
IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

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

**PROPOSED JOINT
PROTECTIVE ORDER**

Judge David Nuffer

Magistrate Judge Brooke C. Wells

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure and for good cause,

IT IS HEREBY ORDERED THAT:

1. Scope of Protection

This Protective Order shall govern any record of information produced in this action and designated pursuant to this Order, including all designated deposition testimony, all designated testimony taken at a hearing or other proceeding, all designated deposition exhibits, interrogatory answers, admissions, documents and other discovery materials, whether produced informally or in response to interrogatories, requests for admissions, requests for production of documents or other formal methods of discovery.

This Order shall also govern any designated record of information produced in this action pursuant to required disclosures under any federal procedural rule, or local rule, of the Court; and any supplementary disclosures thereto.

This Order shall apply to the parties, and to any nonparty, from whom discovery may be sought who desires the protection offered by this Order.

Nonparties may challenge the confidentiality of the protected information by filing a motion to intervene and a motion to de-designate.

2. Definitions

(a) The term PROTECTED INFORMATION shall mean confidential or proprietary technical, scientific, financial, business, health, or medical information which would be protected by Fed. R. Civ. P. 26(c), and which is designated either CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY or CONFIDENTIAL INFORMATION by the producing party. Information is not PROTECTED INFORMATION if:

- (1) the information in question has become available to the public through no violation of this Order; or
- (2) the information was known to any receiving party prior to its receipt from the producing party; or
- (3) the information was received by any receiving party without restrictions on disclosure from a third party having the right to make such a disclosure.

(b) The term CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall mean PROTECTED INFORMATION that is so designated by the producing party. The designation CONFIDENTIAL INFORMATION - ATTORNEYS

EYES ONLY may be used only for the following types of past, current, or future PROTECTED INFORMATION: (1) sensitive technical information, including current research, development and manufacturing information and patent prosecution information, (2) sensitive business information, including highly sensitive financial or marketing information and the identity of suppliers, distributors and potential or actual customers, (3) competitive technical information, including technical analyses or comparisons of competitor's products, (4) competitive business information, including non-public financial or marketing analyses or comparisons of competitor's products and strategic product planning, or (5) any other PROTECTED INFORMATION the disclosure of which to non-qualified people, subject to this Order the producing party reasonably and in good faith believes would likely cause business, competitive, or other financial harm.

(c) The term CONFIDENTIAL INFORMATION shall mean all PROTECTED INFORMATION that is not designated as "CONFIDENTIAL INFORMATION - ATTORNEYS EYES ONLY."

(d) The term TECHNICAL ADVISOR shall refer to any person who is not a party to this action, and/or not presently employed by the receiving party or a company affiliated with the receiving party through common ownership, but who is, in the judgment of the engaging party's counsel, reasonably necessary for development and presentation of the engaging party's case. A TECHNICAL ADVISOR may include an outside expert; a consultant retained to provide technical or other expert services such as expert testimony; or a consultant hired, retained, or employed to assist in trial preparation.

3. Disclosure Agreements

(a) Each receiving party's TECHNICAL ADVISOR shall sign a disclosure agreement in the form attached hereto as Exhibit A. Copies of any disclosure

agreement in the form of Exhibit A signed by any person or entity to whom PROTECTED INFORMATION is disclosed shall be provided to the other party promptly after execution by facsimile and overnight mail. No disclosures shall be made to a TECHNICAL ADVISOR for a period of five (5) business days after the disclosure agreement is provided to the other party.

(b) Before any PROTECTED INFORMATION is disclosed to outside TECHNICAL ADVISORS, the following information must be provided in writing to the producing party and received no less than five (5) business days before the intended date of disclosure to that outside TECHNICAL ADVISOR: the identity of that outside TECHNICAL ADVISOR, business address and/or affiliation and a current curriculum vitae of the TECHNICAL ADVISOR, and, if not contained in the TECHNICAL ADVISOR's curriculum vitae, a brief description, including education, present and past employment and general areas of expertise of the TECHNICAL ADVISOR. If the producing party objects to disclosure of PROTECTED INFORMATION to an outside TECHNICAL ADVISOR, the producing party shall within five (5) business days of receipt serve written objections identifying the specific basis for the objection, and particularly identifying all information to which disclosure is objected. Failure to object within five (5) business days shall authorize the disclosure of the PROTECTED INFORMATION to the TECHNICAL ADVISOR. As to any objections, the parties shall attempt in good faith to promptly resolve any objections informally. If the objections cannot be resolved, the party seeking to prevent disclosure of the PROTECTED INFORMATION to the expert shall move within five (5) business days for an Order of the Court preventing the disclosure. If no such motion is made within five (5) business days, disclosure to the TECHNICAL ADVISOR shall be permitted. In the event that objections

are made and not resolved informally and a motion is filed, disclosure of PROTECTED INFORMATION to the TECHNICAL ADVISOR shall not be made except by Order of the Court.

(c) Any disclosure agreement executed by any person affiliated with a party shall be provided to any other party who, based upon a good faith belief that there has been a violation of this order, requests a copy.

3. Designation of Information

(a) Documents and things produced or furnished during the course of this action shall be designated as containing CONFIDENTIAL INFORMATION by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION

(b) Documents and things produced or furnished during the course of this action shall be designated as containing information which is CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by placing on each page, each document (whether in paper or electronic form), or each thing a legend substantially as follows:

CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY

(c) During discovery a producing party shall have the option to require that all, or batches of, materials be treated as containing CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY during inspection; and to make its designation as to particular documents and things at the time copies of documents and things are furnished.

(d) A party may designate information disclosed at a deposition as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION –

ATTORNEYS EYES ONLY by requesting the reporter to so designate the transcript at the time of the deposition.

(e) A producing party shall designate its discovery responses, responses to requests for admission, briefs, memoranda and all other papers sent to the Court or to opposing counsel as containing CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY when such papers are served or sent.

(f) A party shall designate information disclosed at a hearing or trial as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by requesting the Court, at the time the information is proffered or adduced, to receive the information only in the presence of those persons designated to receive such information and Court personnel, and to designate the transcript appropriately.

(g) The parties shall use reasonable care to avoid designating any documents or information as CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY that is not entitled to such designation or which is generally available to the public. The parties shall designate only that part of a document or deposition that is CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition. For example, if a party claims that a document contains pricing information that is CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, the party will designate only that part of the document setting forth the specific pricing information as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document.

4. Disclosure and Use of Confidential Information

(a) Unless its disclosure is allowed by this Order, PROTECTED INFORMATION shall not be disclosed except as agreed by the parties or as allowed by another Order of this Court.

(b) An employee of the United States may disclose, or may direct another person to disclose, PROTECTED INFORMATION that is relevant to any civil, criminal, regulatory, or administrative action to any appropriate federal, state, local, foreign, or tribal law enforcement authority or any other appropriate agency with authority to enforce laws pertaining to any activity relating to the PROTECTED INFORMATION. However prior to any such disclosure the employee intending to make the disclosure must provide 14 days' notice to the producing party to allow the producing party the opportunity to object if such objection is appropriate. Any such agency that receives PROTECTED INFORMATION shall keep it confidential to the extent provided by law.

(c) PROTECTED INFORMATION may be also disclosed by the receiving party to Qualified Recipients as defined in paragraph 5. Unless otherwise allowed by the agreement of the parties, by this Order, or by another Order of this Court, Qualified Recipients shall hold such information received from the disclosing party in confidence, shall use the information only for purposes of this action and for no other action, shall not use it for any business or other commercial purpose, shall not use it for filing or prosecuting any patent application (of any type) or patent reissue or reexamination request, and shall not disclose it to any person. All information that has been designated CONFIDENTIAL INFORMATION or as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be carefully maintained so as to preclude access by persons who are not qualified to receive such information under the terms of this Order.

5. Qualified Recipients

For purposes of this Order, “Qualified Recipient” means

(a) For CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY:

(1) For Defendants: outside counsel of record in this action, and the partners, associates, secretaries, paralegal assistants, and employees of such counsel to the extent reasonably necessary to render professional services in this action, outside copying services, document management services and graphic services;

(2) For the United States: all employees and contractors of the United States Department of Justice or the Internal Revenue Service (including counsel for the Internal Revenue Service) who are assigned to work on or provide services in connection with this action, or are otherwise authorized to receive information about this action under the law and policies applicable to the Internal Revenue Service and the United States Department of Justice, including outside copying services, document management services and graphic services;

(3) Court officials involved in this action (including court reporters at depositions and in Court, persons operating video recording equipment at depositions, and any special master appointed by the Court);

(4) Any person designated by the Court in the interest of justice, upon such terms as the Court may deem proper;

(5) Any TECHNICAL ADVISOR employed by the outside counsel of record, when such outside counsel provides a copy of this Order to the TECHNICAL ADVISOR and advises the TECHNICAL ADVISOR that he or she is subject to its terms; and

(6) Any witness during the course of discovery, so long as it is stated on the face of each document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY being disclosed that the witness to whom a party is seeking to disclose the document was either an author, recipient, or otherwise involved in the creation of the document or is referred to within the document as having participated in events, communications, or facts described within the document. A receiving party may also disclose a document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to a witness, provided that the receiving party has a reasonable basis for believing that the witness in fact received or reviewed the document, participated in events or communications described therein, or otherwise has or could have knowledge of the events, communications, or facts described therein. Nothing herein shall prevent disclosure at a deposition of a document designated CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY to the officers, directors, and managerial level employees of the party producing such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, or to any employee of such party who has access to such CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY in the ordinary course of such employee's employment.

(b) FOR CONFIDENTIAL INFORMATION:

- (1) Those persons listed in paragraph 5(a);
- (2) In-house counsel for a party to this action who are acting in a legal capacity and who are actively engaged in the conduct of this action, and the secretary and paralegal assistants of such counsel to the extent reasonably necessary;

(3) The insurer of a party to litigation and employees of such insurer to the extent reasonably necessary to assist the party's counsel to afford the insurer an opportunity to investigate and evaluate the claim for purposes of determining coverage and for settlement purposes; and

(4) Employees of the parties.

6. Use of PROTECTED INFORMATION

(a) In the event that any receiving party's briefs, memoranda, discovery requests, requests for admission or other papers of any kind which are served or filed shall include another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, the papers shall be appropriately designated pursuant to paragraphs 3(a) and 3(b) above. Documents, papers and transcripts filed with the Court that contain any other party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY shall be filed according to DUCivR 5-2.

(b) All documents, including attorney notes, which contain another party's CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, shall be handled as if they were designated pursuant to paragraphs 3(a) or 3(b) above.

(c) To the extent that documents that will be produced are reviewed by a receiving party prior to production, any knowledge learned during the review process will be treated by the receiving party as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY until such time as the documents have been produced, at which time any stamped classification will control. No photograph or any other means of duplication, including but not limited to electronic means, of materials provided for review

prior to production is permitted before the documents are produced with the appropriate stamped classification. This designation shall not control in the event that the documents are publicly available or otherwise available from a source other than the producing party.

(d) In the event that any question is asked at a deposition with respect to which a party asserts that the answer requires the disclosure of CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, such question shall nonetheless be answered by the witness fully and completely. Prior to answering, however, all persons present shall be advised of this Order by the party making the confidentiality assertion and, in the case of information designated as CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY at the request of such party, all persons who are not allowed to obtain such information pursuant to this Order, other than the witness, shall leave the room during the time in which this information is disclosed or discussed.

(e) Nothing in this Order shall bar or otherwise restrict outside counsel from rendering advice to his or her client with respect to this action and, in the course thereof, from relying in a general way upon examination of PROTECTED INFORMATION, provided, however, that in rendering such advice and in otherwise communicating with his or her clients, such counsel shall not make an unauthorized disclosure of any materials designated CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY.

(f) Nothing in this Order shall be grounds for limiting or restricting the use of PROTECTED INFORMATION during a public hearing or trial.

7. Inadvertent Failure to Designate

(a) In the event that a producing party inadvertently fails to designate any of its information pursuant to paragraph 3 above, it may later designate by notifying the receiving parties in writing. The receiving parties shall take reasonable steps to see that the information is thereafter treated in accordance with the designation.

(b) No person or party shall incur any liability hereunder with respect to disclosure that occurred prior to receipt of written notice of a belated designation.

8. Challenge to Designation

(a) No party shall be obligated to challenge the propriety of any designation when made, and failure to do so shall not preclude a subsequent challenge to the propriety of such designation. Any receiving party may challenge a producing party's designation at any time. A failure of any party to expressly challenge a claim of confidentiality or any document designation shall not constitute a waiver of the right to assert at any subsequent time that the same is not in-fact CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY.

(b) Notwithstanding anything set forth in paragraph 2 above, any receiving party may disagree with the designation of any information received from the producing party as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY. The receiving party may request the producing party in writing to change the designation, stating the reasons in that request. The producing party shall then have five (5) business days from the date of receipt of the notification to:

- (1) advise the receiving party in writing whether or not it persists in such designation; and

(2) if it persists in the designation, to explain the reason for the particular designation.

(c) If no written response to the receiving party's notification is made within five (5) business days, the information will be de-designated to the category requested by the receiving party. If the producing party timely persists in its designation and explains the reasons for its designations as described in paragraph 8(b), the parties shall attempt in good faith to resolve any objections informally within five (5) business days of receipt of the producing party's written response. If the objections cannot be resolved, the producing party may then move the Court for a protective order or any other order to maintain the its designation. The burden of proving that the designation is proper shall be upon the producing party. If no such motion is made within five (5) business days from the date that the producing party notified the receiving party that it persisted in its designation, the information will be de-designated to the category requested by the receiving party. In the event that a receiving party triggers the procedures in paragraph 8(b), designated PROTECTED INFORMATION shall not be disclosed except as agreed by the parties or as permitted by this subsection, by another provision of this Order, or by Order of the Court.

9. Inadvertently Produced Privileged Documents

The parties acknowledge that regardless of the producing party's diligence, an inadvertent production of attorney-client privileged or attorney work product materials may occur. In accordance with Fed. R. Civ. P. 26(b)(5), and Fed. R. Evid. 502, they therefore agree that if a party through inadvertence produces or provides discovery that it believes is subject to a claim of attorney-client privilege or attorney work product, the producing party may give written notice to the receiving party that the document or thing is

subject to a claim of attorney-client privilege or attorney work product and request that the document or thing be returned to the producing party. The receiving party shall return to the producing party such document or thing, and any copies made thereof. Return of the document, or thing, shall not constitute an admission or concession, or permit any inference, that the returned document or thing is, in fact, properly subject to a claim of attorney-client privilege or attorney work product, nor shall it foreclose any party from moving the Court pursuant to Fed. R. Civ. P. 26(b)(5) and Fed. R. Evid. 502 for an Order that such document or thing has been improperly designated or should be produced. The producing party shall preserve the document, thing, and/or copies thereof until the conclusion of this action or as otherwise required by law, whichever is later.

10. Inadvertent Disclosure

In the event of an unauthorized disclosure of another party's PROTECTED INFORMATION, upon learning of the disclosure, the party making the unauthorized disclosure shall promptly: (i) notify the person to whom the disclosure was made that it contains CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY subject to this Order; (ii) make all reasonable efforts to preclude dissemination or use of the CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY by the person to whom disclosure was inadvertently made including, but not limited to, obtaining all copies of such materials from the person; and (iii) notify the producing party of the identity of the person to whom the disclosure was made, the circumstances surrounding the disclosure, and the steps taken to ensure against further dissemination or use of such information.

11. Limitation

This Order shall be without prejudice to any party's right to assert at any time that any particular information, or document, is or is not subject to discovery, production or admissibility on the grounds other than confidentiality.

12. Conclusion of Action

(a) After this action, and any appeal arising from it is complete, trial counsel for each party may retain one archive copy of all documents and discovery material even if that information is designated as PROTECTED INFORMATION, which information shall be handled as outline in (c) below. Trial counsel's archive copy shall remain subject to all obligations of this Order.

(b) In addition to the provisions of paragraph 12(a), the United States Department of Justice may retain its work product, copies of court filings and official

transcripts and exhibits and other documents required to be retained by written Department of Justice record-retention policy, provided that all such retained documents designated as PROTECTED INFORMATION continue to be treated as provided herein, and that any file containing such information also contain a copy of this Protective Order.

(c) To the extent that any party has PROTECTED INFORMATION in its possession that is not addressed by paragraphs 12(a) or 12(b), each party or other person subject to this Order shall destroy or return to the producing party all materials and documents containing any PROTECTED INFORMATION regardless of its designation as CONFIDENTIAL INFORMATION – or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, and to certify to the producing party such information has been fully destroyed or returned. Such return or destruction shall not relieve said parties or persons from any of the continuing obligations imposed upon them by this Order.

13. Production by Third Parties Pursuant to Subpoena

Any third party producing documents or things or giving testimony in this action pursuant to a subpoena, notice or request may designate said documents, things, or testimony as PROTECTED INFORMATION. The parties agree that they will treat PROTECTED INFORMATION produced by third parties according to the terms of this Order.

14. Compulsory Disclosure to Third Parties

If any receiving party is subpoenaed in another action or proceeding or served with a document or testimony demand or a Court order, and such subpoena or demand or Court order seeks PROTECTED INFORMATION of a producing party, the receiving party shall give prompt written notice to counsel for the producing party and allow the producing party an opportunity to oppose such subpoena, demand, or Court order prior to the

deadline for complying with the subpoena, demand, or Court order. No compulsory disclosure to third parties of information or material exchanged under this Order shall be deemed a waiver of any claim of confidentiality, except as expressly found by a court or judicial authority of competent jurisdiction.

15. Jurisdiction to Enforce this Order

After the termination of this action, this Court will continue to have jurisdiction to enforce the terms, covenants and restrictions outlined in this Order.

16. Modification of this Order

Any person or entity may seek a modification of this Order at any time either through stipulation or Order of the Court.

17. Confidentiality of Party's Own Documents

A designating party may disclose to its officers, directors, employees, attorneys, consultants or experts, or to any other person, its own PROTECTED INFORMATION. Such disclosure shall not waive the protections of this Order and shall not entitle other parties or their attorneys to disclose such information in violation of it, unless by such disclosure of the designating party the information becomes public knowledge. Similarly, this Order shall not preclude a party from showing its own information, including its own information that is filed under seal by a party, to its officers, directors, employees, attorneys, consultants or experts, or to any other person.

SO ORDERED AND ENTERED BY THE COURT PURSUANT TO DUCivR 26-2
EFFECTIVE AS OF NOVEMBER 3, 2016.