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

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

OPPOSITION TO DEFENDANTS' MOTION TO DESIGNATE CERTAIN DOCUMENTS AS CONFIDENTIAL

Plaintiff the United States of America, pursuant to the Stipulation of Confidentiality, dated January 24, 2011 (Docket No. 31), and in Opposition to the FRG Defendants' Motion to Designate as Confidential Exhibits 14-17 appended to its Motion to Compel, dated February 7, 2011 (Docket No. 37), respectfully states as follows:

Preliminary Statement

The United States objects not only to the FRG Defendants' attempt to designate as confidential the four exhibits appended to their February 7, 2011 Motion to Compel, but the designation of any such similar exhibits to be offered in this case in the future. Such materials, to the extent they contain tax "return information,"[1] simply do not meet any standard for filing under

1. At the outset, it is readily evident from review of the exhibits that the FRG Defendants wish to seal that they contain materials that are already in the public record, such as pleadings from lawsuits (continued...)

seal or designating them as confidential - whether set forth in the Internal Revenue Code, the Federal Rules, case law, or in the parties' recently-entered Stipulation of Confidentiality.

In this case, the FRG Defendants' tax preparation activities and tax advice is the central matter in dispute. To prove or defend the claims asserted will require specific consideration of tax return information prepared or considered by the FRG Defendants. Therefore - and unlike an action in which tax return information is peripheral to the claims being litigated - the importance of disclosing the full record upon which this case is litigated is heightened, even if some privacy concerns are present. Moreover, the prohibitions regarding disclosure of returns and return information under 26 U.S.C. ("I.R.C.") § 6103 are inapplicable because clear exceptions contained in that code provision apply here - where the returns or return information relates directly to the claims and issues being litigated. I.R.C. § 6103(h)(4)((B) and (C). As a result, the privacy interests at issue are outweighed by the public's right to a complete record of this action. And sealing all such materials would be unworkable in any event. In short, if the FRG Defendants are correct, and the relevant exhibits (plus the many others like them that can be anticipated to be offered as evidence) are to be sealed, there is no end to the evidence that will require similar treatment in this case - effectively putting the entire case under seal.[2]

(...continued)
relating to the scams that form the basis for certain theft loss claims (*see, e.g.,* Exhibit 17 at US 4042-4063) - and accordingly such materials are not properly sealed regardless of the propriety of the FRG Defendants' motion in other respects.

2. All exhibits containing return information used in depositions would be sealed, as would testimony about them; and all trial exhibits and testimony would similarly be sealed. About the only thing left for the public record would be case citations.

The United States' position in this matter is consistent with its practices in similar injunction lawsuits against tax preparers or promoters of illegal tax schemes. The United States files numerous injunction cases, answers to tax refund and penalty cases, and other lawsuits involving federal tax matters every year in which tax returns and return information are offered as evidence. In such cases, however, the United States does not in blanket fashion designate or file under seal taxpayer records offered as exhibits in support of its motions and pleadings, but instead merely redacts the information that falls under Fed. R. Civ. P. 5.2. *See, e.g., United States v. Curtis Morris*, No. 09-cv-02381 (D. Colo. February 7, 2011)(granting motion for summary judgment under I.R.C. §§ 7407 and 7408, after motion, dated August 27, 2010 (Docket No. 39), supported by nine redacted exhibits, including tax returns); *United States v. Knupp*, Slip Copy, 2010 WL 2245551 (N.D. Ga. May 14, 2010)(granting motion for a preliminary injunction under I.R.C. §§ 7407 and 7408, after motion, dated October 2, 2009 (Docket No. 2), supported by 11 redacted exhibits, including tax returns). There is no reason the FRG Defendants cannot do the same with the exhibits at issue.

ARGUMENT

Although district courts may seal materials where a party's interest in privacy outweighs the public interest in disclosure, a court must be mindful of the presumption that court files remain open to public view. *See In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 473-74 (6th Cir.1983) (noting the "long-established legal tradition," recognizing "the presumptive right of the public to inspect and copy...." court records); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir.1983), *cert. denied*, 465 U.S. 1100 (1984); *see also United States v. McVeigh*, 119 F.3d 806, 814 (10th Cir. 1997)(it is "clearly established that court documents are covered by a common law right

of access"). Thus, courts only have the qualified "power to seal their records when interests of privacy outweigh the public's right to know." *In re Knoxville News-Sentinel Co.*, 723 F.2d at 474.

The FRG Defendants have not formally moved for a protective order under Rule 26 (and, to the extent they are deemed to have implicitly done so via the present motion, they have not carried their burden for establishing grounds for entry of such an order (*see* Opposition to Motion to Compel, dated November 22, 2010 (Docket No. 22) at 8-10 for a discussion of the applicable standards for entry of a protective order)). However, as with all protective order motions, a party seeking to file materials under seal must demonstrate "good cause" to the Court that the particular documents justify court-imposed secrecy at the expense of keeping the record public. *Certain Underwriters at Lloyd's v. United States*, No. 2:08-cv-841, 2010 WL 2683142, at *1 (S.D. Ohio July 1, 2010)(denying motion to file materials under seal). This is the movant's burden, and he must carry it by "analyz[ing] in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Baxter Int'l v. Abbott Laboratories*, 297 F.3d 544, 548 (7th Cir. 2002)(denying motion to seal); *Certain Underwriters at Lloyd's v. United States*, 2010 WL 2683142, at *1 (*citing Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc.*, 823 F.2d 159, 163 (6th Cir. 1987).

The FRG Defendants seek to file under seal four exhibits. The first, Exhibit 14, are excerpts from the IRS administrative file of FRG customer Robert Bozzelli, including a description of the basis for the theft loss claim FRG prepared for Bozzelli. The second, Exhibit 15, are IRS interview notes from its interview of FRG customers Don and Kay Giles in May 2010. The third, Exhibit 16, is a single page from the IRS administrative file of FRG customer Jocelyn Arnold. And the fourth, Exhibit 17, is a lengthy compilation of documents relating to the Giles's theft loss claim, including tax return forms and related schedules, correspondence between the IRS and FRG relating to the

same, and materials provided to the IRS by FRG to substantiate their purported theft loss claim, such as public pleadings filed in separate actions or evidence that the Gileses invested in the scam at issue (ABFS).

I. Exceptions to I.R.C. 6103 Explicitly Permit Public Disclosure of the Exhibits at Issue.

Section 6103 of the Internal Revenue Code prohibits the disclosure of "return information" - which protects taxpayer information from being disseminated to the public, whether by the Government or anyone else. 26 U.S.C. ("I.R.C.") § 6103 *et seq.* (2011); *Church of Scientology of California v. Internal Revenue Service*, 484 U.S. 9, 10 (1987) ("Section 6103 of the Internal Revenue Code lays down a general rule that 'returns' and 'return information' as defined therein shall be confidential").[3]

The terms 'return' and 'return information' are elaborately defined in subsection (b) of the statute. *Church of Scientology*, *supra*. In particular, 'return information' includes–

> 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, * * *.

26 U.S.C. § 6103(b)(2)(A).

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3. In defense of their motion, the FRG Defendants also cite Section 7431 as prohibiting third parties from disclosing taxpayer return information. (Motion at 4, *citing* I.R.C. § 7431). However, that provision exists solely so that taxpayers may bring actions in district court where a Government employee or third party has violated Section 6103. It therefore does not create any independent grounds for sealing the relevant exhibits. Indeed, it is the United States' position that the taxpayer information at issue in this case fits into at least two of the exceptions enumerated in Section 6103 - so, if the United States is correct, Section 7431 does not advance the FRG Defendants' argument.

But there are exceptions to this prohibition addressed specifically in the body of the code provision. One, Section 6103(h)(4), provides as follows:

> (4) *DISCLOSURE IN JUDICIAL AND ADMINISTRATIVE TAX PROCEEDINGS* - A return or return information may be disclosed in a Federal or State judicial or administrative proceeding pertaining to tax administration, but only -
>
> * * *
>
> (B) if the treatment of an item reflected on such return is directly related to the resolution of an issue in the proceeding; [or]
>
> (C) if such return or return information directly relates to a transactional relationship between a person who is a party to the proceeding and the taxpayer which directly affects the resolution of an issue in the proceeding;

I.R.C. § 6103(h)(4)(B) and (C). Courts will permit disclosure of tax return information where either of these exceptions is applicable. *See, e.g., Baldwin v. United States*, 732 F. Supp. 2d 1142, 1146 (D. V.I. 2010)(denying motion to seal; 6103(h)(4)(B) exception applied because issue of treatment of item reflected on tax return was necessary to resolve lawsuit); *Norman E. Duquette, Inc. v. Comm'r of Internal Revenue*, 110 F. Supp. 2d 16, 20-21 (D. D.C. 2000)(applying 6103(h)(4)(B) exception but stating in *dicta* that 6103(h)(4)(C) was also applicable). And as their terms indicate, the exceptions allow the disclosure of return information of third parties to an action even though that third party's own tax liability is not at issue. *See generally Tavery v. United States*, 32 F.3d 1423 (10th Cir. 1994)(applying 6103(h)(4)(B) exception to excuse disclosure of third party taxpayer information in separate action).

Both exceptions apply here. The FRG Defendants' treatment of theft loss claims on the returns they prepare for their taxpayer customers is directly at issue in the lawsuit, making the 6103(h)(4)(B) exception applicable. Resolving the Government's claims will require the Court to consider both the tax returns the FRG Defendants filed for their customers, as well as the materials

provided to the Government, at the time of the filing of a return or thereafter, to justify and support the theft loss claims set forth in the underlying returns.

The 6103(h)(4)(C) exception also permits disclosure of the exhibits. In some instances, return information will be disclosed as an exhibit not merely to demonstrate how the FRG Defendants supported a theft loss claim, but more broadly to demonstrate the nature of the relationship between the relevant taxpayer and the FRG Defendants concerning the services they provided and representations they made in the course of providing such services. Exhibit 17 is a prime example of this, as it contains a conglomeration of income tax returns plus information that the FRG Defendants included with that return to persuade the IRS that the particular theft loss involving the ABFS investment scam was proper. In other cases, information provided by a taxpayer who contracts with Elsass and FRG to prepare a tax return will shed light on the nature of the relationship between the FRG Defendants and their customers, the information provided to the FRG Defendants, *etc.*

In any event, the return information at question is exempt from Section 6103's prohibitions on disclosure. The FRG Defendants certainly do not make anything close to a contrary showing in their motion - they fail to cite a single case in support of their argument (and they should not be allowed to use their reply brief to rectify such glaring deficiencies). In fact, there is persuasive case law in the Government's favor on this issue. Specifically, in *Bowers v. J & M Discount Towing, L.L.C.*, No. 06-299, 2007 WL 967161 (D. N.M. Feb. 28, 2007), a New Mexico district court denied a party's motion to seal exhibits appended to a United States motion to dismiss on the grounds that the exhibits were subject to the Section 6103 exceptions. *Bowers*, 2007 WL 967161, at *1. The court determined that the explicit exceptions to confidentiality created by Congress as codified in Section 6103(h)(4) did not require sealing of the documents even though they contained tax return

information; in addition, it also found that the movant had not met his "heavy burden" of overcoming the presumption of keeping federal proceedings open to the public. *Id.* at *5. Neither have the FRG Defendants done so with their conclusory motion.

II. The Exhibits are Not "Confidential" under the Stipulation of Confidentiality.

Other than the fact that the materials at issue broadly contain some information falling into the definition of "return information," there is nothing about the exhibits that would render them confidential as envisioned by the parties' Stipulation of Confidentiality. Indeed, to so classify these exhibits as confidential perverts the purpose of the Stipulation, which was drafted ***at the request of the FRG Defendants*** solely so that they would agree to produce "proprietary" information they were reluctant to otherwise disclose, such as financial records or evidence of their business practices. None of the exhibits contain business proprietary information about FRG or trade secrets about how that entity conducts its business, nor do they disclose intellectual property (and the FRG Defendants never argue in their motion that the exhibits at issue are confidential in this respect). Indeed, the FRG Defendants were producing to the Government taxpayer "return information" long before the Stipulation was finalized and entered by this Court at the end of January 2011, without ever designating any such return information as confidential.[4]

The FRG Defendants seem to believe that the mere existence of the Stipulation of Confidentiality justifies their decision to designate the exhibits as confidential and file them under seal. Thus, they misleadingly argue that they properly filed the exhibits under seal because Local Rule 79.3 authorizes the filing of materials in this manner "after the entry of a protective order, or

4. If it is in fact the FRG Defendants' position that **all** tax return information to be used in proceedings in this case is confidential, then the parties and the Court will need to revisit the Stipulation of Confidentiality, because everything being produced would suddenly be subject to its provisions - well beyond what the Government understood the Stipulation's scope to be.

as here, a stipulation." (Motion at 3). Because there is no protective order yet in place, this argument suggests that the Stipulation of Confidentiality automatically confers confidentiality upon whatever documents the parties to this case so designate. But the Stipulation states the contrary: merely designating documents as confidential *does not make them so*, and the terms of the Stipulation provide an explicit mechanism by which the parties may dispute the confidential nature of the materials. (*See, e.g.,* Stipulation at ¶¶ 4, 11). Thus, in arguing that they may preordain what is to be sealed, the FRG Defendants purport to usurp the Court's proper role in determining whether sealing of the exhibits is appropriate in the first place. *See, e.g., Citizens First Nat'l Bank of Princeton v. Cincinnati Ins. Co.,* 178 F.3d 943, 945-46 (7th Cir. 1999)(Posner, J.)("[t]he judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record;" trial court may not simply "rubber stamp a stipulation" to seal the record).[5]

III. There are No Other Good Grounds for Sealing the Exhibits.

None of the FRG Defendants' other arguments for filing the relevant exhibits under seal are persuasive. First, other than citing broadly to the language of Rule 26, the FRG Defendants have made no showing that public disclosure of the relevant information will lead to "annoyance, embarrassment, oppression or undue burden or expense," sufficient to overcome the counterveiling

5. On a related note, the Defendants failed to comply with the electronic filing rules of this Court in unilaterally filing the documents at issue under seal. The Electronic Filing Policies and Procedures Manual for the Southern District of Ohio (last rev. January 15, 2010), p. 13, specifically requires a party who seeks to file exhibits under seal to first obtain prior court approval to do so. Here, however, the FRG Defendants (who knew full well, based upon the Court's January 31st Order, that their deadline for filing a motion to compel was February 7, 2011) simply chose on their own to file the exhibits at issue under seal - without this Court's prior approval, and also before addressing the confidentiality issue with the United States either, as the Stipulation of Confidentiality envisions.

public interest in keeping materials relevant to this case in the public record. Rather, they assume this will naturally be the case (presumably to the taxpayers whose return information is at issue), but they do not substantiate their point with case law or facts. Certainly the FRG Defendants themselves cannot complain of "annoyance, embarrassment, or oppression" from the disclosure of materials evidencing their practices, given that the lawsuit turns on their conduct.

Rule 5.2 also provides no grounds for granting the FRG Defendants' motion. Consistent with their other arguments in the motion, the FRG Defendants merely cite the rule and then conclusorily assert it covers the present circumstances. But they ignore Rule 5.2's plain language - in particular, Rule 5.2(a), which expressly provides for redaction of defined categories of information, such as Social Security numbers, contained in the relevant documents. Redacting the specified information from the document is all that is necessary in this case - there is no reason to seal the entirety of the exhibits at issue. *Payne v. City of Missoula*, No. CV 10-00056-M-DWM-JCL, 2010 WL 3081270, at *1 (D. Mont. Aug. 5, 2010)(denying motion to seal entire document under Rule 5.2(d) where confidential information could simply be redacted, as it was not relevant to purpose of offering document). The United States takes steps to redact documents when appending tax returns or taxpayer-related exhibits to its briefs, so it is hardly unreasonable to require that counsel for the FRG Defendants do the same.[6]

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6. The FRG Defendants also assert that in the "alternative" the Court should permit them to redact the exhibits, along with restricting the public's remote access to the materials via PACER. The second component of this request, however, is not only unworkable (this case simply does not merit that sort of specialized treatment by the Court) but completely unsubstantiated in the FRG Defendants' motion, besides being based upon privacy considerations that are outweighed by the counterveiling concerns about the public record of this action. In addition, when recently asked by Government counsel to elaborate upon the scope of this alternative relief, all counsel for the FRG Defendants indicated was redaction of information specified in Rule 5.2(a). Accordingly, redaction is sufficient to protect the truly private content of the relevant exhibits.

Finally, the FRG Defendants claim a lack of prejudice to the Government if the relief they request is permitted, but this argument misapprehends *whose* prejudice is at issue. Certainly we foresee unreasonably burdensome logistical difficulties in having to seal each and every exhibit likely to be offered in this case (whether in depositions, motions, or at trial) whenever an exhibit touches on return information in any way, shape, or form. But even ignoring that objection, it is fundamentally the case that the "taxpayer privacy interest" in these materials is greatly outweighed (given the applicable Section 6103 exceptions) by the public interest in having access to the full record of this case - and that means access to exhibits relied upon by the parties to prove their claims, or by the Court in reaching decisions in this case. It is simply not appropriate to seal all of the relevant exhibits in a case focusing upon tax return preparation practices. Thus, regardless of whether the United States as a litigant in this case will be impacted by having to seal all such materials, the public interest ***will*** be prejudiced if relevant exhibits are hidden from public view. The FRG Defendants' motion is completely silent on this important consideration.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that this Court deny the FRG Defendants' motion, order the unsealing of Exhibits 14-17 to the Motion to Compel, and require the FRG Defendants to refile redacted versions of those documents.

February 28, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 28, 2011, I served the foregoing **OPPOSITION TO DEFENDANTS' MOTION TO DESIGNATE CERTAIN DOCUMENTS AS CONFIDENTIAL** by ECF filing, which provides notice of the filing to the following:

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