

Denver C. Snuffer, Jr. (#3032) [denversnuffer@gmail.com](mailto:denversnuffer@gmail.com)

Steven R. Paul (#7423) [spaul@nsdplaw.com](mailto:spaul@nsdplaw.com)

Daniel B. Garriott (#9444) [dbgarrriott@msn.com](mailto:dbgarrriott@msn.com)

Joshua D. Egan (15593) [Joshua.egan@me.com](mailto:Joshua.egan@me.com)

**NELSON, SNUFFER, DAHLE & POULSEN**

10885 South State Street

Sandy, Utah 84070

Telephone: (801) 576-1400

Facsimile: (801) 576-1960

*Attorneys for Defendants*

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-EJF

**DEFENDANTS' OBJECTION TO  
ORDER GRANTING UNITED STATES'  
EXPEDITED MOTION FOR SANCTIONS  
(Doc. 235) AND REQUEST FOR  
EXPEDITED TREATMENT**

Judge David Nuffer  
Magistrate Judge Evelyn J. Furse

Pursuant to [Fed. R. Civ. P. 72\(a\)](#) and [DUCivR37-1\(a\)](#), Defendants object to the Order Granting United States' Expedited Motion for Sanctions Against Neldon Johnson, International Automated Systems, Inc., RaPower-3, LLC, and/or LTB1, LLC ([Doc. 235](#)) on grounds that the Order violates the right of privacy of purchasers of RaPower-3, LLC solar lenses and Plaintiff has expressly stated during the hearing before Judge Furse that it has every intention to use the private contact information in Defendants' database to audit those private individuals' tax

returns. Defendants believe the Plaintiff will act on their intent, and their intention violates numerous personal rights and constitutional protections.

Defendants request the matter be heard by the assigned judge, Judge David Nuffer. Defendants request expedited treatment of this objection.

This discovery dispute began with a motion to compel filed by Plaintiff following a series of depositions during the week of June 28, 2017. A letter from Plaintiff's counsel on July 27, 2017 requested specific documents based on prior discovery requests and Mr. Johnson's deposition testimony. On August 17, 2017, Plaintiff filed a motion to compel ([Doc. 210](#)) identifying documents it believed had not been previously produced, based on Mr. Johnson's deposition testimony. Following briefing on the motion and a hearing held before Magistrate Judge Furse, an order was issued requiring the production of the identified records or: "If any of the documents in categories 1 through 5 do not exist after a diligent search, Defendants shall so state that under penalty of perjury".

Defendants undertook efforts to identify the documents and to either produce documents or an explanation as to why the documents cannot be produced. Counsel for Plaintiff was satisfied as to the explanation of parts 4 and 5 of the order, but as counsel discussed parts 1-3 of the order, Plaintiff decided to file a motion to compel production and obtain access to Defendant's computer files.

On October 11, 2017, Plaintiff filed its motion for sanctions for Defendants' failure to comply with the August 17, 2017 Order. The court set a hearing date for October 23, 2017 to consider the motion.

In an effort to satisfy Plaintiff that Defendants had provided all relevant documents responsive to the Court's order, Defendants' counsel sent an email on October 16, 2017

producing additional documents and explaining Defendants' position. A copy of the email letter referenced is attached hereto as Exhibit 1.

After the hearing on October 23, 2017, Judge Furse took the matter under advisement and then issued a ruling on October 25, 2017, ordering Defendants to allow Plaintiff and a computer forensic expert to enter onto Defendants' business premises and "review and/or copy the documents identified in ¶ 1." ([Order, Doc. 235, at ¶ 4](#)). In addition to ordering that the government shall have access to Defendants' computer information, Judge Furse ordered additional and further relief never requested by Plaintiff and ordered any costs of the fishing expedition into Defendants' files to be paid by Defendants.

#### **DEFENDANTS' OBJECTIONS**

1. Defendants object to the Order because the Order has the potential to impose on Defendants the unlawful disclosure, and permits Plaintiff to convey private information relating to private individuals to the IRS which could be used by the IRS to harass those people and coerce them to abandon legal tax treatment.

During the hearing on October 23, 2017, counsel for Plaintiff admitted that Plaintiff intends to and will use the data obtained from Defendants' records in enforcement actions against those individuals. Plaintiff's counsel claims that section 4(b) of the Protective Order ([Doc. 116](#)) authorizes Plaintiff to disseminate the names of people to the IRS who have purchased solar lenses from RaPower-3, LLC. Defendants should not be required to divulge private, protected information within its databases that will be used by the government, as has been announced in open court, in violation of those individual's rights to privacy and against unreasonable searches and seizures.

2. Presence of a videographer. In [¶ 9 of the Order](#), Judge Furse said that “Counsel for the United States may bring a videographer to record the proceedings during the visit identified in ¶ 4 to document Defendants’ compliance with this Order.” At no time during the briefing of the motion or during oral argument did Plaintiff seek to include a videographer in the discovery of computer evidence. Such an expense and intrusion are not warranted and is disproportionate to the discovery obligation by Defendants.
3. The information does not advance any issue in this dispute. The names of the individuals who have purchased lenses from RaPower3 have been previously provided. Only the names are nominally relevant, if relevant at all, to any issue in dispute. Obtaining wholesale access to the computer system of the Defendants to engage in an unfettered fishing expedition does not advance any issue or claim in this case.
4. It is important that the tax treatment taken by individuals or entities who purchased solar lenses from RaPower-3, LLC has never been adjudicated as unlawful or contrary to allowable IRS code sections. While the IRS has challenged taxpayers’ rights to claim the solar credit or business depreciation expenses, and over 200 individuals have been audited, none of those cases have proceeded out of administrative review. There has yet to be a judicial determination that the buyers of the RaPower-3, LLC solar lenses are not entitled to take the solar tax credit and that individuals or entities that own and lease solar lenses are not entitled to take a depreciation expense for their solar energy business. Until such time as there is a judicial determination of unlawful tax treatment, the information obtained by the

government in this case should not be used for enforcement purposes and the Protective Order entered in this case should be clarified to prohibit the government's use of confidential information outside of the parameters of this case.

Dated this 1st day of November, 2017.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.  
Denver C. Snuffer, Jr.  
Steven R. Paul  
Daniel B. Garriott  
*Attorneys for Defendants*

### CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANTS' OBJECTION TO ORDER GRANTING UNITED STATES' EXPEDITED MOTION FOR SANCTIONS (Doc. 235) AND REQUEST FOR EXPEDITED TREATMENT** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher  
Erin R. Hines  
Christopher R. Moran  
US Dept. of Justice  
P.O. Box 7238  
Ben Franklin Station  
Washington, DC 20044  
*Attorneys for USA*

Sent via:  
☐ Mail  
☐ Hand Delivery  
☐ Email: [erin.healygallagher@usdoj.gov](mailto:erin.healygallagher@usdoj.gov)  
[erin.r.hines@usdoj.gov](mailto:erin.r.hines@usdoj.gov)  
[christopher.r.moran@usdoj.gov](mailto:christopher.r.moran@usdoj.gov)  
☒ **X** Electronic Service via Utah Court's e-filing program

/s/ Steven R. Paul  
*Attorneys for Defendants*