one of the subpoenas to a person residing in the District of Utah, Jeff Dalebout, is attached as Exhibit B. The subpoenas were dated to be issued on June 2, 2016,[1] and each required a response on July 5, 2016. (Ex. B.) Counsel for Defendants never sought to meet-and-confer with counsel for the United States regarding their objections to the 14 subpoenas before filing the motion to quash on July 11, 2016. To date, six subpoenaed persons have produced documents.

The subpoenas request 23 categories of documents, including copies of documents that the tax return preparer, or any client of the preparer, received from the Defendants containing information about the technology or tax benefits (*see generally Ex. B*) and documents that purportedly substantiate any deduction, credit, claim or other tax item related to a Lens or System for Defendants' purported solar energy technology (*id.* at Request No. 14). Among other things, the subpoenas also request documents reflecting payments made by any client to the

[1] Eight subpoenaed persons waived service of the subpoenas. Counsel for the United States has learned that the six remaining subpoenas were not actually served. Accordingly, and in the interest of full transparency, the United States has re-noticed the document subpoenas to the six remaining persons. The content of the re-noticed subpoenas is identical to the contents of the subpoenas noticed on May 26, 2016, except for the date of issuance and the date for compliance.

defendants related to the solar energy scheme, copies of tax returns prepared by the subpoenaed individuals claiming any tax benefit as a result of any client's participation in the solar energy scheme, any advice or opinions rendered by the subpoenaed individuals to any client regarding the client's participation in the solar energy scheme, copies of correspondence between the subpoenaed individuals and any of the defendants, copies of documents reflecting payment(s) made by any client to the subpoenaed individuals with respect to advice, consulting, or tax return preparation services to clients who participated in the solar energy scheme. Rather than address each specific category contained in the subpoenas, defendants categorically object to the subpoenas in their entirety, claiming that the "information requested is directly related to the 'lenses'" (ECF Doc. 62, p. 3) without providing any support for their argument that every single responsive document is somehow confidential or related to defendants' trades secrets and/or confidential and commercial activities.

II. Defendants' motion to quash fails to meet numerous procedural and substantive requirements and should be denied.

A. Counsel for Defendants failed to meet and confer with counsel for the United States regarding any objections to the June 2, 2016 subpoenas, therefore the motion should be denied.

DUCivR 37-1(a) states that in order for the court to entertain a discovery motion, when all parties are represented by counsel, there must be "a statement [in the motion] 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." Defendants' motion contains no such statement. (*See* ECF Doc. 62.) Counsel for Defendants made no attempt to even discuss their objections to the subpoenas, much less to reach an agreement with counsel for the United States before filing their motion to quash.

B. Defendants' motion was untimely filed and should be denied.

Under Fed. R. Civ. P. 45(a)(4) and DUCivR 45-1, a party seeking to issue a third-party subpoena for the production of documents must provide at least four days' notice to all parties before serving the subpoena. This requirement "is imposed as a precautionary measure and is designed to give an opposing party the opportunity to object to a subpoena prior to service." *Nunes v. Rushton*, 2015 U.S. Dist. LEXIS 73207, at *5 (D. Utah Jun. 4, 2015) (Pead, M.J.); *accord Sanders v. Yellow Cab Drivers Ass'n*, 2012 U.S. Dist. LEXIS 18474 (D. Utah Feb. 13, 2012) (Warner, M.J.) ("[O]ne obvious purpose of the . . . notice period[ ] is to provide parties with an opportunity to conduct a meet-and-confer concerning a subpoena and, if necessary, move to quash that subpoena before it is actually served on the nonparty."). At the very latest, "a motion under Fed.R.Civ.P. 26(c) for protection from a subpoena is timely filed if made before the date set for production." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 669 F.2d 620, 622 n.2 (10th Cir. 1982).

Here, Defendants were notified, no later than May 26, 2016, that the United States would be issuing the 14 subpoenas. (Ex. A.) They had *forty days thereafter* to file an objection to the subpoenas by July 5, the date set by the subpoenas for the production of responsive documents. But they did not do so, nor did they request an extension of time. Defendants offer no explanation for their failure to timely file. Defendants' motion to quash, filed on July 11, 2016, is untimely and should be denied as to all subpoenas.

Further, Defendants' failure to timely file the motion to quash and timely serve the motion on the subpoenaed persons has resulted in at least six people producing documents

responsive to the subpoenas. Therefore, in addition to being untimely filed, Defendants' motion to quash should be denied as moot with respect to those subpoenas.

C. Defendants' motion, made in the District of Utah, should be denied as to any subpoenas that require compliance outside the District of Utah.

Under Fed. R. Civ. P. 45(d)(3)(B), the proper venue for a motion to quash or modify a subpoena to purportedly protect "a trade secret or other confidential research, development, or commercial information" is "the court for the district where compliance is required." Only six of the 14 subpoenas seek compliance in the District of Utah. Therefore, Defendants' motion to quash any subpoenas that seek compliance outside the District of Utah is a procedural nullity and should be denied.

D. Defendants' motion should be denied on its merits.

Defendants claim that the third-party subpoenas seek documents that would "disclos[e] a trade secret or other confidential research, development, or commercial information" belonging to Defendants, including "'lenses' as well as confidential and commercial communications and actions undertaken by Defendants." Fed. R. Civ. P. 45(d)(3)(B)(i); (ECF Doc. 62 at 3). "To resist discovery under Rule 26(c)(7), a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful." *Centurion Indus. v. Steurer*, 665 F.2d 323, 325 (10th Cir. 1981) (applying then-Fed. R. Civ. P. 26(c)(7) to a subpoena under Rule 45). Defendants do not meet their burden on either topic.

Defendants' motion does not establish that the documents sought by the United States from third parties contain Defendants' trade secrets or other confidential information. Utah law, for example, defines a "trade secret" as "information, including a formula, pattern, compilation, program, device, method, technique, or process, that: (a) derives independent economic value,

actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Utah Code Ann. § 13-24-2(4). Defendants offer only broad *assertions* that the documents and information sought by the subpoenas contain purportedly secret information. They do not offer facts supported by affidavits, or even specific legal arguments, to provide a foundation on which this Court could determine that the 14 subpoenas request trade secrets. Defendants do not specify exactly which documents or information should be protected or why. Defendants do not identify for this Court the measures that they themselves have taken to maintain secrecy of such documents and information, *see* Utah Code Ann. § 13-24-2(4)(b), especially when the documents are already in the hands of persons or entities other than Defendants. They have not met their burden of showing that they are seeking to protect secret or otherwise confidential information.

Further, Defendants claim – also without specificity – that they would be harmed if this Court were to allow the subpoenaed third parties to produce documents in their possession. (ECF Doc. 62 at 3). But Defendants never explain what that harm would be. Most incredibly – if the harm to them would be so great – Defendants fail to explain why they did not protect their own interests by moving to quash the subpoenas *before* the date set for compliance. Defendants have not met their burden of establishing that the information they seek to protect is a trade secret and disclosure might be harmful.

E. Defendants' requested modifications to subpoena compliance have no basis and should be denied.

Defendants do not dispute that the documents requested by the 14 subpoenas are relevant to this litigation. (*See generally* ECF Doc. 62.) They ask, however, that if the Court is considering denying their motion to quash the subpoenas, the Court instead modify the procedures for compliance in one of two ways. Defendants ask that they "be granted additional time . . . to review and properly designate the documents and information *in Defendants' possession*." (ECF Doc. 62 at 4 (emphasis added)). This request seems to suggest that Defendants believe that they should be given the opportunity to review any third-party documents and to make confidentiality designations per the standard protective order *before* such documents are produced to the United States. (*Id.*; *see also id.* at 3 ("disclosure *by Defendants* will expose confidential and commercial communications" and asking that the Court modify the subpoenas "to allow *Defendants* to produce the requested documents" (emphases added)).)

This request has no basis in Fed. R. Civ. P. 45, in DUCivR 45-1, or in the standard protective order. For the reasons offered by the United States, the standard protective order should be suspended for purposes of this litigation. (ECF Docs. 39, 44.) But even if it is not suspended, the standard protective order does not provide that one party may review and redact documents subpoenaed from a third party before those documents are produced to the party that issued a subpoena. Instead, only the "third party producing documents or things . . . pursuant to a subpoena . . . may designate said documents [or] things . . . as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY." (Standard Protective Order ¶ 14.) Defendants' proposal is ripe for abuse and should not be permitted here, particularly in an untimely motion.

In light of the specific terms of the standard protective order, there is no reason to delay this Court's decision on the motion to quash pending its decision on the United States' motion for relief from the standard protective order. (*See* ECF Doc. 62 at 3.) Whether the standard protective order is suspended or is in place for this litigation, Defendants do not have any right to prevent or interfere with the production of documents from a third party.

III. Conclusion

For all of the procedural and substantive reasons above, Defendants' motion to quash (ECF Doc. 62) should be denied and the subpoenas should not be modified in any respect.

Dated: July 25, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on July 25, 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:

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