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IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRIC 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.	**REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO QUASH** Case No. 2:15-CV-0828 DN Judge: Honorable David Nuffer Magistrate Judge Brooke Wells

Defendants, RaPower-3, LLC; International Automated Systems, LLC; LTB1, LLC; and Neldon Johnson, by and through their counsel of record, Justin D. Heideman and Christian D. Austin of the law firm Heideman & Associates, hereby submit this *Reply Memorandum in Support of Defendants' Motion to Quash*.

ARGUMENT

On July 25, 2016, Plaintiff filed its "*Response to Defendants' Motion to Quash Subpoena"* ("Plaintiff's Motion"). In Plaintiff's Motion, Plaintiff requests this Court deny Plaintiff's Motion because Defendants allegedly (1) failed to "meet-and-confer," (2) failed to timely file, (3) was not appropriately filed because the subpoenas required compliance outside the District of Utah, and (4) failed to posit merited arguments. Given the history between the parties and the sensitivity of the technology, Plaintiff's suggestions fail, and this Court should accordingly grant Defendants' *Motion to Quash*. The foregoing will be discussed as follows.

I. DEFENDANTS HAD NO DUTY TO MEET AND CONFER BECAUSE THEY WERE NOT THE PARTY SEEKING TO COMPEL DISCOVERY, AND EVEN IN THE EVENT THEY WERE REQUIRED TO MEET AND CONFER, THE PARTIES MET AND DISCUSSED ISSUES REGARDING DISCOVERY ON NUMEROUS OCCASIONS.

Plaintiff suggests Defendants' *Motion to Quash* should be denied because the parties failed to "meet-and-confer" regarding Defendants objections. However, because Defendants were not the parties seeking to compel discovery, they were not required to meet and confer. Rule 37 of the Federal Rules of Civil Procedure states that when a party is moving to compel discovery, "[t]he motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action." Fed. R. Civ. P. 37(a)(1).

DUCivR 37-1(a) states that a court will not entertain a discovery motion "unless counsel for the moving party files with the court, at the time of filing the motion, a statement 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." In a recent case, *Am. Charities for Reasonable Fundraising Regulation, Inc. v. O'Bannon*, 2015 U.S. Dist. LEXIS 103814, 2015 WL 4693468 (D. Utah Aug. 5, 2015), the court stated that before the court would consider a motion to compel, the meet and confer requirements must be made. Moreover, Rule 45 of the Federal Rules of Civil Procedure, governing quashing subpoenas, does not include any requirement to meet and confer. Fed. R. Civ. P. 45(d)(3)(a). Here, Defendants are neither the party attempting to obtain discovery nor are they seeking a motion to compel. Defendants are simply attempting to quash a subpoena that contravenes the Standard Protective Order currently in place concerning confidential information. Additionally, because Defendants were not seeking discovery, they are not required to meet and confer.

Even in the event Defendants were required to meet and confer, the parties have for all intents and purposes done so on multiple occasions. This Court is fully aware of the issues plaguing this litigation with respect to discovery. Specifically, Plaintiff sought relief from and to eliminating, the Utah Standard Protective Order, and Defendants objected to Plaintiff's motion on the grounds the Standard Protective Order provides Defendants with the protection needed to ensure their technology, practices, and procedures remain confidential and proprietary. As a result of this, the parties entered into an agreement whereby the Defendants could refrain from producing information they believed would be subject to any applicable protective order.

Defendants feel that since the government withdrew the criminal charges originally brought against Defendant that now, in lieu of the criminal action, the government has brought this civil action. In light of the parties' history and the agreement entered into, the parties have extensively disagreed on what information should be discoverable at this time. Specifically, whether certain information is confidential, trade secret, or proprietary. As a result of these disagreements, the parties have had numerous teleconferences to discuss concerns over what information will be produced at this time. Defendants have made Plaintiff's aware that any information that could possibly disclose confidential information will be provided subject to the outcome of the hearing on the protective order. Therefore, even though the parties to this motion are not required to meet and confer, either under the Federal Rules of Civil Procedure or Utah's local rules, the parties have substantially done so.

II. DEFENDANTS' MOTION SHOULD NOT BE DISMISSED AS UNTIMELY.

Under Rule 6 of the Federal Rules of Civil Procedure, "When an act may or must be done within a specified time, the court may, for good cause, extend the time." Fed. R. Civ. P. 6(b)(1). If the time for compliance is passed, the court may extend the time for excusable neglect. Fed. R. Civ. P. (b)(1)(b). Here, new Counsel has entered the case, nearly 30 subpoenas have been issued in the past few months, at least one extension for compliance was granted, and Defendants' Motion was timely pursuant to that extension. Furthermore, if the subpoenas at issue are at least modified, as requested in Defendants' Motion, Plaintiff will not be unfairly prejudiced. Specifically, in Defendants' Motion, Defendants have requested the subpoenas at least be

modified until this Court has decided the issue surrounding the protective order. In light of this, the Court should exercise its discretion under Rule 6 of the Federal Rules of Civil Procedure, and not deny Plaintiff's Motion on the grounds of being untimely.

III. THE ISSUING DISTRICT COURT IS THE CORRECT FORUM FOR DEFENDANT TO MOVE TO QUASH SUBPOENAS ISSUED TO THIRD-PARTIES REQUESTED TO COMPLY IN OUT-OF-STATE DISTRICTS.

Plaintiff erroneously argues that under Fed. R. Civ. P. 45(d)(3)(B), Defendant should have to quash or modify the subpoenas issued to third-parties in the district court where compliance is required. Plaintiff's argument on this point is in err for two reasons. First, Fed. R. Civ. P. 45(d)(3)(B) does not apply to Defendant because Defendant is not the person from who production is sought. Further, Plaintiff's argument is contradictory to the rationale behind Fed. R. Civ. P. 45(d), which is to avoid undue burden and expense.

Fed. R. Civ. P. 45(d) is meant to provide a shield to the "person commanded to produce," in order "to avoid imposing undue burden and expense on a person subject to the subpoena." See, 45(d)(2)(B); Fed. R. Civ. P. 45(d)(1). Presently, Plaintiff is attempting to use Fed. R. Civ. P. 45(d) as a sword to create the opposite result by inflicting undue burden and expense on Defendant. Requiring Defendant, who is present in this District, to quash the subpoenas in multiple out-of-state jurisdictions would undoubtedly result in undue burden and expense to Defendant. Interpreting, Fed. R. Civ. P. 45(d) in this manner, as suggested by Plaintiff, simply flies in the face of the intent and goal sought to be accomplished by Fed. R. Civ. P. 45(d). Plaintiff should not be allowed to inflict undue burden or expense upon Defendant this way.

Thus, this Court should reject Plaintiff's argument on this point. This District Court, where the case is pending and where Defendant is located, is the correct venue for Defendant to move to quash subpoenas issued to third-parties residing out-of-state.

IV. DEFENDANTS' MOTION TO QUASH SHOULD BE GRANTED ON ITS MERITS

Plaintiff erroneously argues that Defendants' Motion to Quash Should be denied on its merits because the Motion does not establish that the documents sought contain trade secrets or other confidential information. Plaintiff then proceeds to only address the argument why the information should not be considered a "trade secret."

Rule 45(d)(3)(b) of the Federal Rules of Civil Procedures allows the Court to protect a party affected by a subpoena to a third-parties if it requires "(i) disclosing a trade secret or other confidential research, development, or commercial information . . ." Fed. R. Civ. P. 45(d)(3)(b)(i) (emphasis added). Plaintiff errs on this point because Defendants' motion seeks to quash the subpoenas by asserting the information is "confidential" and "commercial information." See Doc. 62, Motion to Quash, Argument subsection I, pg. 2. Plaintiff simply fails to make any argument why the information should not be considered "confidential" and "commercial information." The private business dealings, negotiations, and contracts between Defendants and the third-parties, from whom production is sought by the subpoenas, are plainly "commercial information," and not public information, which should remain confidential and private. Plaintiff fails to recognize that disclosing private business dealings, and negotiations, and contracts generally, are likely to injure Defendants in ways that cannot fully be understood

or articulated. For instance, Defendants negotiation and agreement with one client may differ from that of another client. In such a case, one client may wonder why they received one deal, while the other client received another. The client may then feel they have been treated differently, and unfairly, when in fact, each client has simply bargained for a different agreement. Thus, the release of such information will likely injure the relationships between Defendants and their clients.

Thus, the confidential commercial information should be protected, and Defendants' Motion to Quash should be granted.

CONCLUSION

For the foregoing reasons, Defendants request this Court grant their *Motion to Quash*.

SIGNED and DATED this 8th day of August, 2016.

HEIDEMAN & ASSOCIATES

/s/ Justin D. Heideman
JUSTIN D. HEIDEMAN
Attorney for RAPower-3, LLC, International Automated Systems, Inc., LTB1, and Neldon Johnson

CERTIFICATE OF SERVICE

On this 8th day of August, 2016, I hereby certify a true and correct copy of the forgoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO QUASH** was served on the following:

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