

**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA, : 2:10-CV-00336
: JUDGE GRAHAM
: MAGISTRATE JUDGE KING
V. :
TOBIAS H. ELSASS, ET AL., :
: DEFENDANT. :

**DEFENDANTS' MOTION TO DESIGNATE CERTAIN EXHIBITS "CONFIDENTIAL"
UNDER THE STIPULATION OF CONFIDENTIALITY FOR THE PURPOSES OF ITS
MOTION TO COMPEL DISCOVERY FILED FEBRUARY 7, 2011 ONLY**

Defendants Tobias H. Elsass, Fraud Recovery Group, Inc. and Sensible Tax Services, Inc. hereby move the Court for an order designating Exhibits 14, 15, 16 and 17 as "CONFIDENTIAL" under the terms of the Stipulation of Confidentiality (the "Stipulation") (Dkt.#31) entered on January 24, 2011. The exhibits are documents produced by the government in discovery that contain third-party tax returns and return information, including without limitation names, addresses, telephone numbers, Social Security Numbers, income sources, investment information, and Internal Revenue Service analyses of taxpayer theft loss claims.

The Court should permit the designation of the exhibits as confidential, and sustain their filing under seal, for the following reasons:

- The public has no interest in the personal taxpayer information contained in the exhibits filed under seal.
- The Stipulation authorizes filing confidential documents under seal.
- Applicable provisions of the Internal Revenue Code, the Federal Rules of Civil Procedure and the Local Rules for the Southern District of Ohio require or otherwise permit filing the exhibits under seal.

- The government will not incur any prejudice if the exhibits are kept under seal for the purposes of the Motion to Compel.

Accordingly, the defendants' motion should be granted.

Respectfully submitted,

s/ David F. Axelrod

David F. Axelrod (0024023)

Trial Attorney

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MEMORANDUM IN SUPPORT

I. PROCEDURAL HISTORY

The Court entered a Stipulation of Confidentiality (the “Stipulation”) (Dkt.#31) on January 24, 2011. (Exhibit 1.) It provides, in pertinent part:

3. A party may designate material as confidential only when the material falls within the protections of Rule 26(c) of the Federal Rules of Civil Procedure. Unless otherwise stated in this stipulation, a declaration setting forth the party’s good faith basis for designating the information as confidential must be sent to all of the parties prior to, or contemporaneously with, the production or disclosure of that information.

7. **The parties and counsel for the parties shall not disclose or permit the disclosure of any documents or information designated as confidential under this Stipulation to any other person or entity, except that disclosures may be made in the following circumstances: *****

- (ii) Disclosures may be made to the Court and its employees;**

11. Any party may at any time serve a written objection to any designation of confidentiality made by the designating party. This notice shall specifically identify the material or information to which the objecting party wishes to have the designation removed. Within seven (7) days of receipt of such objection, the designating party (i) shall review the material to which the objection applies, (ii) notify the objecting party in writing whether the designating party will agree to remove the designation as requested, and (iii) if it will not agree to remove the designation, the designating party will state with specificity its reasons for not agreeing. If an agreement cannot be reached, the designating party may move for a ruling from the Court, designating the material as confidential or for other similar protection, within seven (7) days of the expiration of the seven (7) day period referenced

above. The material at issue will be treated as confidential until the Court decides the motion. If the parties disagree about whether the information is confidential and the designating party does not timely move the Court, then the document is deemed to be not confidential.

15. Nothing in this Stipulation shall be grounds for limiting or restricting the use of the materials filed with the court or at [sic] during a public hearing or trial.

(Exhibit 1.) (Emphasis added.)

The defendants filed a Motion to Compel on February 7, 2011. Four exhibits out of the seventeen attached to the motion contain personal tax returns and return information for third parties not involved in this litigation.¹ The defendants filed a Notice of Filing Exhibits Under Seal (Dkt. #38) on February 8, 2011, and submitted the exhibits in paper to the Clerk of the Court. Simultaneously therewith, the defendants transmitted the exhibits to the government. (Exhibit 3.) The defendants' counsel provided the government with a declaration setting forth the grounds for the confidential designation as required by the Stipulation. (See Exhibit 4, Declaration of Brian J. Laliberte ("Laliberte Declaration")).

The government objected to the designation of Exhibits 14 through 17 as confidential under the Stipulation, and to them being filed under seal. (See Exhibit 5, which contains the complete set of email correspondence between defense counsel and government counsel on this issue to date.) The defendants disagree with the government's assessment that the documents are not confidential, or otherwise can be redacted in a way that does not reduce their clarity. The Stipulation requires the

¹ The Declaration of Attorney Brian J. Laliberte, supporting the recitation of the facts and authenticating the exhibits, has been attached as Exhibit 2.

defendants to move the Court for a ruling that first, it properly designated the documents as confidential, and second, it properly filed them under seal.

The Court should grant the requested relief, permit the exhibits to remain designated as confidential and under seal.

II. LAW AND ARGUMENT

A. The Stipulation of Confidentiality permits the designation of documents as “confidential,” and contemplates that such documents will be provided to the Court under seal.

The Stipulation authorizes the disclosure of confidential documents to the Court. See Stipulation, ¶ 7. (ii). Southern District of Ohio Local Rule 79.3 authorizes the filing of documents under seal after the entry of a protective order, or as here, a stipulation. S.D. Ohio L.R. 79.3(a). The rule provides: “Unless otherwise ordered or specifically provided in these Rules, all documents which are (1) submitted for an *in camera* inspection by the Court, (2) **covered by a protective or other order requiring that they be filed under seal**, or (3) the subject of a motion for such an order, shall be submitted to the Clerk for filing in a securely sealed envelope.” (Emphasis added.) The defendants complied with Local Rule 79.3, and the Stipulation, in filing Exhibits 14, 15, 16 and 17 under seal. The Court should sustain that decision, and allow the documents to remain designated as confidential and under seal.

B. Applicable law and rules prohibit the disclosure of personal identifiers and taxpayer information.

The Stipulation contemplates designating documents, and filing them under seal, for any of the reasons permitted by Fed. R. Civ. P. 26(c). Rule 26(c) provides: “The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression or undue burden or expense” The exhibits filed under

seal contain personal taxpayer information. If the defendants published that information via PACER, it could lead to any of the adverse consequences identified in the rule. The designation of Exhibits 14, 15, 16 and 17 therefore was appropriate under the Stipulation, and Rule 26(c), to protect nonparty taxpayer information from public disclosure and potential abuse. See also Fed. R. Civ. P. 5.2(d) (authorizing the Court to order exhibits to be filed under seal).

Applicable provisions of the Internal Revenue Code also require the exhibits to be filed under seal. Section 7431, Title 26, United States Code provides:

(b) If any person who is not an officer or employee of the United States knowingly, or by reason of negligence, inspects or discloses any return or return information with respect to a taxpayer in violation of any provision of section 6103 or in violation of section 6104(c), such taxpayer may bring a civil action for damages against such person in a district court of the United States.

A person found liable under this provision may be subject to civil penalties, actual damages, punitive damages, the cost of an enforcement action and reasonable attorneys fees.² 26 U.S.C. § 7431(c).

Furthermore, Section 6103, Title 26, United States Code states: “Returns and return information shall be confidential. . . .” A “return” is defined as “any tax or information return . . . or claim for refund required by, or provided for or permitted under, the provisions of this title which is filed with the Secretary by, on behalf of, or with respect to any person, and any amendment or supplement thereto, including supporting schedules, attachments, or lists which are supplemental to, or party of, the return so filed.” 26 U.S.C. § 6103(b)(1).

² Similarly, Section 7216, Title 26, United States Code, prohibits disclosure of information by preparers of tax returns, like the defendants, under penalty of criminal sanction.

“Return information” is broadly defined in division (b)(2) of Section 6103 as follows:

(A) a taxpayer’s identity, the nature, source, or amount of his income, payments, receipts, deductions, exemptions, credits, assets, liabilities, net worth, tax liability, tax withheld, deficiencies, overassessments, or tax payments, whether the taxpayer’s return was, is being, or will be examined or subject to other investigation or processing, or any other data, received by, recorded by, prepared by, furnished to, or collected by the Secretary with respect to a return or with respect to the determination of the existence, or possible existence, of liability (or the amount thereof) of any person under this title for any tax, penalty, interest, fine, forfeiture, or other imposition, or offense,

(B) any part of any written determination or any background file document relating to such written determination (as such terms are defined in section 6110(b) which is not open to the public inspection under section 6110 ***.³

The Internal Revenue Code clearly requires careful handling of taxpayer information that may become part of the public record of this case.

The taxpayer privacy interests embodied in these statutes, and more generally in Rule 26(c), therefore should control the outcome here. The Court therefore should find that the defendants designated the exhibits as confidential and filed them under seal consistently with the Stipulation and applicable law and rules.

C. The government will not suffer any prejudice if Exhibits 14, 15, 16 and 17 remain filed under seal.

Paragraph 15 of the Stipulation expressly states: “Nothing in this Stipulation shall be grounds for limiting or restricting the use of materials filed with the court or at [sic] during a public hearing or trial.” The government produced the documents without regard to the information contained in the taxpayer files, and they remain in the

³ Section 6110, Title 26, United States Code permits the disclosure of certain determination information, but otherwise requires the deletion of personal identifiers.

government's possession. The government can use the exhibits, of course, and will not incur any prejudice if the exhibits remain under seal. Absent any prejudice to the government, the Court should weigh the taxpayer privacy interests above all else and permit the exhibits to remain designated as confidential and under seal.

D. The Court, in the alternative, should permit the defendants to proffer redacted versions of the exhibits.

Although the defendants do not concede any of the foregoing points, as a practical matter, the Court should permit them sufficient time to redact the exhibits if they are to become part of the public record of this case. Even if the Court orders the exhibits redacted, it also should enter an order that limits or prohibits nonparty remote electronic access to them. See Fed. R. Civ. P. 5.2(e). The risk of harm to the taxpayers whose information is in issue outweighs any other factor in determining whether the defendants properly filed the exhibits under seal. The Court therefore should grant this alternative relief if it does not permit the exhibits to remain under seal.

III. CONCLUSION

For the foregoing reasons, the defendants' motion – which requests very limited relief for the purposes of protecting taxpayer information submitted in connection with a procedural motion, should be granted. Consequently, Exhibits 14, 15, 16 and 17 should be designated as "CONFIDENTIAL" under the Stipulation of Confidentiality, and remain under seal for the purposes of the defendants' Motion to Compel. Failing that, the Court should grant alternative relief permitting the defendants to redact the documents and restricting electronic access to them via PACER and the CM/ECF System.

Respectfully submitted,

s/ David F. Axelrod
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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing was served upon all counsel of record via the Court's CM/ECF System this 15th day of February, 2011.

s/ Brian J. Laliberte

One of the Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF OHIO
COLUMBUS DIVISION

UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	Civil No. 2:10-cv-336-JLG-NMK
)	
TOBIAS H. ELSASS,)	
SENSIBLE TAX SERVICES, INC., and)	
FRAUD RECOVERY GROUP, INC.,)	
)	
)	
Defendants.)	

STIPULATION OF CONFIDENTIALITY

Plaintiff the United States of America, and Defendants Tobias H. Elsass, Sensible Tax Services, Inc., and the Fraud Recovery Group, Inc.’s (“FRG”)(collectively, the “FRG Defendants”) hereby enter into the following stipulation of confidentiality:

1. This Stipulation and Protective Order shall apply to any agents, attorneys, experts consultants, employees, parent companies, subsidiaries, officers, directors and employees of the parties, including but not limited to personnel of an office, board, division, or bureau of the Department of Justice (“Department”), clerical personnel and supervisory personnel of the Department, officers and employees of the Internal Revenue Service, and officers and employees of another federal agency working under the direction and control of the Department of Justice.

2. The restrictions and limitations contained in this Stipulation and Protective Order shall apply to documents (including all copies, excerpts and summaries thereof) produced, and deposition testimony provided, in connection with the third party subpoenas served or to be served

on the Third Party, and its current and past employees, in connection with the above referenced suit, (collectively “Discovery Material”).

3. A party may designate material as confidential only when the material falls within the protections of Rule 26(c) of the Federal Rules of Civil Procedure. Unless otherwise stated in this stipulation, a declaration setting forth the party’s good faith basis for designating the information as confidential must be sent to all of the parties prior to, or contemporaneously with, the production or disclosure of that information. The acceptance by the non-designating party of materials designated as confidential, whether received in discovery or otherwise, shall not be construed to waive the non-designating party’s right later to object to the designation in accordance with the terms of this Stipulation.

4. All copies, duplicates, extracts, summaries, or descriptions (hereinafter referred to collectively as “copies”) of documents or information designated as confidential under this Order, or any portion thereof, must be immediately affixed with the words: “CONFIDENTIAL: Subject to Protective Order in *United States v. Elsass, et al.*”

5. If a document marked confidential is introduced during a deposition, the portion of the deposition regarding the confidential document may be designated confidential, if such designation is made on the record at the time of the deposition or, if the party claiming confidentiality is not present at the deposition, by written notice within seven days thereafter. The portions of the transcript designated as confidential shall be affixed with the words: “CONFIDENTIAL: Subject to Protective Order in *United States v. Elsass, et al.*”

6. Except as otherwise provided in this Stipulation, information or documents designated as confidential by a party under this Stipulation shall not be used or disclosed by the

remaining parties or their counsel or any persons identified in Paragraph 8 of this Stipulation for any purposes whatsoever other than preparing for and conducting the litigation in this lawsuit (including any appeals).

7. The parties and counsel for the parties shall not disclose or permit the disclosure of any documents or information designated as confidential under this Stipulation to any other person or entity, except that disclosures may be made in the following circumstances:

(i) Disclosure may be made to employees of counsel for the parties, or to employees of the parties necessary to properly accomplish any purpose or activity described in 26 U.S.C. §§ 6103(h) or (k)(6) and the regulations thereunder, which is necessary for the preparation and trial of the above-captioned lawsuit. Any such employee to whom counsel for the parties makes a disclosure must be advised of, and become subject to, the provisions of this Stipulation requiring that the documents and information be held in confidence;

(ii) Disclosures may be made to the Court and its employees;

(iii) Disclosure may be made to court reporters engaged for depositions and those persons, if any, specifically engaged for the limited purpose of making photocopies of documents.;

(iv) Disclosure may be made to:

(a) any independent outside experts or consultants retained by the parties or their counsel for purposes of this litigation;

(b) employees and subcontractors of the independent outside experts or consultants retained by the parties or by their counsel for purposes of this litigation in paraprofessional, clerical, stenographic and ministerial positions; and

(v) Disclosures may be made to any fact witnesses or potential fact witnesses when a good faith determination is made that the documents would be relevant to their testimony or potential testimony. Such witnesses shall be informed of this Stipulation and Protective Order, that it applies to them, and be given a copy of the Order if requested.

8. Except as provided otherwise in this Stipulation, counsel for the parties shall keep all documents designated as confidential which are received under this Stipulation secure within their exclusive possession and must place such documents in a secure area.

9. No information or material designated as confidential shall be disclosed to any person described in subparagraphs (i) and (iv) of Paragraph 7 above until such time as such persons execute a copy of the Confidentiality Agreement in the form annexed hereto as Exhibit A agreeing to be bound by the terms of this Stipulation and Protective Order. The parties shall retain all copies of the Confidentiality Agreements executed by such persons until this action is resolved, at which time, upon request, the parties or their attorneys will exchange all the Confidentiality Agreements executed in this action.

10. Nothing in this Stipulation limits the right of any party to seek any protection it deems necessary for any documents or information, in accordance with Rule 26 of the Federal Rules of Civil Procedure/Rules of the United States Court of Federal Claims.

11. Any party may at any time serve a written objection to any designation of confidentiality made by the designating party. This notice shall specifically identify the material or information to which the objecting party wishes to have the designation removed. Within seven (7) days of receipt of such objection, the designating party (i) shall review the material to which the objection applies, (ii) notify the objecting party in writing whether the designating party will agree

to remove the designation as requested, and (iii) if it will not agree to remove the designation, the designating party will state with specificity its reasons for not agreeing. If an agreement cannot be reached, the designating party may move for a ruling from the Court, designating the material as confidential or for other similar protection, within seven (7) days of the expiration of the seven (7) day period referenced above. The material at issue will be treated as confidential until the Court decides the motion. If the parties disagree about whether the information is confidential and the designating party does not timely move the Court, then the document is deemed to be not confidential.

12. Nothing in this Stipulation shall prevent disclosure of any confidential information if the designating party consents in writing to the disclosure.

13. Notwithstanding any provision of this Stipulation, the parties may disclose confidential information or documents if necessary to comply with a subpoena or court order, whether or not originating with the Court in this captioned Stipulation. Within seven days of when it is recognized that disclosure of confidential information or documents is required to comply with a subpoena or court order, the party shall give prompt written notice to the designating party of the impending disclosure, unless otherwise prohibited by law.

14. At the conclusion of this litigation (including any appeals) all material designated confidential pursuant to the terms of this Stipulation shall either be destroyed or returned to the designating party, within sixty (60) days after the conclusion of the litigation, except with respect to (a) material that becomes part of the Court record in this matter, (b) work product of counsel, (c) transcripts, exhibits, and other documents required to be maintained by the Department's written record retention policy as necessary for an understanding of the outcome of the case, provided that

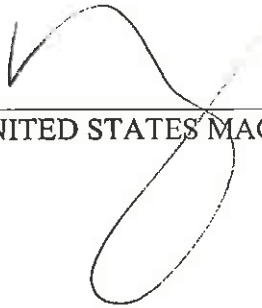
all material designated confidential in such retained material is maintained in accordance with the provisions hereof.

15. Nothing in this Stipulation shall be grounds for limiting or restricting the use of materials filed with the court or at during a public hearing or trial. Any party who wishes, in the context of public hearing or trial, to limit or restrict the use of material previously designated as confidential shall be obligated to follow the dictates of Paragraph 11 above, and/or seek an order from the Court designating that such materials will be filed under seal so as to protect their confidential character.

16. This Stipulation and Protective Order may be modified or amended only by an order of this Court or by written agreement between the Parties.

January 24, 2011

It is so Ordered:



UNITED STATES MAGISTRATE JUDGE

/s/ David F. Axelrod
David F. Axelrod
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Counsel for the United States of America

EXHIBIT A

CONFIDENTIALITY AGREEMENT

I have received and read all the terms of the Stipulation and Protective Order in the action captioned _____, and understand and hereby agree to be bound by all the terms thereof with respect to the use and disclosure of information and materials designated as "CONFIDENTIAL". I further expressly agree that I will not in any way use, disclose, discuss, summarize, reveal or refer to any information or material designated "CONFIDENTIAL" for any purpose whatsoever other than as permitted in the terms of the Stipulation and Protective Order, unless the Court hereafter alters the Protective Order or its applicability to me.

Dated:

Signature

Print Name

Print Name, Address,
and Phone Number of
Company or Firm

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION


UNITED STATES OF AMERICA, : 2:10-CV-00336
PLAINTIFF, : JUDGE GRAHAM
V. : MAGISTRATE JUDGE KING
TOBIAS H. ELSASS, ET AL., :
DEFENDANT. :

DECLARATION OF ATTORNEY BRIAN J. LALIBERTE

1. I am one of the attorneys of record for the defendants in this action.
2. The facts set forth in the Procedural History section of the Memorandum in Support to which this declaration is attached are within my personal knowledge.
3. I was the principal drafter of the Motion to Compel Discovery, and I chose to designate Exhibits 14, 15, 16 and 17 as confidential and to file them under seal.
4. I also was the person principally responsible for communicating the decision to designate the exhibits as confidential to the government, which I did on February 8, 2011, simultaneously with my production of those documents as exhibits to the Motion to Compel.
5. The e-mail correspondence between the government and myself, attached to the Memorandum in Support, are true and accurate copies of the messages exchanged on or about February 8, 2011 and February 14, 2011, concerning the exhibits' confidential designation and the decision to file them under seal.

6. The other exhibits attached to the Memorandum in Support are true and accurate copies of the documents as they exist in the defendants' possession or in my possession.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Brian J. Laliberte

Dated: February 15, 2011

From: Laliberte Brian <brian@axelrodohio.com>
Subject: USA v. Elsass, Exhibit 14 - Filed Under Seal
Date: February 8, 2011 10:48:28 AM EST
To: "Brian H. (TAX) Corcoran" <brian.h.corcoran@usdoj.gov>, "Erin (TAX) Healy Gallagher" <Erin.HealyGallagher@usdoj.gov>
▶ 1 Attachment, 1024 KB

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From: Laliberte Brian <brian@axelrodohio.com>
Subject: **USA v. Elsass, Exhibit 15 - Filed Under Seal**
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To: "Brian H. (TAX) Corcoran" <brian.h.corcoran@usdoj.gov>, "Erin (TAX) Healy Gallagher" <Erin.HealyGallagher@usdoj.gov>
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From: Laliberte Brian <brian@axelrodohio.com>
Subject: USA v. Elsass, Exhibit 16 - Filed Under Seal
Date: February 8, 2011 10:49:07 AM EST
To: "Brian H. (TAX) Corcoran" <brian.h.corcoran@usdoj.gov>, "Erin (TAX) Healy Gallagher" <Erin.HealyGallagher@usdoj.gov>
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From: Laliberte Brian <brian@axelrodohio.com>
Subject: **USA v. Elsass, Exhibit 17 (Pt.1) - Filed Under Seal**
Date: February 8, 2011 10:50:45 AM EST
To: "Brian H. (TAX) Corcoran" <brian.h.corcoran@usdoj.gov>, "Erin (TAX) Healy Gallagher" <Erin.HealyGallagher@usdoj.gov>
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From: Laliberte Brian <brian@axelrodohio.com>
Subject: USA v. Elsass, Exhibit 17 (Pt.2) - Filed Under Seal
Date: February 8, 2011 10:51:44 AM EST
To: "Brian H. (TAX) Corcoran" <brian.h.corcoran@usdoj.gov>, "Erin (TAX) Healy Gallagher" <Erin.HealyGallagher@usdoj.gov>
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**IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION**

UNITED STATES OF AMERICA, : 2:10-CV-00336
: JUDGE GRAHAM
PLAINTIFF, : MAGISTRATE JUDGE KING
V. :
TOBIAS H. ELSASS, ET AL., :
:
DEFENDANT. :

DECLARATION OF ATTORNEY BRIAN J. LALIBERTE

1. I am one of the attorneys of record for the defendants in this action.
2. I have reviewed the discovery the government has provided to the defendants, including its written responses to requests for production, requests for admission and interrogatories.
3. The defendants have used the following documents, identified by Bates numbers US17207 (Exhibits 14), US17495 (Exhibit 15), US18517 (Exhibit 16) and US04028-US04129 (Exhibit 17) as exhibits to their Motion to Compel Discovery.
4. Information in some of these exhibits is the personal tax return information of individuals who are not parties to this litigation, the public disclosure of which is prohibited by statute. In addition, the personally identifying information could allow the theft of their identities.
5. Rather than risk an inadvertent failure to redact all personal identifiers from the documents, with the attendant risk of identity theft, I chose to designate the referenced exhibits as "CONFIDENTIAL" under the Stipulation of Confidentiality.

6. In designating the exhibits as “CONFIDENTIAL” and filing them under seal, the defendants acted in an abundance of caution to prevent the disclosure of taxpayer personal identifiers in a filing that is accessible through the Internet to anyone with a PACER account.

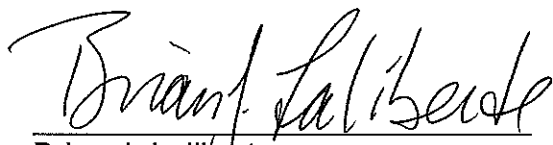
7. Designating the exhibits as “CONFIDENTIAL” and filing them under seal does not prejudice the government. Pursuant to paragraph 15 of the Stipulation of Confidentiality, “Nothing in [the] Stipulation shall be grounds for limiting or restricting the use of materials filed with the court or at during [sic] a public hearing or trial.”

8. Given the short amount of time the defendants had to prepare their Motion to Compel Discovery and the related exhibits, filing Exhibits 14, 15, 16 and 17 under seal in their entirety was the most expedient course of action.

9. Additionally, having litigated data theft cases involving Social Security Numbers, bank account numbers, credit card numbers and other personal identifiers, and also having responded to data and identity theft as the Chief of the Criminal Division in the Ohio Attorney General’s Office, I am sensitive about inadvertently exposing personal identifiers by publishing them on the Internet through PACER.

10. I have attempted, in good faith, to balance the spirit and the letter of the requirements contained in the Stipulation of Confidentiality, Fed. R. Civ. P. 5.2, this Court’s local rules, the guidelines and best practices for using the Court’s CM/ECF System, my own personal experience in filing documents under seal, and the defendants’ interests in ensuring that taxpayer personal identifiers are not made public in choosing to file certain exhibits under seal.

I declare under penalty of perjury under the laws of the United States of America
that the foregoing is true and correct.


Brian J. Laliberte

Dated: February 8, 2011

From: "Corcoran, Brian H. (TAX)" <Brian.H.Corcoran@usdoj.gov>
Subject: **Elsass - motion to compel - exhibit question**
Date: February 8, 2011 11:22:25 AM EST
To: Laliberte Brian <brian@axelrodohio.com>
Cc: "Healy Gallagher, Erin (TAX)" <Erin.HealyGallagher@usdoj.gov>

Brian – I see that you are filing several exhibits in support of your motion under seal. Please explain why. The documents appear to be materials the Gov't produced and which have not been designated confidential by either party, and which we would not consider subject to 6103 or otherwise confidential (although we would redact SSN's and addresses). In addition, the ECF rules state you need prior approval to file things under seal.

Brian H. Corcoran

Trial Attorney

Department of Justice - Tax Division

(202) 353-7421 ph

(202) 514-6770 fax

Brian.H.Corcoran@usdoj.gov

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From: "Corcoran, Brian H. (TAX)" <Brian.H.Corcoran@usdoj.gov>
Subject: RE: Elsass - motion to compel - exhibit question
Date: February 8, 2011 12:26:15 PM EST
To: Laliberte Brian <brian@axelrodohio.com>
Cc: "Healy Gallagher, Erin (TAX)" <Erin.HealyGallagher@usdoj.gov>, "David F. F. Axelrod" <david@axelrodohio.com>

Nothing about these exhibits is privileged or confidential beyond SSNs and addresses – and we routinely redact such information from materials we offer as exhibits, no matter the burden of so doing. In addition, it is facially incorrect that these documents cannot be redacted without destroying their meaning; and some of the materials (for example, Exhibit 17 part 2 is full of materials relating to ABFS) you have filed are far from confidential, even if it were true that the “taxpayer information” they contain is confidential.

What I am hearing you say is that you simply do not want to redact the relevant documents. That’s unacceptable, especially given your pending motion, which demands the Government engage in onerous and unnecessary discovery efforts.

I note you have purported to file a “notice of filing under seal” moments ago. However, in accordance with Paragraph 3 of the Stipulation, you have not provided us with the required declaration setting forth your grounds for so designating the materials. In addition, you did not comply with the ECF rules, which require prior approval for filing under seal.

In short, the Government objects to your designations (and this e-mail shall constitute written notice under Paragraph 11) and demands that they be unsealed and filed normally, with addresses and SSNs redacted. You must now comply with Paragraph 11 and establish the confidentiality of these items – this includes, at the appropriate time, moving to designate the materials as confidential within the time frames set forth therein.

Brian H. Corcoran
Trial Attorney
Department of Justice - Tax Division
(202) 353-7421 ph
(202) 514-6770 fax
Brian.H.Corcoran@usdoj.gov

From: Laliberte Brian [mailto:brian@axelrodohio.com]
Sent: Tuesday, February 08, 2011 11:31 AM
To: Corcoran, Brian H. (TAX)

Cc: Healy Gallagher, Erin (TAX); David F. F. Axelrod
Subject: Re: Elsass - motion to compel - exhibit question

Brian:

The documents are taxpayer documents or IRS documents that contain taxpayer information that cannot be meaningfully or efficiently redacted without destroying the documents' content, which is relevant to the motion. Rather than redact, the best practice under the circumstances, is to file the exhibits under seal. They are referenced by Bates number in the brief, and you have them in your possession (I assume). I am certain that the government does not want taxpayer social security numbers and other personal identifiers accessible through PACER. Indeed, the Local Rules and ECF manual mandate that such personal identifiers not be published on PACER.

Please let me know if you intend to press an objection.

Thank you.

Brian J. Laliberte
Axelrod Laliberte LLC

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Mobile: 614.284.7171
Fax: 614.545.6356
Email: brian@axelrodohio.com

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On Feb 8, 2011, at 11:22 AM, Corcoran, Brian H. (TAX) wrote:

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either party, and which we would not consider subject to 6103 or otherwise confidential (although we would

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Cc: "Healy Gallagher, Erin (TAX)" <Erin.HealyGallagher@usdoj.gov>

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From: Laliberte Brian <brian@axelrodohio.com>
Subject: Re: Elsass - motion to compel - exhibit question
Date: February 8, 2011 11:30:44 AM EST
To: "Corcoran, Brian H. (TAX)" <Brian.H.Corcoran@usdoj.gov>
Cc: "Healy Gallagher, Erin (TAX)" <Erin.HealyGallagher@usdoj.gov>, "David F. F. Axelrod" <David@AxelrodOhio.com>

Brian:

The documents are taxpayer documents or IRS documents that contain taxpayer information that cannot be meaningfully or efficiently redacted without destroying the documents' content, which is relevant to the motion. Rather than redact, the best practice under the circumstances, is to file the exhibits under seal. They are referenced by Bates number in the brief, and you have them in your possession (I assume). I am certain that the government does not want taxpayer social security numbers and other personal identifiers accessible through PACER. Indeed, the Local Rules and ECF manual mandate that such personal identifiers not be published on PACER.

Please let me know if you intend to press an objection.

Thank you.

Brian J. Laliberte
Axelrod Laliberte LLC

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Mobile: 614.284.7171
Fax: 614.545.6356
Email: brian@axelrodohio.com

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From: "Corcoran, Brian H. (TAX)" <Brian.H.Corcoran@usdoj.gov>
Subject: RE: USA v. Elsass - Exhibits 14, 15, 16 and 17 - Confidentiality Designation
Date: February 14, 2011 2:07:31 PM EST
To: Laliberte Brian <brian@axelrodohio.com>, "Healy Gallagher, Erin (TAX)" <Erin.HealyGallagher@usdoj.gov>
Cc: "David F. F. Axelrod" <david@axelrodohio.com>

You are correct.

From: Laliberte Brian [mailto:brian@axelrodohio.com]
Sent: Monday, February 14, 2011 1:58 PM
To: Corcoran, Brian H. (TAX); Healy Gallagher, Erin (TAX)
Cc: David F. F. Axelrod
Subject: USA v. Elsass - Exhibits 14, 15, 16 and 17 - Confidentiality Designation

Brian:

I have reviewed the documents marked as Exhibits 14, 15, 16 and 17, which we filed under seal on Tuesday, February 8, 2011. I am affirming our position, set forth in the email correspondence and declaration I sent to you also on February 8, that the documents should be designated as confidential and filed under seal. I understand that the government disagrees, and that we will not be able to resolve this extra-judicially. If I am incorrect, please let me know.

We will file our motion, under paragraph 11 of the Stipulation, in due course.

Thank you.

Brian J. Laliberte
Axelrod Laliberte LLC

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