

1 Technology Inc. to Produce Requested Documents (“Motion”).¹

2 **ARGUMENT**

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4 ***I. ACTI Ignores the Stipulated Protective Order that It Asked the Court to Enter Because ACTI Knows that It Is Outcome Determinative.***

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6 ACTI does not deny that the Stipulated Protective Order directly prohibits the exact
7 concerns it currently expresses. Nor does ACTI deny that it asked the Court to enter the
8 Stipulated Protective Order so that it could produce these exact documents after CH2E sought
9 them in the First Requests.

10 Further, ACTI does not even mention—much less attempt to distinguish—controlling
11 case law in the District of Nevada holding that a party has no right to object on confidentiality
12 grounds when the Court has already entered a stipulated protective order. (Mot. at 11 (citing
13 *Koninklijke Philips Electronics N.V. v. KXD Tech., Inc.*, No. 2:05-cv-01532-RLH-GWF, 2007
14 WL 778153, at *4 (D. Nev. Mar. 12, 2007) (granting motion to compel where “a stipulated
15 protective order regarding the production of confidential and proprietary information has been
16 entered in this case”).)

17 These undisputed facts and controlling case law are outcome determinative and require
18 the production of the design drawings. The fact that ACTI ignores these determinative facts and
19 law exposes the Opposition as nothing more than hyperbole designed to distract from the
20 operative issue in the Motion: whether ACTI is justified in refusing to produce purportedly
21 proprietary documents when it had already asked the Court to enter the Stipulated Protective
22 Order so that it could produce these very documents.

23 As a matter of law, the Court should grant the Motion and require ACTI to produce the
24 design drawings pursuant to the existing Stipulated Protective Order.

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27 ¹ Capitalized terms are as defined in the Motion. American Combustion Technologies of
28 California Inc.’s Opposition to CH2E’s Motion to Compel and Request to Amend Stipulated Protective
Order is referred to as the “Opposition” or “Opp.”

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II. ACTI’s Mischaracterizations and Conjecture Cannot Change the Fact that the Design Drawings Are Relevant and Must Be Produced as Required by the Federal Rules of Civil Procedure.

As a preliminary matter, ACTI’s attempt to re-characterize the design drawings at issue in this case as “manufacturing” drawings (Opp. at 2.) is directly contradicted by the testimony of its President, Latif Mahjoob:

- Q. The design drawings you also have?**
- A. Yes.
- Q. But you didn’t give those to CH2E?**
- A. No. Those are ours.

(Mot. at Szewczyk Dec., Ex. E (L. Mahjoob Dep. Tr.) at 238:24-239:2.) CH2E’s Requests sought these design drawings as part of its request for “[a]ll calculations, designs, drawings, schematics and other Documents relating to the design of the Equipment.” (Request No. 31.) ACTI’s current re-labeling is simply an attempt to cast relevant documents as somehow irrelevant due to an arbitrary label.

In any event, CH2E has made clear, both in conferrals and in the Motion,² that ACTI’s complete and detailed design drawings are directly relevant to its claims for several reasons.

First, the design drawings are relevant to CH2E’s claim that ACTI’s Equipment—as an entire system—could not work as promised and warranted. And, contrary to ACTI’s current statement that the drawings “do not contain calculations” (Opp. at 10), Mr. Mahjoob explained that these “drawings or schematics” are the only drawings which “embod[y]” the “calculations [ACTI] made for the unit [it] sold to CH2E.” (Mot. at Szewczyk Dec., Ex. E (L. Mahjoob Dep. Tr.) at 188:10-189:20.) They are therefore necessarily relevant under Federal Rule of Civil Procedure 26’s broad standard.

Further, accepting ACTI’s position that it can cherry-pick “discrete areas” of the detailed

² Contrary to ACTI’s baseless statements, CH2E made crystal clear in numerous conferrals, including written conferrals and in a nearly hour-long telephonic conferral, why the design drawings are relevant and necessary. (Mot. at Szewczyk Dec., Ex. 4 (“The production of partial drawings or component drawings would allow ACTI to hide system-wide inefficiencies. . . . And [] the Purchase Agreement required ACTI to provide complete and detailed design drawings, and ACTI’s failure to do so is one of the bases for CH2E’s breach of contract claim.”).)

1 drawings (Opp. at 11) would not only allow ACTI would to hide system-wide inefficiencies, but
2 it would also allow ACTI to hide any manner in which ACTI failed to adhere to its own
3 drawings. And, because ACTI has never produced a log of the documents it has withheld, CH2E
4 does not have the ability to pinpoint certain drawings or portions thereof.

5 *Second*, ACTI admits that the “workmanship” and “material” details the requested
6 drawings include components which are specifically discussed in the Complaint (Opp. at 10-11),
7 but nonetheless makes a blanket assertion that these details are not relevant (Opp. at 8). Aside
8 from the facial contradiction, ACTI’s argument ignores the fact that the drawings are necessary
9 to determine whether ACTI complied with its own plans with respect to these issues.

10 *Third*, the design drawings are relevant to CH2E’s breach of contract claim, which
11 alleges that ACTI breached the Purchase Agreement by failing to provide complete and detailed
12 drawings of the pyrolysis system. The fact that ACTI is now asserting an (incorrect) alternative
13 interpretation of the contract does not and cannot change the relevancy of the drawings during
14 the discovery phase of this case. Indeed, under ACTI’s theory, it could unilaterally determine
15 that central documents are not discoverable based on any unreasonable interpretation it develops.
16 Such a position is simply not permissible under the Federal Rules of Civil Procedure.

17 *Fourth*, ACTI has made the pre-construction drawings all the more relevant by arguing
18 that CH2E made modifications to certain components of the Equipment which altered its ability
19 to operate. Although CH2E vigorously disputes the factual accuracy of ACTI’s argument, it
20 necessarily makes the drawings critical as to the issue of whether the Equipment—as originally
21 designed as a total system by ACTI—was capable of operating at the warranted levels.

22 *Finally*, despite its attempt to cast the obviously relevant drawings as somehow not
23 relevant, ACTI essentially concedes that the drawings are relevant by arguing that CH2E can just
24 “measure the distances and specifications based on the actual as-built equipment.” (Opp. at 10.)
25 Aside from the fact that it is entirely inappropriate to withhold documents on the grounds that the
26 other party could physically inspect equipment and attempt to derive what ACTI could have
27 calculated, doing so would not show whether ACTI followed its own calculations and designs.

28 The burden is on ACTI—not CH2E—to show that the drawings are not relevant.

1 *Koninklijke*, 2007 WL 778153 at *4 (“The party opposing discovery has the burden of showing
2 the discovery is . . . not relevant.”). ACTI has not and cannot carry that burden.³

3 ***III. ACTI Concedes that Pilot Unit Drawings Are Relevant.***

4 In the Opposition, ACTI concedes that the Pilot Unit drawings are relevant, identifies
5 documents in its possession that are responsive to CH2E’s discovery requests, and
6 acknowledges—without providing a reason why—that ACTI has not yet produced the
7 responsive documents. Notably, as of the November 14, 2016 filing of this Reply, ACTI still has
8 not produced these admittedly relevant documents. The Court should order ACTI to produce
9 immediately these documents, as they should have been produced months ago.

10 ACTI also concedes that it has relevant “manufacturing” drawings for the pilot unit,
11 but refuses to produce the drawings “absent protections for its intellectual property/trade
12 secrets.” (Opp. at 14.) As discussed above, the Stipulated Protective Order, which was
13 negotiated in 2015 so that ACTI could produce these exact documents, sufficiently protects
14 ACTI’s proprietary drawings. Accordingly, the Court should order ACTI to immediately
15 produce the complete set of all drawings for the Pilot Unit.

16 ***IV. ACTI Concedes that the No Copy AEO Provision Would be Prejudicial to CH2E.***

17 As a preliminary matter, the single cursory paragraph in Mr. Mahjoob’s affidavit is
18 unlikely to sustain ACTI’s burden of proving that the documents at issue contain trade secrets.
19 *See Le v. Zuffa, LLC*, No. 2:15-cv-01045-RFB-PAL, 2016 WL 2770522, at *1-2 (D. Nev. May
20 12, 2016). However, whether or not such documents could classify as trade secrets is not at issue
21 in the Motion—the issue is whether ACTI is justified in withholding documents under the guise
22 of “confidentiality” when the Court has already entered the Stipulated Protective Order which
23 directly addresses such concerns.⁴ It is not.

24 ³ ACTI’s apparent argument that a party must attach an expert affidavit to support a discovery
25 request has no basis under the law. *See* Fed.R.Civ.P. 26(b)(1); *Koninklijke*, 2007 WL 778153 at *4.

26 ⁴ ACTI’s attempt to move for the modification of the Stipulated Protective Order in its Opposition
27 was properly rejected by the Court. [ECF No. 58]. Although the Court notified ACTI that it must file its
28 request as a separate document, ACTI has not done so. Accordingly, ACTI’s request for a new protective
order with a No Copy AEO Provision is not at issue. CH2E addresses the prejudicial nature of such a
provision strictly for the benefit of the Court.

1 In any event, ACTI essentially concedes that the No Copy AEO Provision would be
2 prejudicial to CH2E, and therefore argues that CH2E would not be competent enough to
3 understand the drawings. (Opp. at 6–7.) ACTI’s argument is both legally irrelevant and
4 factually inaccurate.

5 ACTI cites to zero case law to support its argument that the purported technical
6 knowledge of a party has any bearing whatsoever on whether a document is discoverable
7 because such considerations are simply not relevant. *See* Fed.R.Civ.P. 26(b)(1); *Koninklijke*,
8 2007 WL 778153 at *4.

9 Further, ACTI’s claim that CH2E does not have the technical knowledge to understand
10 such documents is disingenuous. Jamie Kostura is a CH2E employee with advanced technical
11 background and capabilities. ACTI is aware of Mr. Kostura’s technical background because he
12 was the principal liaison with ACTI in 2014. ACTI also knows that Mr. Kostura is involved in
13 this lawsuit because he was listed in CH2E’s initial disclosures, has verified discovery response
14 on behalf of CH2E, and ACTI has identified him as someone it may want to depose.⁵

15 Simply put, not allowing CH2E’s counsel to confer with CH2E’s own technical
16 personnel would prejudice CH2E’s ability to present its case. And, ACTI’s new position⁶ that
17 the No Copy AEO Provision could allow CH2E’s counsel to make internal copies does nothing
18 to address the fact that CH2E would be prejudiced by not being able to confer with CH2E’s
19 technical personnel or in any convenient manner with its experts.

20 ***V. ACTI’s Refusal to Produce Documents Based on Purported Conversations in 2013 Is***
21 ***Improper.***

22 There is no basis in the law for a party to refuse to produce documents based on a
23 concern that the receiving party will not abide by a stipulated protective order that expressly
24 prohibits the act about which the producing party is concerned. Thus, as a matter of law, ACTI’s

25 ⁵ CH2E disputes ACTI’s statements regarding the ability of any other employee to understand the
26 drawings, but will not burden the Court with further discussion on an irrelevant issue.

27 ⁶ Prior to the Opposition, ACTI had never offered to allow CH2E’s attorneys to make internal
28 copies. Indeed, when the issue was raised by CH2E’s counsel (Opp. at Kawahito Dec., Ex. 3), ACTI
never made any offer to allow some copies to be made.

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1 refusal to produce the documents at issue is unjustified, and CH2E respectfully submits that the
2 Motion should be granted.

3 Further, ACTI's purported concern lacks any basis in logic or fact. ACTI claims that, in
4 2013, a non-party tangentially related to CH2E expressed an interest in acquiring ACTI's
5 technology. This interest was purportedly expressed before CH2E learned that the Equipment
6 could not operate as promised and before this lawsuit was filed. It was therefore necessarily
7 known by ACTI at the time that it negotiated and asked the Court to enter the Stipulated
8 Protective Order.

9 As explained above and in the Motion, the Stipulated Protective Order prohibits CH2E
10 from revealing documents marked as Confidential to non-parties. It also prohibits CH2E from
11 using any documents marked as Confidential for any non-litigation purposes. And, ACTI's
12 accusations that CH2E would violate these provisions have no basis in reality. Indeed, ACTI has
13 cited to zero evidence that any CH2E officer or employee has ever violated a Court order in any
14 manner, or that CH2E does not strictly abide by corporate formalities.

15 Simply put, the Stipulated Protective Order—which ACTI asked this Court to enter so
16 that it could produce these exact documents—adequately protects ACTI's interests, and ACTI
17 therefore had no justifiable reason for refusing to produce the requested documents. CH2E
18 respectfully requests that the Court grant its Motion.

19 **CONCLUSION**

20 For all of the foregoing reasons, CH2E moves this Court for an order compelling ACTI to
21 produce, within five days of the Court's order, all documents responsive to Requests Nos. 31, 32,
22 and 33. CH2E further asks the Court to award CH2E its expenses in bringing this Motion,
23 including attorneys' fees, pursuant to Federal Rule of Civil Procedure 37.

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1 Dated: November 14, 2016.

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CERTIFICATE OF SERVICE

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I hereby certify that on the 14th day of November 2016, and pursuant to Fed. R. Civ. P. 5(b), a true and correct copy of the foregoing **CH2E’S REPLY IN SUPPORT OF ITS MOTION TO COMPEL AMERICAN COMBUSTION TECHNOLOGY INC. TO PRODUCE REQUESTED DOCUMENTS** was electronically filed and served through the Court’s CM/ECF system, which will send a notice of electronic filing to the following:

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