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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 **UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO EXTEND TIME TO RESPOND TO DISCOVERY REQUESTS** Judge David Nuffer Magistrate Judge Brooke C. Wells

The United States filed its complaint on November 23, 2015.[1] Discovery commenced on March 10, 2016 with the Rule 26(f) attorneys' conference.[2] The United States issued its first requests for the production of documents and first set of interrogatories to all Defendants on April 8, 2016.[3] On April 11, 2016, the United States moved for relief from the District of Utah's Standard Protective Order.[4]

Defendants have resisted nearly all of the United States' discovery requests. Their primary, and often sole, objection to any production of documents or information centers on the protective order – or lack thereof. Defendants have not produced the bulk of information and documents responsive to the United States' discovery requests.[5] They claim that the responsive information and documents are subject to some kind of confidentiality protection[6] and refuse to fully respond until a protective order is entered and the issue is settled[7]. Further, the responses to the United States' first set of interrogatories provided by Defendants International Automated Systems, Inc. ("IAS"), LTB1, LLC ("LTB"), and Neldon Johnson were so deficient – for reasons

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[1] ECF Doc. 2.

[2] ECF Doc. 35 ¶ 1(c).

[3] *See, e.g.*, ECF Doc. 95-6, excerpts from United States First Requests for the Production of Documents to Defendant Neldon Johnson; ECF Doc. 57-1, United States' First Interrogatories to Neldon Johnson.

[4] *See generally* ECF Doc. 39.

[5] *See* ECF Doc. 112 at 3-4 (noting that a "vast amount of documentation" has not yet been produced). Shepard and Freeborn have produced some documents and Defendants have answered certain interrogatories propounded by the United States. But Johnson, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC, have not produced any documents to date. *E.g.* ECF Doc. 111-1, "Defendant Neldon Johnson's Production of Documents."

[6] *See* ECF Doc. 112 at 3-4.

[7] *E.g.* ECF Doc. 66-1; ECF Doc. 83; ECF Doc. 111-1.

other than their objections based on the purported confidentiality of their documents – that United States filed motions to compel.[8] RaPower-3 failed to respond at all, resulting in the United States filing another motion to compel.[9] When RaPower-3 did respond, its responses and objections showed the same deficiencies as the responses and objections from Johnson, IAS, and LTB.[10]

From March 14, 2016 through July 21, 2016, the United States served Defendants with notice of its intent to issue subpoenas for the production of documents to third-party witnesses, and did serve the subpoenas.[11] Defendants moved to quash many of the third-party subpoenas for the production of documents.[12] Again, Defendants' primary argument is that the subpoenas seek documents that would fall under a protective order.

On September 20, 2016, this Court granted the United States' motion for relief from the application of the Standard Protective Order.[13] The order granting such relief also stayed this case "for forty-five days to allow the parties to negotiate a new protective order."[14] The parties

[8] ECF Docs. 55-57.

[9] ECF Docs. 53 & 59.

[10] ECF Docs. 59 & 69.

[11] *E.g.*, ECF Doc. 39 at 2-3; ECF Docs. 71, 73, 77, 85, 86.

[12] ECF Docs. 62, 65, 70, 83, 84, and 87.

[13] ECF Doc. 92.

[14] *Id.* at 6.

submitted their respective proposed protective orders on November 3, 2016.[15] The stay expired on November 4, 2016.[16] To date, a new protective order has not been entered by the Court.

On November 4, 2016, Defendants filed a motion seeking relief regarding various discovery motions pending before this Court.[17] At base, their primary requests appear to be that this Court should enter a new protective order before entering any order on the pending discovery motions and that they should be granted 60 days from the date a new protective order is entered to respond to the United States' discovery requests. Defendants' motion should be denied.

I. The motions to quash the United States' subpoenas should be denied promptly, regardless of whether or when a new protective order is entered in this case.

As the United States has explained in briefing before this Court, Defendants' motions to quash were legally and factually meritless.[18] They should be denied. There is no reason to delay a decision on those motions until a new protective order is entered because Defendants did not make even a minimal showing that the documents the United States sought by the subpoenas were entitled to any confidentiality protection. The delay caused by these unfounded motions to quash has already been substantial and need not continue.

[15] ECF Docs. 106 and 110.

[16] ECF Doc. 92 at 6.

[17] ECF Doc. 112.

[18] ECF Docs. 71, 73, 77, 85, 86.

But if this Court does choose to enter a new protective order first and then dispose of the motions to quash, Defendants themselves acknowledge that their arguments would be "moot."[19] In either event, the subpoenas should not be quashed.

II. Defendants have not shown good cause for their request for 60 additional days to respond to the United States' discovery requests.

Defendants were served the United States' first requests for the production of documents and first set of interrogatories on April 8, 2016.[20] Now, more than seven months (and counting) later, Defendants claim that they cannot produce responsive documents and information in their possession, custody, or control without *yet another* 60 days after a protective order is entered in this case.[21] There are two issues to be addressed here: (a) all Defendants' production of documents and information that they claim is PROTECTED INFORMATION and (b) the failure of Defendants Johnson, IAS, RaPower-3, and LTB to adequately respond or object to the United States' first set of interrogatories for reasons other than the protective order issue.

With respect to documents and information purportedly subject to a new protective order, Defendants simply claim that they have been "unable to adequately[] protect, categorize and mark for protection the vast documentation without a finalized protective order that would provide the parameter of protection of the various document production that is and should be protected."[22] But they do not explain why, if they have collected "vast documentation," they

[19] *See* ECF Doc. 112 at 4; ECF Doc. 113.

[20] *See, e.g.*, ECF Doc. 95-6, excerpts from United States First Requests for the Production of Documents to Defendant Neldon Johnson; ECF Doc. 57-1, United States' First Interrogatories to Neldon Johnson.

[21] ECF Doc. 112 at 3-4.

[22] *Id.* at 3.

have been unable to review it and designate it in the last seven months. The parties have not disputed, nor have they proposed a material change in, the definition of PROTECTED INFORMATION, and what information may qualify as CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY.[23] Defendants do not identify any uncertainty on this issue that would have prevented them from doing the work to designate their responsive documents and information in the seven months since having received the United States' discovery requests.

With respect to the responses to the United States' first set of interrogatories from Johnson, IAS, RaPower-3, and LTB: these parties provided incomplete information, and untimely and improper objections for reasons not related to the protective order issue. The United States' briefing in support of its motions to compel states the reasons that these responses were inadequate and their objections should be deemed waived.[24] The United States' motions to compel should be granted. These Defendants do not explain why, if the motions to compel are granted, they would require an additional 60 days to make full responses to the United States' first set of interrogatories.[25] They have had more than seven months' notice of the information the United States is seeking.

For these reasons, Defendants have not shown "good cause" for allowing 60 additional days from the date a new protective order is entered in this case to produce the requested documents and respond to the first set of interrogatories. "Good cause means little more than

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[23] *Compare* ECF Docs. 106 ¶ 2 & 110 ¶ 2 *with* D. Utah Standard Prot. Order ¶ ¶ 2, 9(d).

[24] ECF Docs. 53, 55-57, 59, 66-69.

[25] *See generally* ECF Doc. 112.

there is a good reason for the action proposed to be taken and can be satisfied by a mere showing of good faith or lack of prejudice to the adverse party."[26] Defendants have not demonstrated a good faith effort to expeditiously complete their discovery obligations. Defendants should not be rewarded for this lack of good faith with an additional two months to complete their obligations, when so substantial a delay would likely endanger the case management deadlines in this case and cause prejudice to the United States in the search for the truth.

Defendants' requested relief should be denied. Instead, Defendants should be granted no more than 14 days from the date a new protective order is entered to produce all documents responsive to the United States' first requests for the production of documents and to respond fully to the United States' first set of interrogatories.

[26] *Anderson v. Herbert*, No. 2:13-CV-00211, 2014 WL 2919708, at *2 (D. Utah June 27, 2014) (Shelby, J.) (quotations omitted); *see also* Fed. R. Civ. P. 6(b)(1)(A) (when an action must be taken within a specific time, the Court may extend the time "for good cause" if a request is made before the deadline expires).

Dated: November 18, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 18, 2016, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to the following:

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