



1 Pursuant to Federal Rule of Civil Procedure 26, Defendants claim the requested  
2 documents are irrelevant, overly burdensome, and impermissibly targeted toward the  
3 development of new claims and defenses (Doc. 320 at 2-3). Defendants also claim the  
4 request, if deemed relevant, may be executed by Defendants and Plaintiff's service of  
5 subpoenas on the third-parties is motivated by harassment (Doc. 320 at 2-3).

6 Plaintiff claims Defendants do not have standing under Rule 26 to object to subpoenas  
7 issued to third-parties (Doc. 320 at 4). Plaintiff further claims the requested documents are  
8 relevant to establish: (A) a connection between Defendants' profits (including successful  
9 federal government bids) and Defendants' violation of Plaintiff's rights; (B) the extent to  
10 which Defendants disclosed Plaintiff's confidential information to third-parties; and (C) the  
11 extent to which Defendants disclosed information under seal in the current proceedings to  
12 third-parties (Doc. 320 at 4-6). Plaintiff further claims it is not discovering documents to  
13 generate new claims or defenses and Defendants cannot be trusted to produce documents  
14 detrimental to their case (Doc. 320 at 4-5).

## 15 **Discussion**

### 16 **A. Standing**

17 Plaintiff claims Defendants have no standing to challenge subpoenas issued to third-  
18 parties because Federal Rule of Civil Procedure 45(c)(3) ("Rule 45") only allows the  
19 nonparty target of a subpoena, not a party, to challenge the subpoena's validity. See James  
20 Wm. Moore, 9 Moore's Federal Practice § 45.50[3] at 45-79, 80 (3d ed. 2008) ("[When a  
21 subpoena is directed to a nonparty, any motion to quash or modify the subpoena generally  
22 must be brought by the nonparty," except where the party "claims a personal right or  
23 privilege regarding the production or testimony.>"). Defendants claim Rule 45 is irrelevant  
24 because Federal Rule of Civil Procedure 26(c) ("Rule 26") allows a party to challenge all  
25 disclosures, regardless of their source, if the requested information exposes the moving party  
26 to "annoyance, embarrassment, oppression, or undue burden or expense." This question is  
27 unsettled in the Ninth Circuit and Defendants have the better argument.  
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1 According to its 1991 Advisory Committee Notes, Rule 45(c)(3) “tracks the  
2 provisions of Rule 26(c).” Fed. R. Civ. P. 45. In this way, Rules 45 and 26 are not mutually  
3 exclusive, but rather cover the same ground. Under Rule 26(c), a party may move for a  
4 protective order to protect itself from “annoyance, embarrassment, oppression, or undue  
5 burden or expense,” regardless of whether the moving party is seeking to prevent disclosure  
6 of information by a nonparty, as long as the moving party can tie the protected information  
7 to an interest listed in the rule, such as annoyance, embarrassment, etc. Fed. R. Civ. P. 26(c).  
8 See also e.g. Portland Gen. Elec. Co. v. U.S. Bank Trust Nat’l Ass’n, 38 F. Supp. 2d 1202,  
9 1206 n.3 (D. Or. 1999), *rev’d on other grounds*; Del Campo v. Kennedy, 236 F.R.D. 454,  
10 459 (N.D. Cal. 2006). Under Rule 45(c), a party may prevent the disclosure of information  
11 by a subpoenaed nonparty if the party “claims a personal right or privilege regarding the  
12 production or testimony.” Moore, *supra* at 45-79, 80. See also Jerry T. O’Brien, Inc. v Sec.  
13 & Exch. Comm’n, 704 F.2d 1065, 1068 (9th Cir. 1983), *rev’d on other grounds*, (“Barring  
14 questions of privilege or other special circumstances,” parties “have no right to protect or  
15 withhold documents held by a third party.”); Diamond State Ins. Co. v. Rebel Oil Co., Inc.,  
16 157 F.R.D. 691, 695 (D. Nev. 1994). The Court reads the interests required for a protective  
17 order under Rule 26(c) and the “claim of personal right or privilege” required for a party to  
18 challenge a subpoena under Rule 45(c) to be the same. Thus, under either rule a party may  
19 prevent the disclosure of information from a nonparty by showing a “claim of personal right  
20 or privilege,” including information which could expose the moving party to “annoyance,  
21 embarrassment, oppression, or undue burden or expense.”

## 22 B. Discovery Ruling

23 Because Defendants do not raise protected interests cognizable under Rules 26(c) and  
24 45(c), the Court finds for Plaintiff and will not issue the requested protective order. The  
25 information sought by Plaintiff is relevant, calculated to discover what confidential  
26 information Defendants shared with third-parties and how this information was used to  
27 secure contracts and profits for Defendants. Contrary to Defendants’ assertions, this  
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1 information is relevant to Plaintiff's existing claims, such as liability on the untried unfair  
2 competition claim or damages on the tried breach of contract and misappropriation of trade  
3 secrets claims. While bona fide allegations of harassment could implicate the interests  
4 outlined in Rules 26(c) and 45(c), Defendants' allegations are not supported with evidence  
5 and, given Defendants' credibility and track record, should not be given much weight. To  
6 address Defendants' harassment concerns, the Court will limit the scope of Plaintiff's  
7 document discovery request as future guidance to prevent Plaintiff from over zealously  
8 seeking information from Defendants' clients and vendors in future subpoenas. Defendants'  
9 final claim, that Defendants should be allowed to produce the requested materials instead of  
10 the subpoenaed third parties, is also without merit. Many of the requested documents do not  
11 concern Defendants and would not be in Defendants' possession.

12 Accordingly,

13 **IT IS ORDERED** Plaintiff's October 28, 2008 subpoenas issued to BGF Industries,  
14 Inc., Aerial Machine & Tool Corp., and Assemblies Unlimited, Inc. **ARE AFFIRMED**, with  
15 the following changes:

- 16 (3) All documents provided to Lawrence Jesclard, Candice Jesclard, or HPS  
17 ("Defendants") in connection with his, her, or its preparation of bids in which the  
18 subpoenaed party participated or was asked to participate with Defendants;
- 19 (4) All communications with actual HPS customers relating to those customers'  
20 transactions with HPS.

21 DATED this 8<sup>th</sup> day of December, 2008.

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Roslyn O. Silver  
United States District Judge