



**U.S. Department of Justice**

**Tax Division**

*Trial Attorney: Christopher R. Moran*  
*Attorney's Direct Line: 202-307-0834*  
*Fax No.: 202-514-6770*  
*Christopher.R.Moran@usdoj.gov*

*Please reply to: Civil Trial Section, Central Region*  
*P.O. Box 7238*  
*Washington, D.C. 20044*

DAH:RSC:CRMoran  
DJ 5-77-4466  
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September 7, 2017

**Via Email**

Eric G. Benson  
Ray Quinney & Nebeker  
36 South State Street  
Suite 1400  
Salt Lake City, UT 84111  
ebenson@rqn.com

Re: *United States v. RaPower-3, LLC et al.*  
Case No. 2-15-cv-00828-DN-BCW

Dear Mr. Benson:

The purpose of this letter is to challenge the confidentiality designations that your client, formerly known as Mantyla McReynolds, and now owned by BDO USA, LLP, made to certain documents it produced in response to the United States' subpoena issued in this case. (See ECF Doc. No. 116, ¶ 8(a).) For the reasons described below, we request that your client: (1) rescind any confidentiality designation of the documents described below, and (2) produce unredacted copies of these documents.

**The Confidentiality Designations are Improper**

Your client's document production included: (1) numerous contracts and written agreements that the defendants entered into with third parties concerning the solar lenses that are at issue in this case; (2) correspondence between defendants in this case and others who purchased lenses; (3) tax returns of parties to this case (*i.e.*, International Automated Systems, Inc. and R. Gregory Shepard); (4) IAS meeting minutes; (5) customer lists describing lenses purchased; (6) information provided by IAS' management in support of Mantyla McReynolds' independent audit of IAS' financial statements; (7) correspondence between Mantyla McReynolds' employees and defendants in this case discussing the tax implications of the solar lenses at issue in this case. A list of the specific documents we are referring to appears at the end of this letter.

**Plaintiff  
Exhibit**

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The documents are not PROTECTED INFORMATION, as defined by the Protective Order entered in this case. See ECF Doc. No. 116, ¶ 2(a). PROTECTED INFORMATION means “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 it falls into one or more of three categories: “(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.” (*Id.* ¶ 2(a).) The documents and information your client produced and designated CONFIDENTIAL are not the type of information that Fed. R. Civ. P. 26(c) or the Protective Order protects; it is not sensitive technical or competitive business information for which disclosure would cause harm. And even if the documents were protected by Rule 26(c), which they are not, much of it fits into one of the three carve-out categories.

For example, information about Defendants’ purported solar energy technology is not PROTECTED INFORMATION because it is not a trade secret. Under Utah law, a trade secret is “information . . . 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 do not keep information about their purported solar energy technology secret. Instead, they make it public knowledge and encourage their customers to spread information about their technology. (*See generally* ECF Doc. 85 at 8-10.) Therefore, documents in which the defendants discuss the propriety of their positions on the tax treatment of their solar lenses and their intentions to market the tax benefits to customers (i.e., Exhibits 136; 372-375) are not protected. Further, Defendants do not require customers to keep their own transactional information confidential and many customers have produced such information, including their contracts with defendants, without confidentiality designations. Likewise, information regarding Mantyla McReynolds’ audit of IAS’ financial statements underpinned IAS’ *public filings* with the SEC. Finally, we may disclose any of the defendants’ tax returns (that your client marked CONFIDENTIAL) that reference the solar lenses at issue in this case. See 26 U.S.C. § 6103(h)(4)(C).

Withdrawing improper confidentiality designations on the listed documents is particularly appropriate as this case moves toward summary judgment and trial preparation. There is a “strong presumption in favor of public access,” *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007), to the documents a court uses “to determine litigants’ substantive legal rights.” *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012). *Accord United States v. Pickard*, 733 F.3d 1297, 1302 (10th Cir. 2013); *PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Tr.*, No. 2:10-CV-0067, 2012 WL 12888387, at \*3 (D. Utah Dec. 6, 2012); DUCivR 5.2(a) (noting the presumption that the records of the District of Utah shall be “open to the public”). As you know, many of the documents and accompanying deposition testimony demonstrate that the defendants knew their lenses were not placed in service as early as 2009, yet

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they continue to make statements to the contrary. This fact goes directly to the defendants' reason to know that their statements about tax benefits were false or fraudulent. *See* 26 U.S.C. § 6700(a)(2)(A). The public has the right to examine the documents on which the Court will base its decision in this case.

**Redactions are Improper**

Your client's document production included several redactions, which apparently relate to addresses, taxpayer identification numbers, and account numbers. This information is not confidential and should be available. Please produce unredacted copies of the documents. Further, to the extent that any document contains information designated by Fed. R. Civ. P. 5.2, any party filing a document with the Court would remain responsible for making appropriate redactions.

Finally, as discussed, attached is a draft Fed. R. Evid. 902(11) Declaration that you indicated your client would sign. Please have an authorized representative complete and sign the Declaration and return it to my office.

Sincerely yours,

/s/

CHRISTOPHER R. MORAN  
Trial Attorney  
Civil Trial Section, Central Region

Cc: Erin Healy Gallagher (via email)  
Erin Hines (via email)

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The following documents do not meet the definition of PROTECTED INFORMATION:

| <b>Plaintiff's Ex.<br/>No.</b> | <b>Bates - Begin</b> | <b>Bates -<br/>End</b> |
|--------------------------------|----------------------|------------------------|
|                                | MM000007             | MM000008               |
|                                | MM000024             | MM000027               |
|                                | MM000028             | MM000028               |
|                                | MM000029             | MM000039               |
|                                | MM000058             | MM000112               |
|                                | MM000129             | MM000129               |
|                                | MM000131             | MM000326               |
|                                | MM000327             | MM000360               |
|                                | MM000363             | MM000382               |
|                                | MM000453             | MM000469               |
|                                | MM000470             | MM000484               |
|                                | MM000485             | MM000501               |
|                                | MM000502             | MM000549               |
|                                | MM000550             | MM000551               |
|                                | MM000607             | MM000608               |
|                                | MM000609             | MM000611               |
|                                | MM000636             | MM000648               |
|                                | MM000650             | MM000659               |
|                                | MM000661             | MM000661               |
|                                | MM000662             | MM000670               |
|                                | MM000710             | MM000713               |
|                                | MM000745             | MM000745               |
|                                | MM000762             | MM000793               |
|                                | MM000905             | MM001139               |
|                                | MM001140             | MM001141               |
|                                | MM001144             | MM001146               |
|                                | MM001167             | MM001168               |
|                                | MM001179             | MM001194               |
|                                | MM001195             | MM001195               |
| 610                            | MM001243             | MM001244               |
|                                | MM001265             | MM001541               |
|                                | MM001542             | MM001542               |
|                                | MM001545             | MM001550               |
|                                | MM001551             | MM001553               |
|                                | MM001554             | MM001554               |
|                                | MM001599             | MM001603               |
|                                | MM001614             | MM001648               |
|                                | MM001649             | MM001682               |

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|     |          |          |
|-----|----------|----------|
|     | MM001716 | MM001718 |
|     | MM001745 | MM001781 |
|     | MM001788 | MM001788 |
|     | MM001789 | MM001789 |
|     | MM001790 | MM002009 |
|     | MM002010 | MM002010 |
|     | MM002047 | MM002071 |
|     | MM002072 | MM002075 |
|     | MM002087 | MM002122 |
|     | MM002140 | MM002140 |
|     | MM002141 | MM002142 |
|     | MM002143 | MM002144 |
|     | MM002147 | MM002147 |
|     | MM002151 | MM002152 |
|     | MM002235 | MM002254 |
|     | MM002257 | MM002311 |
|     | MM002312 | MM002365 |
| 372 | MM004317 | MM004318 |
|     | MM004319 | MM004319 |
|     | MM004320 | MM004320 |
|     | MM004324 | MM004324 |
| 373 | MM004325 | MM004326 |
| 374 | MM004327 | MM004328 |
| 376 | MM004391 | MM004394 |
| 377 | MM004395 | MM004409 |
|     | MM004395 | MM004410 |