

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.	)	

**OPPOSITION TO DEFENDANTS’ MOTION FOR PROTECTIVE ORDER**

Plaintiff the United States of America, for its opposition to the Motion for Protective Order filed by Defendants Tobias H. Elsass, Sensible Tax Services, Inc. (“Sensible”), and Fraud Recovery Group, Inc. (“FRG”)(collectively, the “FRG Defendants”) hereby states as follows:

**Preliminary Statement**

In asking the Court to restrict the Government’s use of materials produced in discovery, the FRG Defendants’ motion for a protective order requests unprecedented relief. But the FRG Defendants have not carried their substantial burden under Rule 26(c) for obtaining such a sweeping protective order. The discovery materials at issue (primarily, but not exclusively, the tax filings of FRG customers prepared by the Defendants setting forth theft loss deductions under 26 U.S.C. (“I.R.C.”) § 165 of the Internal Revenue Code, supplemented by back-up materials prepared internally at FRG) are highly relevant to the claims in this lawsuit, and thus appropriately sought in discovery. This is the *sole* reason the United States has asked for their production - not to aid the

IRS in its audit of FRG customers. There is nothing confidential or proprietary about these materials that renders their mere disclosure harmful to the FRG Defendants. The FRG Defendants' motion is premised on speculative harms to their business that (if they are given credence) are occurring independent of the discovery process. And the FRG Defendants' request for a protective order is untimely as well, coming months after the FRG Defendants themselves disclosed customer information without ever requesting limits on its use.

In ruling on the FRG Defendants' motion, the Court must balance the unsubstantiated harms the FRG Defendants predict will come to pass (the closing of their business) against the public interest occasioned by this lawsuit. The Department of Justice has a fundamental law enforcement duty to share information with its "client," the IRS, under certain circumstances. That duty would be unreasonably and improperly thwarted by the proposed protective order. Indeed, taken to its logical conclusion, the FRG Defendants' request amounts to an effort to stop the IRS from lawfully enforcing the provisions of the Internal Revenue Code against FRG's customers, in violation of the Anti-Injunction Act (I.R.C. § 7421(a)), which prohibits suits (or motions within suits) that seek to halt the IRS's assessment or collection of federal taxes.

### **Relevant Factual Background**

#### *FRG's Challenged Conduct*

Without a single fact to support their assertions, the FRG Defendants devote a substantial portion of their motion attempting to paint as improper the IRS's ongoing investigation of Elsass's tax-preparation conduct and audits of his customers' tax returns claiming theft loss deductions. (*See* Memorandum in Support of Motion for Protective Order ("Motion") at 6-10). To this end, the FRG Defendants have set forth a litany of speculative and unsubstantiated instances of alleged

overreaching by the IRS in the investigation leading up to the filing of this suit, and cite other instances in which they claim the IRS “has set out deliberately and improperly to destroy a business” (Motion at 8).<sup>1</sup>

As a general matter, the FRG Defendants’ assertions are based wholly on the hearsay speculations of a single FRG employee, and are otherwise unsupported by actual proof that in any case a particular FRG customer’s theft loss claim was improperly denied. Yet (and although the Government strongly contests the FRG Defendants’ attempts to stigmatize the IRS’s legitimate law-enforcement activities),<sup>2</sup> for the purposes of determining this motion, what is revealing about these

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1. In particular, the FRG Defendants make liberal reference to *United States v. Zerjav*, Case No. 4:08CV00207 ERW (E.D. Mo.), citing a March 2009 decision in that case denying the Government’s motion for a preliminary injunction. The United States will not relitigate that case in the context of this opposition brief, but notes its vehement disagreement with that district court’s misguided characterizations of the facts, as well as the court’s failure to recognize clear evidence offered therein of a pattern of misconduct on the part of that tax preparer. Nevertheless - no preliminary injunction motion is pending here, and thus the Court need not presently engage in any inquiry with respect to the appropriateness of injunctive relief in this case, making *Zerjav* of little relevance herein. Tellingly, the FRG Defendants neglect to mention the ultimate outcome in the *Zerjav* action - a permanent conduct-specific injunction prohibiting the *Zerjav* defendants from engaging in the fraudulent tax preparation conduct investigated by the IRS, coupled with an order prohibiting one of the company’s principals from preparing tax returns for several years. (*See Zerjav Stipulated Order*, dated March 26, 2010 (Docket No. 213), a true copy of which is attached as Exhibit A).

2. The Declaration of FRG employee and attorney Laurie Wirt, offered to substantiate these allegations, is essentially a laundry list of hearsay statements, in which Ms. Wirt recounts statements purportedly made by IRS employees to her in the course of FRG customer audits. She does not establish any particular instances in which an audit has resulted in a wrongful determination with respect to a particular FRG customers’ tax return, as reflected in an appeals determination adverse to the Government or other court decision. She also makes misleading if not false statements. For example, Ms. Wirt’s Declaration claims that a Tax Compliance officer “told” her that he had received an e-mail from the Justice Department informing him that FRG had been closed. Wirt Decl. ¶ 9. While the Justice Department did issue a press release (as is its standard practice) at the time of the filing of this suit indicating that the lawsuit seeks to permanently enjoin the FRG Defendants from tax preparation, and while it is conceivable that this press release was disseminated internally by the IRS, at no time has any attorney involved in this case - or any Justice Department

allegations is the extent to which the FRG Defendants base their claims of harm on IRS conduct that occurred before, or simultaneously with, the filing of the complaint in April 2010. (*See, e.g.*, Wirt Decl., attached to Motion, at ¶¶ 7-9). In effect, the FRG Defendants conclusorily assert that the mere existence of the lawsuit is “resulting” in massive disallowances - not that the IRS has ever used information obtained in discovery from the lawsuit to aid the audit process. Wirt Decl. ¶ 10 (“[i]t appears to me that the IRS is disallowing theft loss deductions . . . solely based upon the existence of the complaint and nothing more”). Thus, the FRG Defendants’ factual “case” for a protective order is not only highly speculative (assuming without proof that production of customer materials will inevitably result of “mass” audits<sup>3</sup>), but underscores the extent to which the purported harms prompting the FRG Defendants’ motion are occurring independent of discovery in this case.

The FRG Defendants’ claims of a substance-free attack on their core business by the IRS also should be considered in light of the wrongdoing in which the Government’s complaint contends the FRG Defendants are engaging. The Government’s lawsuit alleges that the FRG Defendants have committed the following violations of the Internal Revenue Code: (a) assisting customers in claiming false or fraudulent theft loss deductions under Section 165; (b) improperly negotiating customer tax refund checks in violation of Section 6695(f); and (c) committing other violations of the tax laws in preparing regular income tax returns through FRG’s sister company, Sensible. (*See generally* Complaint (Docket No. 1)). In effect, the Government alleges, victims of financial fraud

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personnel for that matter - ever indicated to anyone at the IRS that FRG is at present closed or enjoined from conducting business, and certainly (as the FRG Defendants know) that is not the case.

3. This is a particularly risible assertion, given the extent to which Government agencies such as the IRS are presently overburdened, and thus unable to examine or audit more than a small percentage of *all* income tax returns filed in the United States on a yearly basis.

are cheated twice: first by the perpetrators of the fraud, and then by Elsass and FRG, who extract large fees from those customers for preparing amended tax returns claiming refunds to which the customers are ultimately found not to be entitled. The complaint also alleges that Defendant Elsass repeatedly, but improperly, signed Forms 2848 (Power of Attorney Forms) for FRG customers identifying himself as an attorney or unenrolled tax return preparer qualified to represent customers before the IRS in audits or examinations, even though (and without disclosing that fact to customers) his license to practice law was indefinitely suspended in 1999. (Complaint at ¶¶ 50-57).

These allegations were not dreamed up by the IRS after the fact. The FRG Defendants certainly do not think so - they have already *admitted* some of the wrongdoing alleged in the case. (See, e.g., Excerpts from Defendants' Responses to the Government's First Set of Interrogatories, dated July 27, 2010 (a true copy of which is attached as Exhibit B) at 8-10 (admitting, in response to Interrogatories No. 14 and 17, that Elsass negotiated refund checks and signed Forms 2848 identifying himself as "attorney")). Such repeated acts - coupled with the Defendants' core business of promoting the preparation of tax returns claiming 165 theft loss deductions - are what moved the IRS to investigate Elsass, examine and audit the tax returns of some of his customers, and then ultimately to refer this case to the Justice Department. See I.R.C. § 7401 (authorizing Secretary of the Treasury to request the Department of Justice to initiate legal proceedings), cited in ¶ 4 of Complaint. There is more than a substantive basis for the Government's acts herein.

#### *Relevant Procedural History*

This motion has been interposed not merely months after it should have been raised, but after the FRG Defendants themselves have produced materials in this case without limitation as to their use. The FRG Defendants were represented at the outset of the litigation by a Washington, D.C.-based firm specializing in federal tax matters, plus local Ohio counsel. After the FRG Defendants

filed their answer in late May, the parties held a lengthy Rule 26(f) conference in June. By this time, as the FRG Defendants' motion admits, the FRG Defendants were well aware of IRS scrutiny of their practices. (*See, e.g.*, Wirt Decl. ¶¶ 7-9 (detailing knowledge of IRS activity between August 2009 and April 2010)). Yet *not once* during the conference did counsel for the Defendants ever raise the concerns asserted in this motion, despite ample opportunity to do so.<sup>4</sup> Indeed, in the Rule 26(f) Report filed by the parties on June 16, 2010 (Docket No. 14), in Section d of the "Discovery Plan" the parties indicated only their expectation that the usual privilege or protection issues that are raised with discovery materials (*i.e.*, attorney-client privilege) would arise - not that the FRG Defendants had concerns that documents produced in discovery would be shared with the IRS.

The Government subsequently served written discovery upon the FRG Defendants at the end of June. In response, the FRG Defendants timely provided written responses in July (*see* FRG's Response to the Government's First Set of Requests for the Production of Documents, dated July 30, 2010, a true copy of which is attached as Exhibit C) but produced very little in the way of documents, objecting that the Government should instead come to Ohio to review customer files in person and designate materials for copying. Again, however, and despite having ample opportunity to do so, the FRG Defendants did not object in their written responses that document production should be governed by any protective order limiting the Government's use of produced materials. (*See generally* Ex. C).

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4. Participating in the Rule 26(f) conference on behalf of the FRG Defendants (in opposition to the might of the Government - represented by a single attorney) were *three* attorneys - one of whom was a prior employee of the Tax Division experienced in Section 7408 injunction cases and well aware of what kinds of discovery are relevant to the claims in such cases. Not one of these more than capable attorneys breathed a word about the potential for harm to the Defendants if discovery materials produced in this case were to be shared between the Justice Department and the IRS.

The FRG Defendants' document production was further delayed by the absence of the FRG Defendants' counsel during a lengthy vacation in August. Then, in the beginning of September, when the Government expected it would at last be in a position to obtain long-sought documentary discovery from the FRG Defendants, the Government's counsel was informed that Defendants' counsel were withdrawing from the case, to be replaced by present counsel. This in turn further delayed the FRG Defendants' document production.

Accordingly, by the beginning of October, the Defendants had successfully avoided for over two months producing most of the materials requested by the Government in June. They had, however, produced several customer lists to the Government, including addresses and social security numbers for those customers. In fact, even before discovery had been served, the FRG Defendants voluntarily provided the Government a list of over 700 customers, all of whose theft loss claims they purported the IRS had "approved." (*See* excerpts from June 2010 list, a true copy of which is attached as Exhibit D; *see also* Response to Interrogatory No. 13 (Ex. B)). The obvious purpose for producing this list was to substantiate the legality of FRG's conduct, by rebutting the Government's contention with direct proof that in fact the theft loss claims prepared by FRG for its customers are routinely approved by the IRS. In effect, the customer list was an invitation to the Government to test the Defendants' assertion. But the list was provided to the Government with none of the restrictions now sought - despite the risk that the information provided would be shared with the IRS.

*Proposed Confidentiality Order*

The parties have previously discussed entry of a protective order - but nothing of the scope now requested by the FRG Defendants. In August of 2010, then-counsel for the FRG Defendants indicated to the Government that they had concerns about producing "financial, proprietary, and

other confidential” information that the FRG Defendants believed they possessed. (*See* August 27, 2010 Letter, a true copy of which is attached as Exhibit E). By this time, of course, the FRG Defendants had produced materials not subject at all to any use limitations - including the customer list it had voluntarily provided - and nothing about this new correspondence suggested that the proposed confidentiality agreement was intended to extend beyond actual “business proprietary” information. The letter included proposed language for such a confidentiality agreement, but none of the restrictions now requested were raised or addressed.

The Government eventually determined that a more detailed confidentiality agreement was called for, and to that end prepared a five-page proposed document containing precise provisions for how confidentiality would be asserted or challenged in the case. (*See* Draft Stipulation of Confidentiality, a true copy of which is attached as Exhibit F). That document was subsequently forwarded to new counsel for the FRG Defendants after his formal appearance in this case. Included in the proposed stipulation was the following paragraph:

Notwithstanding any provision of this Stipulation, where counsel believe confidential information or documents, either on its face or in conjunction with other information, indicates a violation or potential violation of law-criminal, civil, or regulatory in nature-the relevant information or documents may be disclosed to the appropriate federal, state, local, foreign, or tribal, law enforcement authority or other appropriate agency charged with the responsibility of investigating or prosecuting such a violation or enforcing or implementing such law.

Only in early October did new counsel raise the present issue in dispute - despite the fact that his client’s prior counsel could easily have raised the issue any time in the prior months.

### **Argument**

As a general matter, information disclosed in discovery in a civil case is not subject to restrictions on its dissemination. However, because a civil litigant should not be required to forfeit

personal privacy, trade secrets, or other proprietary information in connection with responding to discovery requests, information produced in discovery can be subject to protections, either through entry of a joint confidentiality order or a protective order under Fed. R. Civ. P. 26. As courts in this jurisdiction recognize, the need for such protections varies depending upon the stage of the litigation - while a litigant may have reasonable expectations that information disclosed in discovery will not be subject to dissemination or public view, that expectation greatly diminishes once a case is actually being tried, at which point public interests of access become of greater concern. *See, e.g., Chubb Custom Ins. Co. v. Grange Mutual Casualty Co.*, No. 2:07-cv-1285, 2010 WL 1258102, at \*1 (S.D. Ohio Mar. 25, 2010), *citing Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.2d 219, 225 (6<sup>th</sup> Cir. 1996) and *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165 (6<sup>th</sup> Cir. 1983).

The FRG Defendants' brief extensively propounds upon a district court's inherent power to fashion the *terms* of a protective order, but conveniently skips over the part about the movant's *burden*: that "“good cause [be] shown”" before entry of a protective order. *Bowens v. Columbus Metro. Library Bd. of Trs.*, No. 2:10-cv-00219, 2010 WL 3719245, at \*1 (S.D. Ohio Sept.16, 2010) (quoting Fed.R.Civ.P. 26(c)). The party seeking a protective order has the burden to demonstrate good cause with specificity; broad allegations are insufficient. *Lewis v. St. Luke's Hosp. Ass'n*, No. 96-4147, 1997 WL 778410, at \*3-4 (6<sup>th</sup> Cir. Dec.9, 1997). In deciding whether to grant a protective order, a district court must balance the parties' competing interests and compare the hardships of granting or denying the request. *York v. Am. Med. Sys., Inc.*, No. 97-4306, 1998 WL 863790, at \*4 (6<sup>th</sup> Cir. Nov. 23, 1998). As part of his overall burden, the movant must demonstrate that the balancing of hardships weighs in his favor. *Nix v. Sword*, 11 F. App'x 498, 500 (6<sup>th</sup> Cir.2001). That burden is elevated where, as here, the non-moving party is a public entity and the dispute raises matters of public concern. *FTC v. Standard Fin. Management Corp.*, 830 F.2d 404,

412 (1<sup>st</sup> Cir. 1987); *see also S.E.C. v. Thorn*, 2001 WL 1678787, at \*7 (S.D. Ohio Nov. 16, 2001)(upholding magistrate judge’s decision denying protective order prohibiting governmental agency from disseminating discovery materials, and citing favorably need for court to weigh public concern when Government is a party to an action).

The FRG Defendants’ motion also mistakenly conflates its ability to move for a protective order based on discovery relating to its customers - third parties to this case - with its ability to invoke their rights in support of the motion. While it is correct that a party may move under Rule 26(c) for a protective order with respect to documents sought from a third party via subpoena,<sup>5</sup> this does not mean the FRG Defendants have broad standing to litigate all of the rights of its customers herein - especially since the tax materials sought in this case are not only highly relevant to this case but constitute an exception to the disclosure limitations of Section 6103, and may therefore be produced in spite of notions of privacy that normally attach to taxpayer information. Certainly the FRG Defendants cannot invoke, as grounds for their motion, the due process rights of their customers that would arise if the IRS had served an administrative summons on any of them under Section 7602 or 7609 - no such summonses are at issue, the FRG Defendants would not have standing to challenge such summonses to the extent they were directed at their customers, and the discovery requests in this case are not “John Doe” summonses directed at FRG either.

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5. Of course, in this case the materials are sought directly from the FRG Defendants, and so case law cited by the FRG Defendants holding that it is permissible to use a Rule 26(c) motion to challenge discovery sought from third parties via subpoena says nothing about the FRG Defendants’ burden herein. In addition, in support of the proposition that the rights of third parties may be raised in asserting a Rule 26(c) motion, the FRG Defendants miscite *Flaherty v. Seroussi*, 209 F.R.D. 295 (N.D.N.Y. 2001) as holding that a protective order was entered in that case to protect third parties from the potential embarrassment of disclosure, when in fact the *Flaherty* court **denied** a motion for a protective order on this basis. *Flaherty*, 209 F.R.D. at 300.

**I. The FRG Defendants Cannot Establish Harm Absent Entry of a Protective Order.**

Putting aside all of its other glaring deficiencies and unreasonable policy burdens it would impose if entered, the FRG Defendants' motion fails for the fundamental reason that the FRG Defendants cannot sustain their burden of demonstrating sufficient harm to justify a protective order. This is especially so given the strongly countervailing public interests at issue.

In asking for a protective order, the FRG Defendants do not deny that the discovery materials to be governed by the proposed order are relevant to the claims and defenses in the case as well as responsive to existing document requests. The FRG Defendants similarly do not assert the withheld materials constitute confidential or business-proprietary information. Accordingly, the sole harm the FRG Defendants base their requested relief upon results not from the mere disclosure of information, but only if discovery is in fact provided by the Department of Justice to the IRS, and then "misused" by the IRS "to initiate audits and wholesale denials of legitimate theft loss deductions" (Motion at 3) prepared for and claimed by FRG's customers.

That harm, however, is wholly speculative. The FRG Defendants state that their business is suffering financially as a result of the IRS's actions. But beyond a single conclusory sentence in the Wirt Declaration, they offer no proof to substantiate this assertion (such as balance sheets, declarations from business people with knowledge of company finances, evidence of refunding customer fees as a result of audits, *etc.*). They also purport that production of discovery materials will inexorably result not only in a massive number of damaging audits but the further deterioration of their profits. Again - what evidence supports this proposition, especially given the fact that the IRS is already conducting audits without use of any discovery produced in this case? The Government, by contrast, has a strong public interest in using discovery materials, where appropriate, for law enforcement purposes. That interest must outweigh any unsubstantiated claims

of harm by FRG. *See S.E.C. v. Thorn*, No. C:01-cv-290, 2001 WL 1678787, at \*7 (S.D. Ohio Nov. 16, 2001)(in ruling on a Rule 26(c) motion where the Government is a party to the action, a Court should take into account the fact that the case raises matters of public concern which will generally outweigh interests of confidentiality).

Significantly, the FRG Defendants' claims of harm are undercut by FRG's own business model, which is premised on IRS resistance to the theft loss claims they help their customers prepare. FRG informs its customers at the outset of the relationship that "[t]he 165 process and interaction with the Internal Revenue Service are a time consuming and complicated matter," that a refund cannot be guaranteed, and that (as part of contracting with FRG) customers in advance should designate FRG employees as their representatives to assist them when - as expected - the IRS examines a theft loss claim. (*See, e.g.*, FRG Contract for Services (FRG-Adkins-6-0008-10), a true copy of which is attached as Exhibit G). In addition, even before a customer receives a refund, FRG charges up-front fees for its services, and also allows customers to choose (as one contracting option) an initial cash payment representing 15 percent of any anticipated refund (*Id.*).

The harm asserted by the FRG Defendants is so speculative that they cannot even demonstrate that it would not occur absent a protective order. IRS audits of FRG customers have been ongoing since 2009 - months before this lawsuit was filed. That process is occurring independently of this lawsuit. How, then, will limiting the Justice Department's use of discovery in this case staunch the damage purportedly being inflicted on FRG by the IRS *right now*, even without a protective order in place? As the FRG Defendants admit, the IRS can on its own obtain all the information it needs to conduct audits without any help from discovery produced in this case. Granting the FRG Defendants' motion based upon such speculative harm would constitute a dangerous precedent, in which the mere filing of a Section 7408 injunction suit like the present one

would require the IRS to scale back, if not abandon, its independent efforts to enforce the Internal Revenue laws against the defendants at issue.

At bottom, the FRG Defendants' motion ignores the fact that FRG is not presently enjoined from the business of tax preparation (and, in that context, from promoting Section 165 theft loss deductions). And indeed, to the Government's knowledge, even while the suit has been pending the FRG Defendants continue to identify scams, cold-call potential customers, and attempt to persuade them to hire FRG to prepare theft loss deduction claims in amended tax returns, as they have since the company was started several years ago. While the FRG Defendants may find the Government's scrutiny of its practices (as well as the existence of this lawsuit) intrusive and inhibiting to their business, the alleged harms resulting therefrom are simply not actionable<sup>6</sup> - and are certainly not the basis for an overbroad protective order that would unreasonably tie the hands of the Government in its law enforcement function.

**II. A Protective Order Would Unreasonably Impinge Upon the Government's Legitimate Law-Enforcement Purpose in Sharing Information Among Governmental Agencies.**

The Government has requested production of FRG customer tax filings and related back-up materials prepared internally at FRG for a single reason: to assist it in proving the claims asserted in this lawsuit. The IRS has not asked the Justice Department attorneys representing the Government in this action to obtain, through the mechanism of discovery, information it cannot obtain through other avenues. And this is not a summons enforcement proceeding either, in which

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6. In fact, the Internal Revenue Code specifically empowers the Government to seek legal action concurrently with independent IRS efforts to enforce the tax laws. Section 7402(a) of the Internal Revenue Code, under which this lawsuit arises, specifically states that the seeking of injunctive relief is "in addition to and not exclusive of any and all remedies of the United States in such courts *or otherwise to enforce such laws.*" I.R.C. § 7402(a) (emphasis added).

the Government is attempting to assist the IRS in obtaining information it previously requested in an administrative summons.

Despite the above, and despite the low likelihood that any information produced in this action will in fact be used by the IRS in its audits or tax return examinations<sup>7</sup>, the protective order motion should be denied because it would unreasonably encroach upon the Government's law-enforcement functions. The Department of Justice has a duty to share information it obtains in a lawsuit with the appropriate IRS officials in some circumstances. This lawsuit is parallel to an ongoing IRS examination of FRG customers (indeed - both matters substantially overlap), and so it is conceivable that information obtained in discovery may bear on such audits, as well as possible future audits or other law enforcement duties. Should information be produced in the lawsuit revealing a potential violation of the Internal Revenue Code, it would be consistent with the Justice Department's law-enforcement goals and obligations to share that information with the IRS. A protective order limiting the use of discovery obtained in this case, or even requiring the Government to first seek Court approval before using it outside the litigation, however, directly contravenes that duty. The FRG Defendants' motion thus raises serious constitutional concerns, as it seeks relief from this Court that would in effect interfere with the Department of Justice's ability to carry out its Article II prerogatives, injecting this Court into its decision-making.

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7. As the FRG Defendants' motion establishes, the IRS has been auditing some FRG customer tax returns for some time without the need for, or use of, information obtained through discovery. (Indeed - the FRG Defendants' motion is based on the factual premise that the audits are resulting in disallowance of theft loss claims based solely on the existence of the complaint and nothing else). And, as the proposed language from the Government's draft confidentiality stipulation indicates (*See* p. 8 above), the Justice Department would only share information with the IRS where counsel reasonably believes it necessary for law-enforcement purposes - not as a routine matter. This is consistent with the Justice Department's practices in litigating cases referred to it by the IRS.

The Government's position herein does not reflect simply a soft policy preference - it is written into law. Thus, for example, Section 7214(a)(8) of the Internal Revenue Code states that “[a]ny officer or employee of the United States acting in connection with any revenue law of the United States - . . . (8) who, having *knowledge or information* of the violation of any revenue law by any person, or of fraud committed by any person against the United States under any revenue law, fails to report, in writing, such knowledge or information to the Secretary,” (emphasis added) is subject to dismissal, fines, and imprisonment. I.R.C. § 7214(a)(8). This provision would apply to the attorneys representing the Government in this case. The Tax Division of the Department of Justice also has its own internal standards which clearly envision the sharing of documents obtained in civil or criminal tax litigation with other governmental agencies in appropriate cases. (*See* 71 Fed. Reg. 11446-02 (defining “routine use” of discovery materials as “[w]here a record, either on its face or in conjunction with other information, indicates a violation or potential violation of law - criminal, civil, or regulatory in nature - the relevant records may be referred to the appropriate Federal, state, local, foreign, or tribal law enforcement authority or other appropriate agency charged with the responsibility of investigating or prosecuting such a violation or enforcing or implementing such law.”) These are by no means the only relevant legal provisions codifying this obligation.

In response to the above, the FRG Defendants have cited zero cases in which a protective order was entered in any civil lawsuit restricting the Government's sharing of discovery materials among governmental agencies. This is not surprising; the Tax Division of the Department of Justice has brought hundreds of injunction cases against tax return preparers and/or promoters of fraudulent tax schemes over the past ten years, and in not one of those cases has a defendant obtained such a limitation on discovery. In fact, other federal district courts have rejected motions seeking similarly

intrusive protective orders intended to hinder the Government's ability to share information obtained in discovery among different governmental agencies. *See S.E.C. v. AA Capital Partners*, No. 06-51049, 2009 WL 3735880, at \*3 (E.D. Mich. Nov. 3, 2009)(rejecting proposed protective order because it “would impede the SEC’s law enforcement function” by limiting the agency’s ability to “share information with other law enforcement agencies”); *S.E.C. v. Thorn*, 2001 WL 1678787, at \*7 (“discovery in a case in which the SEC is a party is not subject to a protective order simply because the SEC may share that information with other authorities, including criminal authorities”).

Anticipating this argument, the FRG Defendants have proposed a “safety valve” mechanism by which the Justice Department could petition this Court should it later wish to share with the IRS discovery produced in this case. (Motion at 13-14). But such a mechanism improperly shifts the onus for a protective order from the FRG Defendants (who under Rule 26 bear the burden to establish why given information warrants protection) to the Government, requiring the United States to justify when and under what circumstances discovery materials may be shared. Such an onerous burden, moreover, would be borne not only by the Justice Department (which would be obligated to make a formal showing, opposable by the FRG Defendants, every time it believed sharing was necessary) but by this Court as well in having to adjudicate the matter in each instance. And in acting in such a capacity, this Court would be stepping outside of its role as adjudicator of the claims raised in this lawsuit, and would instead be effectively supervising the functions of a federal agency on an *ad hoc* basis. It is difficult to fathom how such a burdensome inquiry appropriately arises in the context of a protective order; certainly the FRG Defendants’ motion does not make that case.

**III. The Requested Protective Order Would Violate the Anti-Injunction Act (26 U.S.C. § 7421(a)).**

Section 7421(a) of the Internal Revenue Code, commonly referred to as the Anti-Injunction Act, provides that “no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person . . .” I.R.C. § 7421(a) (2010). Courts in this jurisdiction recognize that the Act accordingly “prohibits courts from entertaining suits seeking injunctions against the assessment or collection of taxes.” *Romp v. United States*, No. 03-4081, 2004 WL 959992, at \*2 (6<sup>th</sup> Cir. May 3, 2004), *citing Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1, 2 (1962). The Act serves the policy goal of permitting the United States (via the IRS) to make tax assessments and to collect on those assessments without judicial intervention, thereby requiring affected parties to dispute such governmental action in the manner provided for by statute (such as by the filing of a suit for refund). *Newhouse v. Hansen*, No. 5:06 CV 1731, 2006 WL 2583412, at \*2 (N.D. Ohio Sept. 7, 2006) *citing Enochs*, 370 U.S. at 7.

The protective order requested in this case by the FRG Defendants would prevent the United States from acting to enforce the Internal Revenue laws against FRG customers, depriving the IRS (where necessary and relevant) of information it might otherwise use in connection with audits or examinations of such customers, or for any other proper law enforcement function. Accordingly, any protective order limiting the ability of the Government to use discovery as it sees fit would violate the Anti-Injunction Act, and the FRG Defendants’ motion should be denied on this basis.

The mere fact that the FRG Defendants’ motion does not ask the Court to enjoin directly the IRS herein from its activities in enforcing the tax laws does not alter the analysis. As observed by the Sixth Circuit in *Dickens v. United States*, 671 F.2d 969, 971 (6<sup>th</sup> Cir. 1982), the Anti-Injunction Act is “equally applicable to activities which *are intended to or may culminate in* the assessment or

collection of taxes” (emphasis added). Because the effect of the requested protective order would be to deny the IRS of information produced in this lawsuit that in some circumstances might aid it in determining whether a given FRG customer should be audited, or shed light on existing audits, or otherwise provide information useful to the IRS in exercising its duties to enforce the tax laws, it amounts to a court order restraining the IRS from enforcing the tax laws in the first place. *Linstruth v. United States*, No. Civ.A. 1:05-MC-038, 2005 WL 4066437, at \*2 (S.D. Ohio Nov. 3, 2005)(denying, as violative of Anti-Injunction Act, motion to quash third party summons issued by IRS); *see also Dickens*, 671 F.2d at 971 (“[a] suit designed to prohibit the use of information to calculate an assessment is a suit designed ‘for the purpose of restraining’ an assessment under the statute”).

#### **IV. The Defendants’ Motion for a Protective Order is Untimely.**

As noted by the Ninth Circuit, “[i]t is well established that a failure to object to discovery requests within the time required constitutes a waiver of any objection.” *Richmark Corp. v. Timber Falling Consultants*, 959 F.2d 1468, 1473 (9th Cir.1992) (citing *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir.1981)); *Pham v. Hartford Fire Ins. Co.*, 193 F.R.D. 659, 661-62 (D. Colo. 2000) (same). Ohio federal courts recognize the importance of this principal; otherwise the 30-day period in which parties have to articulate objections to written discovery loses its substantive meaning. *Cleveland Indians Baseball Co. v. United States*, No. 96-2240, 1998 WL 180623, at \*4 (N.D. Ohio Jan. 28, 1998) (party’s “failure to respond within that thirty day period operates as a waiver of all objections a party might have”).

Before October, the FRG Defendants *never* asserted - whether in written discovery responses, formal correspondence to counsel, or verbally during the Rule 26(f) Conference or

otherwise - any objection whatsoever to producing otherwise responsive and relevant materials on the grounds that the Government's use of that discovery should be restricted or limited. The purported harm invoked herein as grounds for the protective order was known to the FRG Defendants months before the suit was filed, as their motion reveals. And the FRG Defendants themselves *voluntarily provided* to the Government information relating to their customers without first demanding agreement on use limitations. They even invited the Government to come to Columbus and inspect (again, without limitation) the very tax materials held in their customer files that they now withhold pending resolution of this motion. (*See* Ex. E (“we need to schedule the government’s inspection of responsive documents in FRG’s office. When we do, may we please choose a date 14 days out?”))

Given the above, the FRG Defendants’ motion should be denied as untimely. A motion seeking such sweeping relief properly should have - and could have - been interposed months ago, at the outset of the case and before discovery began. The FRG Defendants’ prior counsel did not see the need to request such a protective order. Such conduct suggests waiver of the concerns now raised, given the status of the case - the horse is out of the barn, so to speak. The late timing of this motion seems to have more to do with the appearance of new counsel in the case in October than with the FRG Defendants’ sudden realization that they require a sweeping protective order that they previously overlooked.

### **CONCLUSION**

For the reasons stated above, the United States respectfully requests that the FRG Defendants’ motion for a protective order be denied in its entirety.

November 22, 2010

Respectfully submitted,

CARTER M. STEWART  
United States Attorney

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on November 22, 2010, I served the foregoing *Opposition to Motion for Protective Order* by electronic mail and first-class mail upon the following:

David F. Axelrod, Esq.  
Axelrod LLC  
250 Civic Center Drive  
Suite 500  
Columbus, Ohio 43215

Counsel for Defendants

/s/ Brian Corcoran  
BRIAN H. CORCORAN



IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF MISSOURI

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 08-cv-00207
	)	
FRANK L. ZERJAV, SR., FRANK L.	)	
ZERJAV, JR., ZERJAV & COMPANY,	)	
L.C., ZERJAV & COMPANY, P.C.,	)	
and ADVISORY GROUP USA, L.C.,	)	
	)	
Defendants.	)	

**Stipulated Order**

The United States has filed a complaint for permanent injunction under 26 U.S.C. §§ 7407, 7408 and 7402(a) against Frank L. Zerjav, Sr., and Frank L. “Tiger” Zerjav, Jr., Zerjav & Company, L.C., Zerjav & Company, P.C., and Advisory Group USA, L.C.

The parties waive the entry of findings of fact and conclusions of law under Rules 52 and 65 of the Federal Rules of Civil Procedure. The parties understand that this order is entered under Fed. R. Civ. P. 65 and constitutes the final judgment in this matter, waive the right to appeal from this judgment, and agree that they will bear their respective costs, including any attorneys’ fees or other expenses of this litigation.

Nothing in this order shall constitute an admission of liability by defendants of any of the matters alleged in the Complaint or in the United States’ Motion for Preliminary Injunction or suggested therein. This order was entered into by defendants to resolve all disputed claims and to avoid the expense and risk of ongoing litigation. The parties consent to the entry of this order without further notice and agree to be bound by its terms. The parties further understand and agree that the Court will retain jurisdiction over this matter for the purpose of implementing and enforcing this order, and defendants understand that if they violate the order, they may be subject to civil and criminal sanctions for contempt of court.

### Order

**1. IT IS HEREBY ORDERED** that for a period of three (3) years from the date of entry of this Order, defendant Frank L. “Tiger” Zerjav, Jr. is enjoined pursuant to Internal Revenue Code (I.R.C.) (26 U.S.C.) §§ 7402, 7407, and 7408 from directly or indirectly: acting as a federal tax return preparer or assisting in, employing others to, or directing the preparation of or filing of federal tax returns for any person or entity other than Frank L. “Tiger” Zerjav, Jr.; preparing or filing (or helping to prepare or file) federal tax returns, amended returns, or other related documents and forms for others; and providing tax advice to any person or entity, including rendering advice or “coaching” which is directly relevant to the determination of the existence, characterization, or amount of an entry on a return or claim for refund.

Tiger Zerjav shall be permitted to conduct administrative, managerial, marketing, and business-development services on behalf of Zerjav & Company, L.C. and Zerjav & Company, P.C. during the three-year tax-preparation and tax-advice injunction period referenced above.

**2. IT IS HEREBY ORDERED** that defendant Advisory Group USA, L.C., and its representatives, agents, servants, employees, and anyone in active concert or participation with it, shall cease conducting business as of April 1, 2010, and is enjoined pursuant to Internal Revenue Code (I.R.C.) (26 U.S.C.) §§ 7402, 7407, and 7408 from directly or indirectly providing tax advice and preparing or filing (or helping to prepare or file) federal tax returns, amended returns, or other related documents and forms for others.

**3. IT IS HEREBY ORDERED** that defendants Frank L. Zerjav, Sr., Frank L. “Tiger” Zerjav, Jr., Zerjav & Company, L.C., and Zerjav & Company, P.C., and their representatives, agents, servants, employees, and anyone in active concert or participation with them, are enjoined pursuant to Internal Revenue Code (I.R.C.) (26 U.S.C.) §§ 7402, 7407, and 7408 from directly or indirectly:

- A. engaging in conduct subject to penalty under I.R.C. § 6700, including making, in connection with the organization or sale of any plan or

arrangement, a statement about the tax benefits of participating in a plan or arrangement that defendants know or have reason to know is false or fraudulent as to a material matter;

- B. engaging in any conduct subject to penalty under I.R.C. § 6694, including preparing tax returns for customers reporting an understatement of liability due to an unreasonable position without substantial authority or more likely than not to not be sustained on its merits;
- C. engaging in conduct subject to penalty under I.R.C. § 6701, including advising, or preparing or assisting others in the preparation of any tax forms or other documents to be used in connection with any material matter arising under the internal revenue laws and which they know will (if so used) result in the understatement of another person's tax liability;
- D. engaging in any other activity subject to penalty under IRC §§ 6694, 6695, 6701, or any other preparer penalty provision of the IRC, or engaging in any conduct that interferes with the administration and enforcement of the internal revenue laws;
- E. preparing or filing federal tax returns, forms or documents, or advising, assisting, or instructing anyone to prepare or file federal tax returns, forms or documents that:
  - 1. claim a rent deduction when a shareholder/taxpayer rents any portion of his personal home to his employer, trade, business, or other entity;
  - 2. purport to establish that shareholders/taxpayers who rent their personal home or personal vehicle are not required to report the rental payments as taxable income because the taxpayer has an accountable plan or other reimbursement policy in effect;
  - 3. do not report automobile leasing or reimbursement income for shareholders/taxpayers who lease their personal vehicle for the convenience of their employer, trade, business, or other entity;

4. claim business deductions for non-deductible personal expenses on any corporate, partnership, tax exempt entity or any other entities' federal tax returns;
5. deduct a wage for shareholders/employees unless such wage is reasonable as set forth in I.R.C. §§ 162(a)(1) and 312(a) and the regulations promulgated thereunder. Defendants shall also provide customers who need to determine a reasonable wage a copy of IRS Fact Sheet 2008-25, and retain in the customers' file a copy of IRS Form 2008-25 and all other documentation establishing the reasonableness of the customers' wage.
6. report compensation paid to a customer-created entity which is not reasonable and/or related to the work performed, including bookkeeping, management, staffing, and support services (or any derivation of these services).
7. claim a 26 U.S.C. § 179 deduction unless in compliance with 26 U.S.C. § 179 and the regulations promulgated thereunder;
8. claim deductions for wages paid to children unless the wages are reasonable, are for services rendered as a bona fide employee of the taxpayer's trade or business, and the customers provide detailed records of the child's work history;
9. claim restaurant meals as a deductible business expense, unless the deduction meets the requirements of 26 U.S.C. § 162, and the taxpayer documents the date, time, purpose, and participants in accordance with 26 U.S.C. § 274;
10. deduct amounts paid or incurred by an employer for educational assistance under 26 U.S.C. § 127, when the employer paid more than 5% of educational assistance to benefit shareholders or owners (or their spouses or dependents);
11. deduct child care expenses under 26 U.S.C. § 129, where the business paid more than 25% of childcare expenses to benefit shareholders or owners (or their spouses or dependents);
12. deduct equipment lease payments for businesses which have transferred, for no consideration, assets or equipment into a newly formed entity, business, or trust; and
13. classify shareholder distributions as "loans to shareholders."

- F. making adjusting journal entries or otherwise changing customers' QuickBooks ledger entries or other accounting records without informing the customers of the changes; and
- G. misrepresenting the terms of this order.

**4. IT IS HEREBY ORDERED** that defendants shall provide a copy of this order to all of defendants' principals, officers, managers, employees, and independent contractors within 15 days and provide to counsel for the United States within 30 days a signed and dated acknowledgment of receipt of this Order for each person for whom defendants provided a copy of this Order in compliance with this paragraph.

**5. IT IS HEREBY ORDERED** that for a period of five (5) years from the date of entry of this Order, Frank Zerjav, Sr. shall notify counsel for the United States in writing of any change in employment status (including self-employment), and any change in his ownership interest in any business entity, within thirty (30) days of such change. Such notice shall include the name and address of each business that Frank Zerjav, Sr. is affiliated with, employed by, or provides services for, a statement of the nature of the business, and a statement of Frank Zerjav, Sr.'s duties and responsibilities in connection with the business or employment.

**6. IT IS HEREBY ORDERED** that for a period of five (5) years from the date of entry of this Order, defendants shall notify counsel for the United States of any changes in the structure of any business entity that the defendants directly or indirectly control, or have an ownership interest in, that may affect compliance obligations arising under this Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor corporation; the creation or dissolution of a subsidiary, parent, or affiliate that engages in acts or practices subject to this Order; the filing of a bankruptcy petition; or a change in the corporate name or address, at least thirty (30) days before such change, provided that, with respect to any proposed change in the business entity about which defendants

learn less than thirty (30) days before the date such action is to take place, defendants shall notify counsel for the United States as soon as it is practicable after obtaining such knowledge.

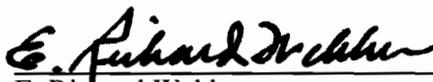
**7. IT IS HEREBY ORDERED** that in February of each year for a period of five (5) years from the date of entry of this Order, beginning in February 2011, for the purpose of determining or securing compliance with its provisions, a neutral monitor, to be determined by the parties by agreement or by the Court if the parties cannot agree, who is an attorney or CPA, shall inspect and review ten (10) federal tax returns (a corporate and related individual returns shall be counted as one return for purposes of this Order) prepared by defendants since this Order was entered to ensure compliance with this Order. Defendants and their representatives, agents, servants, employees, and anyone in active concert or participation with them shall permit the neutral monitor, within three (3) business days of receipt of written notice from the neutral monitor, access during normal business hours to any office or facility storing documents of any business that the defendants directly or indirectly manages, controls, or has a majority interest in, and to inspect and copy all documents, including tax returns to review, relevant to any matter contained in this Order. Defendants shall also permit the neutral monitor to interview defendants, principals, officers, customers, employees, independent contractors, or any other person with relevant information regarding any matter contained in this Order.

Within sixty (60) days of terminating its investigation, the neutral monitor shall provide a written report to defendants and the United States setting forth in detail the manner and form in which defendants have complied or not complied with the injunction. The costs of the neutral monitor shall be paid by defendants.

**8. IT IS HEREBY ORDERED** that the Court retains jurisdiction to enforce this injunction and that in order to monitor defendants' compliance with this injunction, the United States may conduct formal discovery using the procedures prescribed by Fed. R. Civ. P. 30, 31,

33, 34, 36, and 45 or as otherwise provided in the Federal Rules of Civil Procedure.

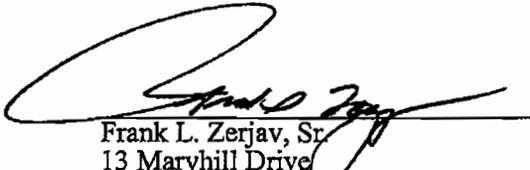
SO ORDERED this 26<sup>th</sup> day of March 2010.



E. Richard Webber  
United States District Judge

**Seen and Agreed:**

Dated: 3/22/10

  
Frank L. Zerjav, Sr.  
13 Maryhill Drive  
Ladue, Missouri 63124

Dated: \_\_\_\_\_

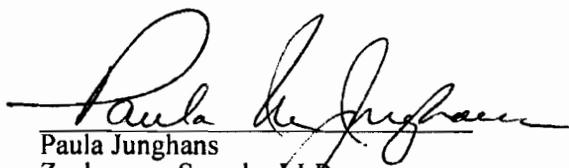
\_\_\_\_\_  
Paula Junghans  
Zuckerman Spaeder LLP  
1800 M. Street, NW, Suite 1000  
Washington, DC 20036-5802  
Counsel for Frank L. Zerjav, Sr.

**Seen and Agreed:**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Frank L. Zerjav, Sr.  
13 Maryhill Drive  
Ladue, Missouri 63124

Dated: March 24 2010

  
\_\_\_\_\_  
Paula Junghans  
Zuckerman Spaeder LLP  
1800 M. Street, NW, Suite 1000  
Washington, DC 20036-5802  
Counsel for Frank L. Zerjav, Sr.

Seen and Agreed:

Dated: 3/22/10

  
\_\_\_\_\_  
Frank L. Zerjav, Jr.  
19202 Old Manchester Road  
Wildwood, Missouri 63069-2561

Dated: \_\_\_\_\_

\_\_\_\_\_  
Matt Jacober  
Scott Dickenson  
10 South Broadway, Suite 1300  
St. Louis, Missouri 63102  
Counsel for Frank L. Zerjav, Sr.

**Seen and Agreed:**

Dated: \_\_\_\_\_

\_\_\_\_\_  
Frank L. Zerjav, Jr.  
19202 Old Manchester Road  
Wildwood, Missouri 63069-2561

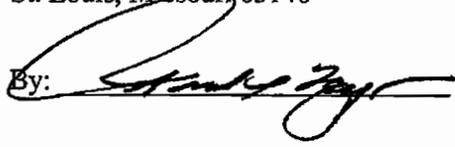
Dated: 3/24/2010

  
\_\_\_\_\_  
Matt Jacober  
Scott Dickenson  
10 South Broadway, Suite 1300  
St. Louis, Missouri 63102  
Counsel for Frank L. Zerjav, Sr.

Seen and Agreed:

Dated: 3/22/10

Zerjav & Company, P.C.  
1980 Concourse Drive  
St. Louis, Missouri 63146

By: 

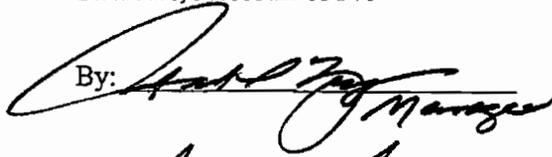
Dated: 3/22/10

Zerjav & Company, L.C.  
1980 Concourse Drive  
St. Louis, Missouri 63146

By: 

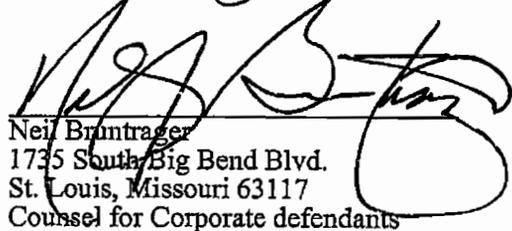
Dated: 3/22/10

Advisory Group USA, L.C.  
1980 Concourse Drive  
St. Louis, Missouri 63146

By: 

Dated: 3/24/10

Neil Bruntrager  
1735 South Big Bend Blvd.  
St. Louis, Missouri 63117  
Counsel for Corporate defendants



**Seen and Agreed:**

Dated: March 26, 2010

  
Michael R. Roessner  
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U.S. Department of Justice  
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Washington, D.C. 20044  
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Facsimile: (202) 514-6770  
Email: [michael.j.roessner@usdoj.gov](mailto:michael.j.roessner@usdoj.gov)  
Counsel for the United States

Dated: March 26, 2010

  
Michael R. Pahl  
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U.S. Department of Justice  
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Washington, D.C. 20044  
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Email: [michael.r.pahl@usdoj.gov](mailto:michael.r.pahl@usdoj.gov)  
Counsel for the United States



**Interrogatory No. 12:** Identify each and every instance in which any of the FRG Defendants have refunded a fee charged a customer for preparing a tax return for that customer claiming a theft loss deduction. In your answer, identify the name and address of the relevant customer, the date the refund was made, the rationale for making the refund, and the amount of the refund.

**Response:** Attached is a list of fee refunds since January 15, 2008, when this information started being tracked. *See* Ex. 7. Before then, the information requested can be determined only by looking within each individual customer file. The same is true for the rationale for making the refund. Because of this, the defendants are opting to provide the government a reasonable opportunity to examine those files pursuant to Rule 33(d) of the Federal Rules of Civil Procedure.

**Interrogatory No. 13:** Set forth the basis for your assertion, contained in the Affirmative Defense of your Answer, that “[i]n the last four years, the IRS has fully or partially allowed approximately 700 theft-loss claims prepared by FRG.” Identify each FRG Defendant customer who is included in those purported 700 instances in which a theft-loss claim prepared by FRG was fully or partially allowed.

**Response:** The defendants provided the identity of these people when they disclosed a list of over 700 people whose theft-loss claims were fully or partially allowed by the IRS. The basis for the assertion is that each of these taxpayers received some correspondence (e.g., refund check) from the IRS fully or partially allowing their theft-loss claim.

**Interrogatory No. 14:** Set forth the basis for your denial, contained in Paragraph 3 of your Answer, of the United States's allegation, contained in Paragraph 3 of the Complaint, that Elsass has “repeatedly, and falsely, held himself out to customers, as well as the IRS, as qualified to represent taxpayers before the IRS in administrative proceedings.”

**Response:** Paragraph 3 of the government’s Complaint alleged that Mr. Elsass violated the law by repeatedly, and falsely, misrepresenting himself as qualified to represent taxpayers before the IRS in administrative proceedings. The defendants

denied this allegation because Mr. Elsass did not intentionally misrepresent his ability to practice. Indeed, the record shows that Mr. Elsass transitioned from signing Forms 2848 as an “a: attorney” to an “h: unenrolled return preparer” to not signing Forms 2848 at all. In other words, once Mr. Elsass fully understood the limitations on his practice before the IRS, he changed what he did. The few Forms 2848 outside this trend were the result of carelessness, not willful misrepresentation.

**Interrogatory No. 15:** Set forth the basis for your denial, in Paragraph 16 of your Answer, of the United States's allegation, contained in Paragraph 16 of the Complaint, that “Elsass has repeatedly and continually submitted false Power of Attorney Forms 2848 to the IRS representing that he is an attorney authorized to practice law in his state when he is not.”

**Response:** See the response to Interrogatory No. 14.

**Interrogatory No. 16:** Describe the circumstances in which, as admitted in Paragraph 45 of the Complaint, “for some clients FRG reported theft-loss claims on Form 4797” rather than on a Schedule A.

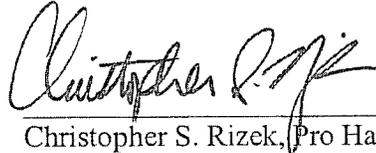
**Response:** The defendants believe that there were only a few of these, and they do not know for which customers they prepared Forms 4797 or the reason why Form 4797 was used. They believe, however, that they used Form 4797 when appropriate.

**Interrogatory No. 17:** Set forth the basis for your denial, contained in Paragraph 58 of your Answer, of the United States's allegation, set forth in Paragraph 58 of the Complaint, that Elsass has “directly obtained from the Government refunds issued to his customers, thereby allowing him to negotiate the refund check, deduct his fee, and then remit the remainder to a customer.”

**Response:** The defendants denied most of the allegations of paragraph 58 of the Complaint because the import was that Mr. Elsass knowingly did something wrong. Upon reflection, though, the defendants can and do admit that Mr. Elsass “directly obtained from the Government refunds issued to his customers, thereby

allowing him to negotiate the refund check, deduct his fee, and then remit the remainder to a customer.”

Date 7/27/2010

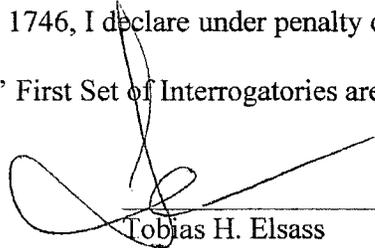


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Christopher S. Rizek, Pro Hac Vice  
Attorney for Defendants  
Caplin & Drysdale, Chtd.  
One Thomas Circle, NW, Suite 1100  
Washington, DC 20005  
Telephone: (202) 862-8852  
Facsimile: (202) 429-3301  
E-mail: csr@capdale.com

In accordance with 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing answers to the United States' First Set of Interrogatories are true and correct.

Executed on 7/25/10



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Tobias H. Elsass  
Fraud Recovery Group  
965 High Street  
Worthington, OH 43085  
Telephone: (614) 568-7444  
Facsimile: (614) 568-7445

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:10cv00336
	)	
TOBIAS H. ELSASS,	)	Judge James L. Graham
SENSIBLE TAX SERVICES, INC., and	)	Magistrate Judge Norah McCann King
FRAUD RECOVERY GROUP, INC.,	)	
	)	
Defendants.	)	

**CERTIFICATE OF SERVICE**

I certify that on July 27, 2010, I served the foregoing on counsel for the plaintiff by mailing it to him at the following address:

Brian H. Corcoran  
Trial Attorney, Tax Division  
U.S. Department of Justice  
Post Office Box 7238  
Washington, D.C. 20044

I also sent Mr. Corcoran a courtesy copy by email at Brian.H.Corcoran@usdoj.gov. Pursuant to stipulation on July 26, 2010, service of this document is timely.

  
 \_\_\_\_\_  
 Matthew C. Hicks, Pro Hac Vice  
 Attorney for Defendants  
 Caplin & Drysdale, Chtd.  
 One Thomas Circle, NW, Suite 1100  
 Washington, DC 20005  
 Telephone: (202) 862-7852  
 Facsimile: (202) 429-3301  
 E-mail: mh@capdale.com



## RESPONSE TO REQUEST FOR PRODUCTION

**RFP No. 1:** All Form 1040 individual tax returns prepared by anyone at FRG or Sensible, whether original or amended, since January 1, 2006 in which any of the following were included, claimed, or reported:

- a. a theft loss deduction under I.R.C. § 165;
- b. a claim for theft loss deduction reported on a Form 4797 instead of on a Schedule A;
- c. a claim for a theft loss deduction reported on a Schedule E instead of on a Schedule A; and
- d. unreimbursed employee expenses reported on a Schedule C.

**Response:** Documents responsive to this request are kept in individual customer files, and the government may inspect and copy those items at a reasonable time and place, and in a reasonable manner, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

**RFP No. 2:** Documents referring or relating to the corporate organization or structure of (a) FRG, and (b) Sensible, including but not limited to organization charts, employee and officer lists, employee and officer rosters, and incorporation documents.

**Response:** Documents responsive to this request are enclosed. *See* Tab 1. A list of past and present employees was provided in response to the government's interrogatories.

**RFP No. 3:** Documents referring or relating to any training in connection with the preparation of federal income tax returns that any officer or employee of FRG or Sensible, including Elsass, undertook or had during the relevant time period, including but not limited to written descriptions of any course of training and any texts or printed materials obtained in connection with the same.

**Response:** Some of the documents that are responsive to this request—that is, internal training materials—are proprietary and confidential. Consequently, the parties are presently attempting to craft an agreement that will allow the

government to use the documents in this litigation while limiting the distribution and publication of those documents and the information contained within them. After this agreement has been reached, the defendants will produce these documents, which have already been collected. *See* Tab 2 & green binder. The government may inspect and copy other responsive documents, including training materials from seminars and other public venues, at a reasonable time and place, and in a reasonable manner, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

**RFP No. 4:** Copies of any correspondence sent by any of the FRG Defendants to the IRS on behalf of an FRG customer during the relevant time period referring or relating to (a) a theft loss deduction claimed on an income tax return, or (b) some other item or claim reported or claimed on a tax return prepared by any of the defendants for the customer but questioned by the IRS.

**Response:** Documents responsive to this request are kept in individual customer files, and the government may inspect and copy those items at a reasonable time and place, and in a reasonable manner, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

**RFP No. 5:** All promotional materials, brochures, marketing materials, charts, diagrams, power point presentations, speech outlines, speech notes, handouts, and other documents used or prepared by any of the FRG Defendants to promote their business, including the promotion of their theft loss deduction expertise, whether through direct mailings to potential customers, print advertisements, television advertisements, or via presentations given at any business seminars, business groups and/or other organizations.

**Response:** Documents responsive to this request are enclosed. *See* Tab 3. The defendants are not certain that this is a complete set because older items may not have been maintained.

**RFP No. 6:** Copies of all contracts entered into between any of the FRG Defendants and its customers relating to the preparation of income tax returns claiming I.R.C. § 165 theft loss deductions.

**Response:** Documents responsive to this request are kept in individual customer files, and the government may inspect and copy those items at a reasonable time and place, and in a reasonable manner, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

**RFP No. 7:** Documents referencing, referring, or relating to any disputes with customers of FRG concerning (a) refunding any payments made by them to any FRG Defendant in connection with the preparation of an income tax return claiming a theft loss deduction, including but not limited to correspondence and legal pleadings filed by or against a former or existing customer in connection with such a dispute, (b) Elsass's status as an attorney, including but not limited to any Forms 2848 he personally signed in connection with providing any services to a customer, or (c) the disallowance by the IRS of a theft loss deduction claim reported on an income tax return prepared by any of the FRG Defendants.

**Response:** Documents responsive to this request, if any, are kept in individual customer files, and the government may inspect and copy those items at a reasonable time and place, and in a reasonable manner, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

**RFP No. 8:** All documents referring or relating to the determination that a potential, past, or existing customer of FRG or Sensible had a valid theft loss claim, including but not limited to research, correspondence, including e-mails, between any FRG Defendant and any potential, prior, or existing customers, internal correspondence and e-mails, and internal memoranda or analyses.

**Response:** Most documents responsive to this request are kept in individual customer files. Research on any specific fraudulent financial scheme is contained in separate files on each financial fraud or scam. The government may inspect and copy these items at a reasonable time and place, and in a reasonable manner, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

**RFP No. 9:** Copies of all IRS Forms 2848 (Power of Attorney) prepared for any FRG or Sensible customer and signed by Elsass.

**Response:** Electronic copies of documents responsive to this request are enclosed on the attached CD. *See* Tab 4.

**RFP No. 10:** All correspondence between the IRS and Elsass referring or relating to Elsass's status as an attorney and/or his capacity or authorization to identify himself on a Form 2848 as an attorney or unenrolled agent.

**Response:** Documents responsive to this request are enclosed. *See* Tab 5.

**RFP No. 11:** Documents sufficient to show the financial status of Sensible or FRG for each fiscal year during the relevant time period, including but not limited to financial statements, profit and loss statements, year-end reports, Form 10-Ks, Form 10-Qs, and bank statements.

**Response:** The defendants normally keep documents that are responsive to this request (that is, documents which reflect the financial status of the defendants) confidential. Consequently, the parties are presently attempting to craft an agreement that will allow the government to use the documents in this litigation while limiting the distribution and publication of those documents and the information contained within them. After this agreement has been reached, the defendants will produce the documents, which have already been collected. *See* Tab 6.

**RFP No. 12:** Documents referencing, referring, or relating to circumstances in which any of the FRG Defendants obtained directly from the IRS refunds relating to claimed theft loss deductions on a customers' income tax returns, and then extracted their fee from that refund before providing the balance to the customer.

**Response:** Some documents responsive to this request were produced by the defendants in response to the United States' First Set of Interrogatories. Other documents responsive to this request are kept in individual customer files, and the government may inspect and copy those items at a reasonable time and place, and

in a reasonable manner, pursuant to Rule 34 of the Federal Rules of Civil Procedure.

**RFP No. 13:** Internal e-mails and correspondence between any officers or employees of FRG or Sensible, including Elsass, discussing (a) the financial status of FRG and Sensible, or (b) the success of either entity at obtaining customers who wished to claim theft loss deductions on their income tax returns, or (c) the relationship between the financial status of FRG and Sensible and its success at obtaining customers who wished to claim theft loss deductions on their income tax returns.

**Response:** No documents responsive to this request have been located.

**RFP No. 14:** Copies of Sensible and FRG's document retention policies.

**Response:** Documents responsive to this request are enclosed. *See* Tab 7.

**RFP No. 15:** All documents referred to by, or referenced or reviewed in preparation of, your Answers to the United States' First Set of Interrogatories, dated June 22, 2010.

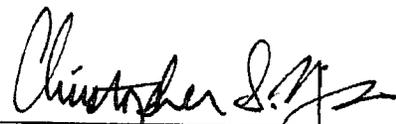
**Response:** The documents referred to by the defendants' response to the United States' First Set of Interrogatories have been identified or produced in response to the United States' First Set of Interrogatories and other requests in this request for production. The identity of documents referenced or reviewed in preparation for the defendants' response to the government's interrogatories constitutes information protected by the attorney-client privilege and the work product doctrine. The documents themselves, if responsive to a proper request, have been identified or produced in response to the United States' First Set of Interrogatories or other requests in this request for production.

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>

**RFP No. 16:** All documents supporting your claims and defenses in this action and/or identified in your Initial Disclosures, dated June 21, 2010.

**Response:** Documents responsive to this request have been identified or produced in response to the United States' First Set of Interrogatories and other requests in this request for production.

Date 7/30/2010



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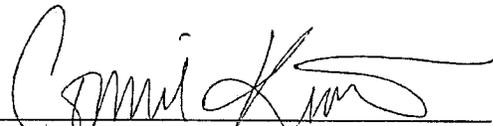
Christopher S. Rizek, Pro Hac Vice  
Attorney for Defendants  
Caplin & Drysdale, Chtd.  
One Thomas Circle, NW, Suite 1100  
Washington, DC 20005  
Telephone: (202) 862-8852  
Facsimile: (202) 429-3301  
E-mail: csr@capdale.com

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:10cv00336
	)	
TOBIAS H. ELSASS,	)	Judge James L. Graham
SENSIBLE TAX SERVICES, INC., and	)	Magistrate Judge Norah McCann King
FRAUD RECOVERY GROUP, INC.,	)	
	)	
Defendants.	)	

**CERTIFICATE OF SERVICE**

I certify that on July 30, 2010, I served the foregoing on counsel for the plaintiff by handing it to him; leaving it at his office with a clerk or other person in charge; or, if no one was in charge, in a conspicuous place in the office. I also sent Mr. Corcoran a courtesy copy by email, without attachments, at Brian.H.Corcoran@usdoj.gov. Pursuant to stipulation on July 26, 2010, service of this response is timely.

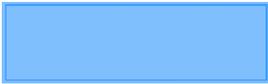
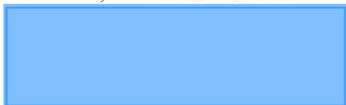
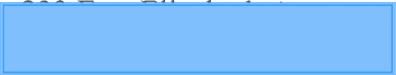
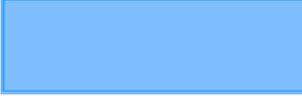
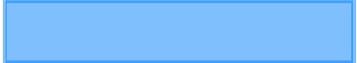
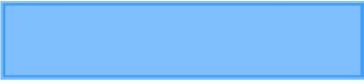
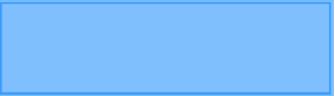
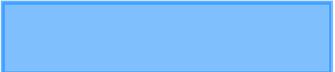
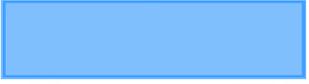
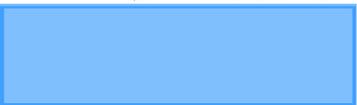


Connie J. Kim, Paralegal  
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Telephone: (202) 862-7804  
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E-mail: cjk@capdale.com

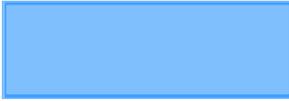
UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF OHIO  
EASTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	No. 2:10cv00336
	)	
TOBIAS H. ELSASS,	)	Judge James L. Graham
SENSIBLE TAX SERVICES, INC., and	)	Magistrate Judge Norah McCann King
FRAUD RECOVERY GROUP, INC.,	)	
	)	
Defendants.	)	

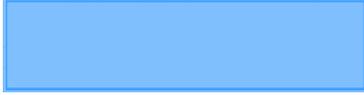
**LIST OF TAXPAYERS WHOSE THEFT-LOSS CLAIMS  
WERE PREPARED BY FRG AND FULLY OR PARTIALLY ALLOWED BY THE IRS**

- |  |  |
|--|--|
| 1) Acedillo, Joel & Rosemarie<br> | 7) Almes, Donald & Barbara<br>   |
| 2) Adams, Kenard & Ruth<br>       | 8) Altman, Daniel & Nancy<br>    |
| 3) Adams, Leonard & Mary<br>      | 9) Amato, James<br>              |
| 4) Adkins, William & Jo<br>       | 10) Ambrose, John & Ina<br>      |
| 5) Ahmadi, Behdad<br>             | 11) Ames, Richard<br>            |
| 6) Alleva, Angelina<br>           | 12) Anderson, Charles & Rita<br> |

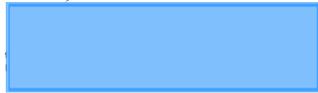
739) Zhai, Hai - Xiao & Chen, Xiao-Hui



740) Zhongqiang, Qian & Lu, Liping



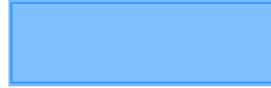
741) Zilai, James & Maria



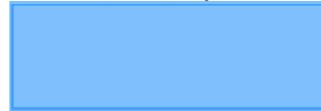
742) Zinn, Thomas & Margaret



743) Zirakzadeh, Manouchehr & Shahin



744) Zomonski, Gary & Melody





Caplin & Drysdale, Chartered  
One Thomas Circle, NW, Suite 1100  
Washington, DC 20005  
202-862-5000 202-429-3301 Fax  
www.caplindrysdale.com

202-862-7852 Direct  
mh@capdale.com

August 27, 2010

***By Electronic Mail***

Brian H. Corcoran  
Trial Attorney, Tax Division  
U.S. Department of Justice  
555 Fourth St., NW  
Washington, D.C. 20001  
Email: Brian.H.Corcoran@usdoj.gov

**Re: Discovery in *United States v. Elsass*, No. 2:10-cv-336**

Dear Mr. Corcoran:

Responses to both parties' first sets of discovery requests were due one month ago.

Since then, FRG has answered interrogatories, produced documents, prepared confidential but non-privileged documents for production, and made other responsive documents available for inspection and copying. But two items remain outstanding.

First, to facilitate production of financial, proprietary, and other confidential information of FRG, the government has agreed in principle to treat this information confidentially. And we have agreed to draft appropriate governing language for the parties' consideration. We propose the following:

Documents identified by the defendants as "confidential," as well as any information contained in those documents, must be treated as confidential by the plaintiffs. Accordingly, the plaintiffs may not reveal confidential documents or their contents to anyone other than the defendants and the court. And any disclosure to the court of confidential documents or their contents must be under seal. If the plaintiffs want to reveal confidential documents or their contents to someone other than the defendants or the court, then the plaintiffs should seek the defendants' agreement in writing. The defendants will have 30 days from receipt of that written request to agree, to seek a protective order pursuant to Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure or other

Caplin & Drysdale  
C H A R T E R E D

- 2 -

authority, or to otherwise resolve the matter with the plaintiff. If the defendants move for a protective order within the 30-day period, the plaintiff may not reveal the confidential documents or their contents during the pendency of the motion.

Second, we need to schedule the government's inspection of responsive documents in FRG's office. When we do, may we please choose a date 14 days out? The price of plane tickets is prohibitive on shorter notice.

The government has also answered interrogatories and produced documents in the last month, of course, and there are two issues that we would like to address sooner rather than later.

First, the 39 disallowed theft-loss claims. In Exhibit A to your discovery response of July 26, 2010, you identify 39 claims which were allegedly disallowed. But it appears from the exhibit that less than half of the 39 claims were fully disallowed. Is that right? And were some of the full disallowances allowed in full or part on appeal? A footnote to the table states the amounts disallowed were "by initial IRS audit, without reference to subsequent appeals results, if any," so it is not clear what the ultimate result was. Consequently, we are still somewhat in the dark concerning this core allegation. Would you please supplement your answers to FRG's discovery requests regarding the 39 disallowed theft-loss claims (i.e., Interrogatory #5, Interrogatory #6, and Request for Production #5) within the next two weeks?

Second, we have received 10,615 pages in response to our requests for production, but they have not been produced as they are kept in the ordinary course of business, nor have they been organized to correspond to the specific request to which they are responsive. For example, pages 1,405 through 1,609 were identified as one document, but those 205 pages actually contained 47 full documents and 13 partial documents. Given the sheer number of claims and taxpayers we are dealing with in this case (nearly 900!), it is imperative that documents be produced as they are kept in the ordinary course and identified as responsive to specific requests. The rules require it, and the instructions to FRG's discovery requests ask for it as well. Would you please ensure that all future productions comply?

Please contact me with any questions at 202-862-7852 or by email at mh@capdale.com. Thank you.

Sincerely,

A handwritten signature in black ink that reads "M. Hicks" followed by a stylized flourish that includes the letters "szc".

Matthew C. Hicks

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. Electronically Stored Information (“ESI”) may be designated as confidential. The physically produced storage device containing confidential ESI must be immediately affixed with the words: “CONFIDENTIAL: Subject to Protective Order in *United States v. Elsass, et al.*”

6. 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.*”

7. 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).

8. 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.

9. 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.

10. No information or material designated as confidential shall be disclosed to any person described in subparagraphs (i) and (iv) of Paragraph 8 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.

11. 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.

12. 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.

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

14. Notwithstanding any provision of this Stipulation, where counsel believe confidential information or documents, either on its face or in conjunction with other information, indicates a violation or potential violation of law-criminal, civil, or regulatory in nature-the relevant information or documents may be disclosed to the appropriate federal, state, local, foreign, or tribal, law enforcement authority or other appropriate agency charged with the responsibility of investigating or prosecuting such a violation or enforcing or implementing such law.

15. 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.

16. 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.

17. 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 12 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.

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

September \_\_, 2010

**[signature block for Defendant]**

CARTER M. STEWART  
United States Attorney

MARK T. D'ALESSANDRO (0019877)  
Assistant United States Attorney  
303 Marconi Boulevard, Suite 200  
Columbus, Ohio 43215  
(614) 469-5715  
Fax: (614) 469-5240  
mark.dalessandro @usdoj.gov

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Telephone: (202) 353-7421  
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[Brian.H.Corcoran@usdoj.gov](mailto:Brian.H.Corcoran@usdoj.gov)

**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

FRAUD RECOVERY GROUP, INC.  
CONTRACT FOR SERVICES

This agreement is entered into by and between Fraud Recovery Group, Inc. an Ohio Corporation, located at 887 Plumtree Drive, Columbus, Ohio 43235 (614-271-9477) and the customer identified hereafter.

Fraud Recovery Group, Inc., also referred to hereafter as "FRG", agrees to assist customer in processing a tax benefit pursuant to 26 USC 165(C)(2). FRG shall provide all necessary documentation and evidence to support the 165 tax benefit on behalf of the customer. In consideration for the services of FRG, customer agrees to one of the following payment schedules.

1) \$ 1200 CASH PAYMENT-50% of the fees due FRG plus 100% of the tax preparation fee. Balance due FRG to be paid upon receipt of the amended tax returns and Customer verification of the expected tax benefit. Customer must sign IRS form 2848. (Fee is 15% of expected refund.)

2) \$ NOT Available DEFERRED CONTRACT-All fees including tax preparation fees to be taken out of customer's refund. Should customer receive refund directly from the IRS, then fees will be paid to FRG directly from customer within 7 days. Customer must sign IRS form 231 and 2848. (Fee is 25% of expected refund.)

3) \$ 300 TAX PREPARATION FEE (\$300 per year amended) Following years to be amended: 2004

Customer chooses number 1 for payment of fees for services. (1 for cash contract or 2 for deferred contract)

Total fees due \$ 1500<sup>00</sup>. (Amount on line 1 OR line 2 plus line 3)

Total paid today \$ 1500<sup>00</sup> (Half of line 1 plus all of line 3 if a cash Contract or \$0 if a deferred contract)

For cash contract customer, second check will be due in the amount of \$ NA upon receipt of the amended returns. (Leave blank if a deferred contract customer.)

Fraud Recovery Group, Inc.  
Contract for Services & Qualification Survey

CUSTOMER INFORMATION

Name(s) William R + Jo D. ADKINS

Address

Customer(s)

Home Phone

E-Mail Address



TERMS OF THIS AGREEMENT

FRG makes no representation on how long it will take to perform the services set forth herein. The 165 process and interaction with the Internal Revenue Service are a time consuming and complicated matter. Nor is any representation being made as to the ability of FRG to obtain the tax relief sought. FRG is relying on the accuracy and completeness of the information provided to us. There is no guarantee the IRS will accept the deduction. The Principals of FRG have processed hundreds of 165 tax refunds successfully. However, each customer's situation is different and unique and must be processed on its own merit with the IRS and the agent assigned to review the request.

FRG is neither a law firm nor an accounting firm. We do not give legal, tax or accounting advice. We suggest you check with your tax professional before signing this document.

Should the IRS elect to audit or review your return(s), FRG will provide representation for you at NO ADDITIONAL CHARGE to substantiate your right to the 165 deduction. If after completion of the audit your deduction is denied, then FRG at no additional cost to the customer, but at FRG's option, may appeal the matter and take the case to the appropriate Tax Court. Should FRG's efforts on your behalf be unsuccessful, then all fees paid shall be refunded in full within 30 days. For those customers who chose a deferred contract, all obligations and agreements shall be voided.

Fraud Recovery Group, Inc.  
Contract for Services & Qualification Survey

All information is kept strictly confidential. We do not and will not disclose any nonpublic personal information about you to anyone for any purpose not permitted by law without your prior written consent. Our offices maintain strict levels of security. Even our employees have restricted access to our customer's information on a "need to know basis" and only within the scope of their employment. FRG requires written authorization to release any information provided by the customer to any third party including the customer's spouse, the IRS or other government or private agencies.

FRG shall not be liable to any customer or third party for any amount exceeding the amount paid as set forth in this agreement.

**BINDING ARBITRATION**

Customer agrees that any claim, dispute or controversy between FRG and customer or any claim of FRG or customer against the other or the employees, agents or assigns of the other and any claim arising from this agreement or the relationships which result from this agreement, no matter against whom made, including the applicability of this arbitration clause and the validity of the entire agreement, shall be resolved by neutral arbitration by the National Arbitration Forum, under the code of procedure in effect at the time the claim is filed. Any arbitration hearing at which you appear will take place at a location near your residence. Rules and forms of the National Arbitration Forum may be obtained and all claims filed at any National Arbitration Office, [www.arbforum.com](http://www.arbforum.com) or P.O. Box 50191, Minneapolis, Minnesota 55405.

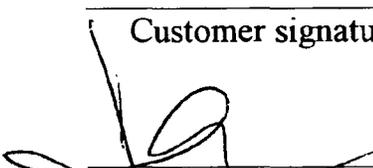
This arbitration agreement is made pursuant to a transaction involving interstate commerce and shall be governed by the Federal Arbitration Act, 9 USC Sections 1-16. Judgment upon the award may be entered in any court having jurisdiction.

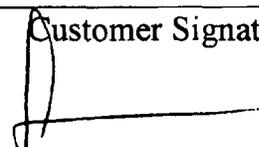
THE PARTIES HERETO UNDERSTAND THAT THEY WOULD HAVE HAD A RIGHT OR OPPORTUNITY TO LITIGATE THROUGH A COURT AND HAVE A JUDGE OR JURY DECIDE THEIR CASE, BUT THEY CHOOSE TO HAVE DISPUTES DECIDED THROUGH ARBTRATION.

This agreement contains the entire agreement of the parties and may not be amended except by a written instrument duly executed and delivered by each party. This agreement supersedes all prior agreements and any understanding between the parties with respect to the subject matter hereof.

Fraud Recovery Group, Inc.  
Contract for Services & Qualification Survey

WITNESS our signatures hereon this 22 day of April  
2006.

\_\_\_\_\_  
Customer signature  
  
\_\_\_\_\_  
PRG Fraud Advisor

\_\_\_\_\_  
Customer Signature  
  
\_\_\_\_\_  
FRG Corp. acceptance

FRG FRAUD ADVISOR NOTES OR SPECIAL INSTRUCTIONS

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

CUSTOMER 165 QUALIFICATION QUESTIONS

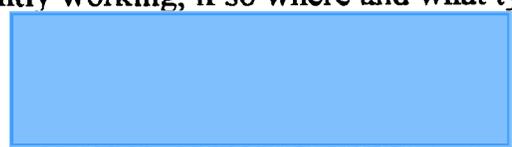
Dear Customer,

The following questions will assist us in qualifying you for a 165 tax benefit. Please answer the questions to the best of your ability. If you need assistance please call your FRG Fraud Advisor or contact our corporate offices at 614-271-9477 or toll free 877-225-8629.

1) What is(are) your date(s) of birth?



2) Are you currently working, if so where and what type of position(s) do you hold?



Director of Construction

3) In what name was the investment(s) made?

William R. Atkins  
Jo Donna Atkins

4) How did you originally hear about the investment? - Friend

5) Whom did you talk with about the investment? When did you meet with them? (approximate date please 04'03)