

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**

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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

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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 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 following subpoenas:

1. Subpoena to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Civil Action to Kenneth Birrell. [See Exhibit 1 – Subpoena to Kenneth

Birrell.]

The aforementioned Subpoena was issued on June 30, 2016 and production required by September 20, 2016.

### **ARGUMENT**

#### **I. THIS COURT SHOULD QUASH THE SUBPOENA BECAUSE THE INFORMATION THE PRODUCING PARTIES 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.” *Id* (emphasis added).

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 technology as well as confidential and commercial communications and actions undertaken by Defendants. Similar to *Centurion*, the Subpoena requests information that if produced will expose sensitive financial information associated with Defendants' trade secrets and highly sensitive, confidential information. Furthermore, disclosure 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 and commercial costs associated with such as used by Defendants. The harm Defendants would suffer if the confidential information was disclosed far outweighs the benefits received from such information. If this Court, however, finds the information "absolutely necessary to the litigation," the information should at least be subject to a protective order of such disclosed information to protect the information from further dissemination.

*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 at least modifies the Subpoena to allow the producing parties to produce the requested documents following this Court's ruling on the standard protective order. Because the information requested involves highly confidential, potentially privileged and trade secret information, Defendants believe that modification of the Subpoena, in the very least, is reasonable given this Court has yet to rule on the protective order .

**II. PURSUANT TO THE STANDARD PROTECTIVE ORDER, THIS COURT SHOULD PERMIT THE PRODUCING PARTIES ADDITIONAL TIME TO REVIEW AND DESIGNATE CONFIDENTIAL INFORMATION.**

Even in the event this Court finds the costs and expenditures associated with the confidential, sensitive information are not protected by Rule 45(d)(3)(b), this Court should be granted additional time to respond. 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 Subpoenas, the producing parties 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 producing parties' possession.

**CONCLUSION**

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

DATED and SIGNED September 16, 2016.

**HEIDEMAN & ASSOCIATES**

/s/ Justin D. Heideman  
JUSTIN D. HEIDEMAN  
*Attorney for Defendants*

**CERTIFICATE OF SERVICE**

On this 16<sup>th</sup> day of September, 2016, I hereby certify a true and correct copy of the forgoing **MOTION TO QUASH SUBPOENA** was served on the following:

<b>Party/Attorney</b>	<b>Method</b>
<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 <sup>th</sup> FL P.O. Box 45000 Salt Lake City, Utah 84145 Tele: (801) 521-9000	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: <a href="mailto:donald@reaylaw.com">donald@reaylaw.com</a>	Hand Delivery U.S. Mail, postage prepaid Overnight Mail Fax Transmission <input checked="" type="checkbox"/> Electronic Filing Notice
<i>Pro Hac Vice Attorney for Plaintiff</i>  Erin Healy Gallagher US Department of Justice (TAX) Tax Division P.O. Box 7238 Washington, DC 20044 Phone: (202) 353-2452 Email: <a href="mailto:erin.healygallagher@usdoj.gov">erin.healygallagher@usdoj.gov</a>	Hand Delivery U.S. Mail, postage prepaid Overnight Mail Fax Transmission <input checked="" type="checkbox"/> Electronic Filing Notice

<p><i>Pro Hac Vice Attorney for Plaintiff</i></p> <p>Erin R. Hines  US Department Justice  Central Civil Trial Section RM 8921  555 4<sup>th</sup> St NW  Washington, DC 20001  Tele: (202) 514-6619  Email: <a href="mailto:erin.r.hines@usdoj.gov">erin.r.hines@usdoj.gov</a></p>	<p>Hand Delivery  U.S. Mail, postage prepaid  Overnight Mail  Fax Transmission  <input checked="" type="checkbox"/> Electronic Filing Notice</p>
<p><i>Attorney for Plaintiff</i></p> <p>John K. Mangum  US Attorney's Office (UT)  Tele: (801) 325-3216  Email: <a href="mailto:john.mangum@usdoj.gov">john.mangum@usdoj.gov</a></p>	<p>Hand Delivery  U.S. Mail, postage prepaid  Overnight Mail  Fax Transmission  <input checked="" type="checkbox"/> Electronic Filing Notice</p>
<p><i>Pro Hac Vice Attorney for Plaintiff</i></p> <p>Christopher R. Moran  US Department of Justice (TAX)  Tax Division  PO Box 7238  Washington, DC 20044  Tele: (202) 307-0234  Email: <a href="mailto:christopher.r.moran@usdoj.gov">christopher.r.moran@usdoj.gov</a></p>	<p>Hand Delivery  U.S. Mail, postage prepaid  Overnight Mail  Fax Transmission  <input checked="" type="checkbox"/> Electronic Filing Notice</p>

**HEIDEMAN & ASSOCIATES**

*/s/ Samantha Fowlks*  
**SAMANTHA FOWLKS**  
*Legal Assistant*