U.S. Department of Justice

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October 10, 2017

VIA EMAIL

Denver Snuffer
Steven Paul
NELSON SNUFFER DAHLE & POULSEN
10885 South State Street
Sandy, Utah 84070

Re: *United States v. RaPower-3, LLC, et al.*

Case No. 2:15-cv-00828-DN-BCW

Dear Counsel:

The purpose of this letter is to challenge certain confidentiality designations in this case (*see* ECF Doc. 116 ¶ 8): the attempted designations of the depositions of Jessica Anderson and Richard Jameson and all documents produced by Mr. Jameson (collectively, the "Information"). For the reasons described below, none of the Information is PROTECTED INOFRMATION. We request that your clients rescind any confidentiality designation (or attempted designation) of this Information.

As an initial matter, the attempts to invoke the Protective Order at the depositions of Ms. Anderson and Mr. Jameson, and on every single page of the Jameson production, failed to actually designate the Information as PROTECTED INFORMATION. The Protective Order requires a party to "designate only that part of a document or deposition that is CONFIDENTIAL INFORMATION or CONFIDENTIAL INFORMATION – ATTORNEYS EYES ONLY, rather than the entire document or deposition." (ECF Doc. 116 ¶ 3(g); *id.* ¶ 2(c) (allowing a party to designate "batches" of materials as PROTECTED INFORMATION when making those materials available for inspection, but requiring the party to make specific designations on particular documents when producing them).) The Protective Order explicitly rejects such attempts to blanket-designate *all* deposition testimony and *every single* page of a document production. The attempted blanket designations of all of the Information failed; therefore none of the Information is PROTECTED INFORMATION. We will not treat it as PROTECTED INFORMATION going forward.

Further, the Information is not PROTECTED INFORMATION under the terms of the Protective Order. 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." (ECF Doc. 116 ¶ 2(a).) Under the terms of the Order, 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 Information here is not the kind of information that Fed. R. Civ. P. 26(c) protects. And even if it were, much if not all of the Information designated 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.) As has been relayed at many depositions in this case, Defendants have broadly disseminated information they obtained from both Ms. Anderson and Mr. Jameson. Further, Defendants do not require customers to keep their own transactional information confidential and many customers have produced such information (and tax returns) without confidentiality designations. (*E.g.*, *id.* at 10-12; Lunn_F&L-00498 through Lunn_F&L-00916; Aulds_R&M-00001 through Aulds_R&M-00211.)

Withdrawing the improper designations on this Information 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"). To the extent

the United States uses any of this Information in support of a public filing that will or may decide this case, such Information should be available to the public.

Sincerely,

/s/ Erin Healy Gallagher
ERIN HEALY GALLAGHER
Trial Attorney
Civil Trial Section, Central Region

CC: Daniel B. Garriott
Joshua Egan