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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 (ECF DOC. 70).** 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 of the law firm Heideman & Associates, hereby submit this *Reply Memorandum in Support of Defendants' Motion to Quash*.

ARGUMENT

On July 21, 2016, Defendants RaPower-3, LLC; International Automated Systems, Inc.; LTB1, LLC; and Neldon Johnson ("Defendants") filed a *Motion to Quash or Modify Subpoena* issued by the United States to Wells Fargo Bank, N.A. Plaintiff filed its "*Response to Defendants' Motion to Quash Subpoena"* ("Plaintiff's Motion"). Plaintiff's response requests this Court deny Defendants' Motion because Defendants allegedly (1) failed to "meet-and-confer," (2) failed to support the motion with law or fact, and (3) failed to appropriately file because the subpoenas required compliance outside the District of Utah. 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. Plaintiff's analysis is in error because Defendants were not the parties seeking to compel discovery. As such, the rules do not require Defendants 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. Notably, however, 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)(emphasis added). Here, Defendants are neither the party attempting to obtain discovery nor the party seeking a motion to compel. Defendants are simply attempting to quash a subpoena that would contravene the agreement the parties made concerning confidential information. As such, Defendants are not seeking discovery, Thus Defendants are not required to meet and confer.

Even if the 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 to entirely reject the Utah Standard Protective Order. As such, 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 decided not to bring criminal charges against them that now, in lieu of a 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, and at what point in time. Defendants have made Plaintiff aware that any information that could possibly disclose confidential information will be provided subject to the outcome of the hearing regarding the protective order. Thus, despite the fact that Defendants are not required to meet and confer, either under the Federal Rules of Civil Procedure or Utah's local rules, the parties have already substantially done so and without resolution.

II. DEFENDANTS' MOTION IS SUPPORTED BY LAW AND FACTS.

Defendants' Motion is supported both by binding case law and the present facts. Plaintiff claims the reason the bank records are necessary is to determine if Defendants made or furnished "gross valuation overstatements" with respect to any "material matter" involved in the scheme. Specifically, Plaintiff's subpoenas are attempting to discover information regarding the lenses, including the cost to produce and market the lenses. Plaintiff's basis for requesting this Court to deny Defendants' Motion is that the Defendants have only offered "broad assertions" that the documents sought by the subpoenas contain purportedly secret information.

Defendants' do not concede the relevancy of the information sought. However, the relevancy of the information does not preclude the information from being sensitive and confidential. Plaintiff is requesting personal and business bank records. A person's or company's bank records are inherently some of the most personal information Defendants could possess. This information sensitivity is further enhanced because it concerns breakthrough technology; and commercial information. Furthermore, the information Plaintiff seeks is plainly not necessary to Plaintiff's claims.

Accordingly, 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). Furthermore, 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 of whether to quash or modify, "the court must balance the need for the confidential information against the possible injuries resulting from disclosure. See *Fanjoy v. Calico Bands, 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).

Here, Plaintiff is seeking information attempting to show Defendants made false or fraudulent statements, or gross valuation over-statements, about material matters in furtherance of the "alleged solar energy scheme" and the extent of Defendants' alleged gross receipts from the alleged scheme pursuant to 26 U.S.C. 6700(a)(2)(B) & (b). Whether or not the information sought is relevant has no bearing on the confidentially or sensitivity of the information. Plaintiff is seeking proprietary information. Furthermore, given the novel technology involved, the sensitivity of such information is heightened. Defendants don't need to expound on their reasons for not wanting bank records associated with their novel technology made public, such reasons are plainly obvious. Furthermore, Plaintiff cannot show the information is necessary to the litigation. See *Innovative Therapies, Inc. v. Meents*, 302 F.R.D. 364, 380 (D. Md. 2014). Plaintiffs have made no effort to review the technology but rather are seeking confidential proprietary bank records. Defendants request that this Court at least modify the subpoenas, to be subject to a protective order, before Defendants release information associated with this highly sensitive, proprietary, information.

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), Defendants 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 error for two reasons. First, Fed. R. Civ. P. 45(d)(3)(B) does not apply to Defendants because Defendants are not the person from who production is sought. Notably, Plaintiff's argument is contradictory to the rationale behind Fed. R. Civ. P. 45(d), which is to avoid undue burden and expense.

> (A) *Appearance not Required*. **A person commanded to produce** documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.
>
> (B) *Objections*. **A person commanded to produce** documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested . . .

Fed. R. Civ. P. 45(d)(2)(A) & (B) (emphasis added

Here, Defendants are not the party commanded to produce information. Fed. R. Civ. P. Moreover, 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 inflict undue burden and expense on Defendants. Defendants have motioned this Court to quash subpoenas issued to third-parties. Requiring Defendants, who are 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 simply should not be allowed to inflict undue burden or expense upon Defendants this way.

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

CONCLUSION

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

SIGNED and DATED August 19, 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 19th day of August, 2016, I hereby certify a true and correct copy of the forgoing **REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO QUASH SUBPOENAS (ECF DOC. 70)** was served on the following:

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