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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828 DN</p> <p>UNITED STATES' RESPONSE TO THE MOTION TO QUASH PRODUCTION OF INFORMATION AND SUBPOENAS (ECF DOC. 83)</p> <p>Judge David Nuffer Magistrate Judge Brooke C. Wells</p>
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Over the decades, promoters of abusive tax shelters have pressed various objects into the service of their schemes: cattle, *Van Scoten v. Comm'r*, 439 F.3d 1243 (10th Cir. 2006); jewelry, *Jackson v. Comm'r*, 966 F.2d 598 (10th Cir. 1992); computer systems, *James v. Comm'r*, 899

F.2d 905 (10th Cir. 1990); “stamp masters” (meaning, “plates used to produce stamps”), *United States v. Philatelic Leasing*, 794 F.2d 781 (2d Cir. 1986); and “reproduction masters’ of [original artwork by] Picasso,” *Rose v. Comm’r*, 868 F.2d 851 (6th Cir. 1989), just to name a few. In this case, the United States alleges that the Defendants have added yet another object to this unfortunate list: “solar thermal lenses.” (*See generally* ECF Doc. 2.)

The United States has sought and will continue to seek proportional, well-tailored discovery on its claims regarding Defendants’ alleged abusive conduct and their defenses. Defendants RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC, and Neldon Johnson (“Moving Defendants”¹) appear prepared to resist nearly every such effort with arguments that lack factual or legal support. One example is the baseless “Motion to Quash Production of Information and Subpoenas” that Moving Defendants filed on August 19, 2016. (ECF Doc. 83.) As with all of the motions to quash that Moving Defendants have filed, this motion should be denied because it is flawed, substantively and procedurally.

I. Statement of issues and facts regarding the “Motion to Quash Production of Information and Subpoenas.”

A. The United States’ claims in this case.

The United States filed its complaint in this case on November 23, 2015 seeking to enjoin Defendants pursuant to 26 U.S.C. §§ 7402 and 7408 from (among other things) organizing, promoting, and selling a “solar energy scheme.” (ECF Docs. 2 and 35). As described in the complaint, the solar energy scheme purportedly offers a “disruptive and revolutionary” approach to capturing and using solar energy. The technology underlying the solar energy scheme,

¹ Defendants R. Gregory Shepard and Roger Freeborn do not join in the motion to quash, nor have they joined in any other motion to quash filed to date. (*See* Docket.)

purportedly invented by Neldon Johnson, uses “solar thermal lenses” on International Automated Systems, Inc.’s (IAS) “solar towers.” IAS permits RaPower-3, LLC to sell the lenses to customers who purportedly lease the lenses to LTB1, LLC. In promoting and selling the solar energy scheme, Defendants make statements to customers regarding the technology, its value, and the applicability of federal tax benefits (deductions and credits) based on the customers’ purchase and participation in the solar energy scheme. (ECF Docs. 2 and 35). Defendants also encourage their customers to sell the so-called “solar lenses” to still more people through a multi-level marketing scheme. (*Id.*) Some customers do “sponsor” other people, often family, friends, or coworkers by recruiting them in to the scheme. (ECF Doc. 2 ¶ 36; Pl. Ex. A, a true and correct copy of excerpts of the Deposition of Frank F. Lunn (“Lunn Dep.”), Aug. 1, 2016, 54:20-56:20, 59:12-61:5; Pl. Ex. B, a true and correct copy of excerpts of the Deposition of Brian Zeleznik (“Zeleznik Dep.”), Aug. 2, 2016, 81:13-82:24, 127:16-128:13; Pl. Ex. C, a true and correct copy of excerpts of the Deposition of Lynette L. Williams (“Williams Dep.”), Aug. 9, 2016, 88:2-15; *see also* Pl. Ex. D, a true and correct copy of excerpts of the Deposition of Preston F. Olsen (“Olsen Dep.”), Aug. 10, 2016, 175:23-180:12; Pl. Ex. 154² at 2-3.)

The parties agreed that discovery would be needed on statements made by Defendants regarding the technology; about any purportedly related federal tax deductions, credits or benefits; and the extent to which the United States Government has been harmed by their statements (which in part relies upon tax benefits claimed by Defendants and/or their customers). (ECF Doc. 35 ¶ 2).

² If a document has been numbered as an exhibit in discovery, the United States will use the same exhibit number for that document throughout the litigation.

The United States alleges that Defendants' technology is actually a sham: it is not now and has never been operational for any purpose that Congress intended to encourage through tax deductions or credits. (*E.g.*, ECF Doc. 2 ¶¶ 45-55.) Therefore, among the key issues in this case is whether Defendants are promoting sham technology as the basis for an abusive tax scheme, with knowledge or reason to know that their statements are false or fraudulent as to a "material matter" under the internal revenue laws. *See* 26 U.S.C. § 6700(a)(2)(A); *United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014); (ECF Doc. 2 ¶¶ 157-198). "Material matters are those which would have a substantial impact on the decision-making process of a reasonably prudent investor and include matters relevant to the availability of a tax benefit." *United States v. Campbell*, 897 F.2d 1317, 1320 (5th Cir. 1990). Here, a "material matter" is the nature and viability of Defendants' purported solar energy technology which is the basis of their scheme. The parties agreed that discovery would be needed on statements made by Defendants regarding the so-called technology and about any related federal tax deductions, credits or benefits they promote. *See* 26 U.S.C. § 6700(a)(2)(A); (ECF Doc. 2 ¶¶ 157-198; ECF Doc. 35 ¶ 2(a)).

Because the United States believes the solar energy scheme is abusive, one aspect of the relief requested is disgorgement of Defendants' gross receipts from the scheme. Therefore, another key issue and topic of discovery in this case is the extent of Defendants' gross receipts "from their sale of 'solar thermal lenses' and 'solar towers' and other related technologies" (ECF Doc. 35 ¶ 2(a)). Information about the names of Defendants' customers, and how many lenses they claim to have "purchased" is highly relevant to this issue.

B. The customer subpoenas seek documents relevant to the United States' claims in this case.

Moving Defendants seek to quash or, in the alternative, modify “the information and subpoenas issued to” Frank Lunn, Brian Zeleznik, Lynette Williams, and Preston Olsen under Fed. R. Civ. P. 45 for the production of documents (hereafter, the “customer subpoenas”). (ECF Doc. 83 at 1-2.) These individuals are some of Defendants’ customers. They all either sold, or attempted to sell, solar lenses on behalf of Moving Defendants through the multi-level marketing scheme.

The customer subpoenas request 13 categories of documents, including: 1) copies of correspondence between the customer and any Defendant, such as documents that the customer received containing information about the technology or tax benefits; 2) documents reflecting any professional advice or opinions that the customer received about participating in the solar energy scheme; 3) copies of tax returns submitted to the IRS by the subpoenaed individuals claiming any tax benefit as a result of participating in the solar energy scheme; 4) documents that purportedly substantiate any deduction, credit, claim or other tax item related to a solar lens or other equipment in Defendants’ purported solar energy technology; and documents reflecting payments made by any client to Defendants related to the solar energy scheme. (*See generally* Pl. Ex. 118, a true and correct copy of the subpoena issued to Williams.)

On March 14, 2016, the United States notified Defendants that it intended to serve the customer subpoenas upon 68 of their customers, including Lunn, Zeleznik, and Olsen. (*See* Pl. Ex. E, a true and correct copy of Pl. U.S.’s Notice of Intent to Subpoena Docs. dated March 14, 2016.) The United States served those subpoenas. Compliance was required no later than April 22, 2016. (*See* Pl. Ex. 35, a true and correct copy of the subpoena to Lunn, which is identical to

the subpoenas issued to Zeleznik and Olsen, except for the place of compliance.) Lunn, Zeleznik, and Olsen produced some responsive documents to the United States without an objection from any Defendant.

The United States notified Defendants of its intent to serve subpoenas for the production of documents upon 45 customers, including Williams, on April 29, 2016. (*See* Pl. Ex. F, a true and correct copy of a true and correct copy of Pl. U.S.'s Notice of Intent to Subpoena Docs dated April 29, 2016.) The United States served the subpoena upon Williams. Compliance was required no later than June 6, 2016. (*See* Ex. 118.) Williams asked for, and received, an extension until June 29. But she did not produce documents on or before that date. The date for compliance with all of the United States' customer subpoenas, including the ones to Lunn, Zeleznik, Williams, and Olsen, is long since passed.

The United States deposed Lunn, Zeleznik, Williams, and Olsen in mid-July and early August. Each deponent identified certain categories of documents responsive to the subpoenas within their custody, possession, or control, but which they did *not* timely produce to the United States. (*See* Pl. Ex. G, a true and correct copy of the letter from Erin Healy Gallagher to Paul Jones dated August 16, 2016.) During their depositions, counsel for the United States discussed supplementing their productions with their attorney, Paul Jones. (*Id.*) Counsel for the United States and Mr. Jones agreed on deadlines for the deponents to produce documents after their depositions. (*See id.*) The specific requests from the United States in Pl. Ex. G can be sorted into a few categories:

- with respect to Lunn, Williams, and Olsen, a deponent's unproduced federal tax returns (whether individual or for an entity) for any year in which the deponent

(or an entity he or she owns) “claims a tax deduction, credit, or other tax benefit or consequence as a result of a purported purchase of a lens or lenses”;

- with respect to Olsen, “the spreadsheets he created to project revenue from the lenses he purportedly purchased from IAUS and/or RaPower-3,” (*see* Olsen Dep. 123:11-124:10);
- with respect to Lunn, Zeleznik, and Williams, “documents from [a deponent’s] ‘Member Office’ or ‘Back Office’ on www.rapower3.com,”;
- with respect to Olsen, “the documents available to him on the IAUS message board.” (*see* Olsen Dep. 57:10-59:21); and
- with respect to Williams, all other documents responsive to the subpoena, including items she identified during her deposition.

Now, months after compliance for all subpoenas was due, Moving Defendants seek to quash or modify the subpoenas to Lunn, Zeleznik, Williams and Olsen for purposes of their supplemental productions.

C. Defendants do not keep information about their solar energy scheme confidential.

Through the United States’ depositions of Lunn, Zeleznik, Williams, and Olsen, and through other discovery the United States has conducted to date, it is clear that Defendants spread information about their solar energy scheme and the purported technology underlying the scheme far and wide.

1. Defendants themselves publicize the features of their purportedly “confidential” technology.

Defendants tout their purportedly confidential technology to the public without concern for “secrecy.” RaPower-3 has described the technology in intimate detail on its publicly-available website. (Pl. Ex. 4, a printout from a prior version of www.rapower3.com.) The RaPower-3 website has also hosted at least two downloadable documents ostensibly authored by IAUS which go into great detail about the allegedly secret technology and how it is supposed to work. (Pl. Exs. 16 & 17, downloads from a prior version of www.rapower3.com; *see* Pl. Ex. 4 at 5, “IAUS Tech White Papers.”)

In addition to the information they have posted on the internet, Defendants invite people to meetings and site visits where Neldon Johnson and Greg Shepard talk about the “secret” technology. (*E.g.*, Williams Dep. 105:13-116:15, 165:18-168:20; Pl. Ex. 114; Pl. Ex. 21, a printout from a prior version of www.rapower3.com; *see also* RaPower-3, Events/Tours, at <http://www.rapower3.com/#!events/ciyn>, last visited Aug. 30, 2016.) Lunn, Williams, and Olsen have all attended such meetings and visited the site of Defendants’ purportedly proprietary and secret technology – multiple times each. (*E.g.*, Lunn Dep. 64:3- 67:18, 71:6-9; Williams Dep. 117:20-24.) RaPower-3 held a “National Convention” over three days in June 2012, for example. (Pl. Ex. H, a copy of an email dated Jul. 19, 2012 with its attachments, received by the United States from one of Defendants’ customers; Williams Dep. 164:18-168:20; Pl. Ex. 114; Olsen Dep. 61:2-62:1.) Neldon Johnson and Randy Johnson spoke for two-and-a-half hours about Moving Defendants’ numerous claimed “breakthrough technologies,” which are: solar lenses; circuit boards; a turbine; the “dual axis tracking system”; a “concentrator”; a “heat exchanger” and “closed loop system”; a “zinc battery”; the frames for the lenses; and a “capacitor.” (Pl.

Ex. H at 5-6.) Defendants also provided photographs and a detailed description of these claimed “breakthrough technologies.” (*Id.* at 10-21.) Then Defendants disclosed their manufacturing and construction plans for the year. (*Id.* at 22.) Shepard encouraged customers to “[f]eel free to copy” the “Convention Manual” with all of this information “or use it in any way that might be helpful” to them. (*Id.* at 1.)

Lunn, Williams, and Olsen saw Defendants’ purported manufacturing plant on their tours. (*E.g.*, Lunn Dep. 71:6-73:10; Williams Dep. 119:7-122:14; Olsen Dep. 49:19-54:16; *see also* Pl. Ex. H at 6.) Williams even took a photograph of a lens at the manufacturing site and of Neldon Johnson showing and talking about the turbine that Defendants claim is part of their technology. (Williams Dep. 110:1-7, 165:18-168:20; Pl. Ex. 114.) Visitors saw the “Project Site” on their tour. (Pl. Ex. H at 6.) Williams described walking among the towers at the Installation outside of Delta, Utah. (*E.g.*, Williams Dep. 119:7-122:14.) Lunn, Williams, and Olsen observed demonstrations of the so-called “solar lenses” at work – though, interestingly enough, never in a context which any sort of useable energy was generated. (*E.g.*, Lunn Dep. 74:17, 77:8-27, 85:20-88:16, 90:6-91:18; Williams Dep. 112:23-117:16, 124:4-9; Olsen Dep. 95:11-20.)

According to Shepard, many people who made a visit like the ones Lunn, Williams, and Olsen made “were not [IAUS] shareholders or Rapower3 [*sic*] team members.” (Pl. Ex. I, a true and correct copy of Shepard’s Resp. to U.S.’ 1st Requests for the Prod. of Docs. to Def. R. Gregory Shepard, No. 27; Pl. Ex. J, a copy of an email dated Feb. 25, 2014, received by the United States from one of Defendants’ customers, in which Shepard invites customers to “bring a guest” to one of many available tours.) Such visitors had no prior business relationship with Defendants. None of the subpoenaed customers (indeed, no customer deposed to date) could

identify a confidentiality agreement or non-disclosure agreement that they were required to sign before hearing about or viewing Defendants' allegedly secret technology, or participating in Defendants' solar energy scheme. (Zelevnik Dep. 86:24-87:16; Lunn Dep. 67:19-24, 70:3-71:5; Williams Dep. 116:18-25; Pl. Ex. K, a true and correct copy of excerpts of the Deposition of Robert Rowbotham, Aug. 8, 2016, 172:17-24.) Defendants' own materials show at least three visitors photographing or recording events during a visit. (Pl. Ex. H at 15.)

In October 2015, Defendants hosted a two-day "Solar Energy Celebration" at the Millard County Fairgrounds which was open to "all of Millard County." (Pl. Ex. L, a flyer produced by Shepard promoting the "celebration.") According to Shepard, "Neldon Johnson was continually active for two days" during the "celebration," and spoke to "different groups of people every hour," giving them "detailed explanations of the Dynamic Voltage Controller and the Concentrated Photo Voltaic System ["CPV"] among other lecture stations." (Pl. Ex. M, a copy of an email dated Oct. 30, 2015, received by the United States from one of Defendants' customers, at 2-3.) Further, "[t]here were four workable CPV panels on display, which were hooked up to [Johnson's] complex circuit system. A big screen TV displayed animated renderings of how our CPV interacts with the sun." (*Id.* at 3.) Defendants even allowed the local newspaper to attend, observe their so-called secret technology, and report upon it. (Pl. Ex. N, a copy of an email dated Oct. 22, 2015, with an excerpt from its attachment, received by the United States from one of Defendants' customers.)

2. Defendants do not require their customers to keep other information about their solar energy scheme confidential.

Defendants maintain public websites with certain sections available only to registered users. One portion available to registered users is the "Member Office" or "Back Office" on

www.rapower3.com. (*E.g.*, Zeleznik Dep. 16:10-18:7; Pl. Ex. J at 1.) Lunn, Zeleznik, and Williams each have access to their own personal “Member Office,” which shows, among other things, the lenses a customer has purportedly purchased, the other people a customer has sponsored in to the scheme, and how many lenses the sponsored persons have purportedly purchased. (*E.g.*, Zeleznik Dep. 129:21-130:8; Lunn Dep. 174:9-175:13; Pl. Ex. 42; Williams Dep. 51:16-22.) One way the sponsorship structure can be viewed on the website is through the “Geneology [*sic*]” link, in either a “Grid” view or a “Tree” view. (Lunn Dep. 176:11-19, 177:9-15; Pl. Ex. 42; Zeleznik Dep. 129:21-130:8, 132:9-21.)

The Member Office also contains a link for “IRS Info,” which may have information regarding the alleged tax benefits of participating in the solar energy scheme. (Lunn Dep. 175:14-177:7; Pl. Ex. 42.) Zeleznik testified that he has never been instructed or required to sign a nondisclosure agreement before accessing his Member Office, and he has never been told that the information on the site is confidential. (Zeleznik Dep. 86:13-87:16.)

Another site that is available to registered users is the RaPower-3 and IAUS message board, at the URL “<http://iaus.boards.net/>.” According to an email sent by Shepard, the message board is a place where customers and IAUS shareholders can get information, make comments, and ask questions. (Pl. Ex. O, a copy of an email dated Jul. 17, 2015, received by the United States from one of Defendants’ customers.) Olsen testified that he had access to the IAUS message board via a user name and password, and he posted some messages on the board. (Olsen Dep. 58:15- 59:1.) According to Shepard, “one can easily access [the IAUS message board] by registering. Once in, you can easily access all messages or click “chief” for all Greg Shepard’s

messages.” (Pl. Ex. I, No. 33.) When asked “[h]ave you ever been told that the contents of the message board are confidential,” Olsen answered “I don’t think so.” (Olsen Dep. 59:15-17.)

II. Moving Defendants’ motion to quash fails to meet substantive and procedural requirements and should be denied.

With few exceptions, Moving Defendants’ motion to quash the customer subpoenas consists of text copied and pasted from the text of their unsubstantiated motions to quash other subpoenas issued by the United States. (Compare ECF Doc. 83 with ECF Docs. 62, 65, and 70.) Moving Defendants argue, without factual support or a specific legal citation underpinning their claims, that the subpoenaed, responsive, and as-yet unproduced documents in their customers’ possession “contain highly sensitive, confidential, personal, and commercial information regarding the technolog[y], costs, and business plan [*sic*].” (ECF Doc. 83 at 3.) Moving Defendants specifically object to the United States’ request that the subpoenaed customers produce “personal tax information and all responsive documents from the ‘Member Office’ area on www.rapower3.com.” (ECF Doc. 83 at 3). Citing Fed. R. Civ. P. 45(d)(3)(B)(i), Moving Defendants contend that such information constitutes “a trade secret or other confidential research, development, or commercial information” belonging to Defendants.” (ECF Doc. 83 at 2.) As in their prior motions, Moving Defendants offer a blanket objection to the customer subpoenas without actually evaluating the purportedly objectionable categories of documents on their merits. But they do not provide any support for their argument that every single responsive document in their customers’ supplemental production is somehow confidential or related to any trade secret.

Even if this Court were to accept Moving Defendants unsubstantiated factual premise (that any of the requested documents constitute Moving Defendants’ trade secrets or confidential

information), which it should not, this Court should nonetheless deny Moving Defendants' motion to quash or modify the customer subpoenas because Moving Defendants do not provide law or facts suggesting that the United States is not entitled to receive such documents in discovery. Any potential "trade secrets" or confidential communications or action about their so-called trade secrets or business activities that might be revealed in their customers' documents are at the very heart of key issues in this litigation: whether Defendants have made false or fraudulent statements or gross valuation overstatements while promoting the abusive tax scheme, and the extent of Defendants' gross receipts from their scheme to be disgorged.

A. Moving Defendants do not have standing to move to quash or modify the customer subpoenas regarding documents in which they have no interest.

Moving Defendants specifically object to the United States' request that the subpoenaed customers produce "personal tax information." (ECF Doc. 83 at 3). The actual documents that the United States requested from various deponents that may invoke "personal tax information" are: a deponent's unproduced federal tax returns (whether individual or for an entity) for any year in which the deponent (or an entity he or she owns) "claims a tax deduction, credit, or other tax benefit or consequence as a result of a purported purchase of a lens or lenses"; Olsen's "spreadsheets he created to project revenue from the lenses he purportedly purchased from IAUS and/or RaPower-3"; and potentially some responsive, yet unproduced documents in Williams' possession, custody, or control.

"Generally, only the party or person to whom [a] subpoena is directed has standing to move to quash or otherwise object to a subpoena." *Transcor, Inc. v. Furney Charters, Inc.*, 212 F.R.D. 588, 590 (D. Kan. 2003). A party may make a motion to quash only when "the party seeking to challenge the subpoena has a *personal right or privilege* with respect to the subject

matter requested in the subpoena.” *Id.* (emphasis added, quotation omitted); *accord Thomas v. Marina Assocs.*, 202 F.R.D. 433, 434 (E.D. Pa. 2001). Moving Defendants do not articulate what personal right or privilege they have in these customers’ documents. Therefore, their motion should be denied with respect to these documents.

B. Defendants do not keep their purported “secret” information “secret.”

The party moving to quash or modify a subpoena has the burden of establishing “that the information sought is confidential and that its disclosure will result in a clearly defined and serious injury to the moving party.” *Transcor*, 212 F.R.D. at 592; *accord Centurion Indus. v. Steurer*, 665 F.2d 323, 325 (10th Cir. 1981) (“To resist [Rule 45] discovery under [then-]Rule 26(c)(7), a person must first establish that the information sought is a trade secret and then demonstrate that its disclosure might be harmful.”); *Innovative Therapies, Inc. v. Meents*, 302 F.R.D. 364, 380 (D. Md. 2014) (“Trade secret or commercially sensitive information must be important proprietary information and the party challenging the subpoena must make a strong showing that it has historically sought to maintain the confidentiality of this information.” (quotations omitted)). Such a claim “must be expressly made and supported by a sufficient description of the nature of the documents, communications, or things not produced so as to enable the demanding party to contest the claim.” *Transcor, Inc.*, 212 F.R.D. at 592. (quotation omitted); *see also Fanjoy v. Calico Brands, Inc.*, 2006 U.S. Dist. LEXIS 55158, 9-10 (D. Utah Aug. 7, 2006) (reciting specific facts offered in support of a finding that subpoenaed information was “confidential”); *R&D Business Sys. v. Xerox Corp.*, 152 F.R.D. 195, 197 (D. Colo. 1993) (reciting facts to show that subpoenaed information was a “trade secret” under Colorado law).

In contrast to the precise articulation of both secrecy and serious harm required by the legal standard, Moving Defendants offer only broad *assertions* that the documents sought by the customer subpoenas contain purportedly secret or sensitive information. They do not offer facts supported by affidavits, or even specific legal arguments, to provide a foundation on which this Court could determine that the customer subpoenas request trade secrets or other confidential information. Nor could they. Defendants affirmatively publish detailed information about the very technology that they now claim is “secret.” Defendants invite people – people not even part of their scheme – to meetings where Shepard and Johnson discuss their so-called secret technology. Moving Defendants allow groups to tour their manufacturing facility. Moving Defendants demonstrate their so-called secret technology to people known and unknown to them. Moving Defendants do not require their visitors to keep such information confidential. Instead, they publicize it in the local newspaper. These actions are consistent with the United States’ allegations in this case: that Defendants did not *want* their customers or other visitors to keep such information a secret. Defendants only collect money from their abusive tax scheme if people like Lunn, Zeleznik, Williams, and Olsen lure friends, family, and others into the scheme *by telling them about it*.

As for the customer information available on their website, Moving Defendants take only minimal steps to limit public access to certain content. They restrict access to a customer’s RaPower-3 Member Office to that customer. But all evidence suggests that this is to maintain the privacy of the customer’s records – not, as Moving Defendants seem to argue, to prevent the names of their customers from being made public. The subpoenaed customers have not objected to producing the documents on any basis, including their own privacy. In fact, Lunn and

Zelevnik (and many other customers) produced *some* documents from their Member Office, just not the specific ones the United States seeks in a supplemental production.

As for the IAUS message board, Shepard admits that one can “easily access” the site by registering. A company with actual, protectable trade secrets or confidential information does *not* make such materials available to the general public for the simple act of registering for a website. Moving Defendants do not, and cannot, demonstrate that they have been at all concerned about their alleged proprietary interests in any of the documents at issue in this motion – at least, not before discovery commenced in this matter.

It follows from Defendants’ own demonstrated lack of effort to protect their so-called secret information that Defendants do not, and cannot, show either facts or law to suggest that disclosure of the requested information to the United States in discovery is a “clearly defined and serious injury.” It is not. Defendants themselves disclose some information to members of the public without restriction, and other information with only a user name and password. The information requested from Defendants’ customers goes to the heart of the claims in the case, including whether Defendants have made certain false or fraudulent statements or gross valuation overstatements, and how much money they made from selling their scheme. Those are facts that need to be revealed in this case, not buried. Moving Defendants’ conclusory statements about “potential damage” if the requested information is disclosed to the United States are “self-serving and insufficient” to show that they are entitled to relief. *See Innovative Therapies, Inc.*, 302 F.R.D. at 381. (“ITI’s conclusory statement that ‘ITI’s financial records are confidential and the release of such records subjects ITI to annoyance, embarrassment, and oppression’ is self-serving and insufficient.”)

For all of these reasons, Moving Defendants do not meet their burden to show that the customer subpoenas even call for trade secret or confidential information, or – assuming they did – that Moving Defendants would suffer serious harm from disclosure of such trade secrets or confidential information to the United States. But even if Moving Defendants had made such a showing, it “does not necessarily preclude the discovery of such information. There is no absolute privilege for trade secrets and similar confidential information.” *Dr. Greens, Inc. v. Spectrum Labs., LLC*, 2012 U.S. Dist. LEXIS 106167, at *8 (D. Kan. July 31, 2012) (footnotes and quotation omitted).

C. Moving Defendants’ proposed modification for compliance should be denied.

In the event that – unlike Moving Defendants here – a party *does* show that a subpoena would require disclosure of a “trade secret or other confidential research, development, or commercial information,” a court may modify conditions of compliance for a subpoena instead of quashing or modifying the subpoena itself if the serving party “shows a substantial need for the . . . material that cannot be otherwise met without undue hardship.” Fed. R. Civ. P. 45(d)(3)(C). The subpoenaed documents are highly relevant to the claims and defenses in this case because they are probative of 1) whether Defendants made or furnished false or fraudulent statements or gross valuation overstatements while promoting their abusive tax scheme, and 2) Defendants’ gross receipts from the scheme. Even assuming that Moving Defendants had shown that the subpoenaed documents contain secret information – which they did not – the United States has a substantial need for the documents from Defendants’ customers themselves that cannot be met without undue hardship. The premise of the well-pled allegations in this case is that Defendants make “false or fraudulent statements” and “gross valuation overstatements”

regarding material matters in federal tax law pursuant to their solar energy scheme and substantially interfere with the enforcement of the internal revenue laws, all for their own enrichment.

Moving Defendants themselves do not dispute that the documents requested by the customer subpoenas are relevant to this litigation. (*See generally* ECF Doc. 83; ECF Doc. 35 ¶ 2(a)). Moving Defendants ask, however, that if the Court is considering denying their motion to quash the subpoena, the Court instead modify the procedures for compliance: to allow “the producing parties” additional time to respond to the United States’ requests to supplement their productions of documents so that they may “review and properly designate the documents and information.”³ (ECF Doc. 83 at 4). Moving Defendants do not have standing to make this request on behalf of the third-party customers. Lunn, Zeleznik, Williams, and Olsen are ably represented by their own attorney (*see* Pl. Ex. G), who can request additional time for their supplemental productions as he sees fit.

³ In their prior motions to quash or modify the United States’ subpoenas for the production of documents to various third parties, Moving Defendants requested that the Court provide *Defendants* additional time to review and produce such documents “in Defendants’ possession.” (ECF Doc. 62 at 4-5; ECF Doc. 65 at 4-5; ECF Doc. 70 at 3-4.) The United States opposed this request in response to each motion, due to its lack of foundation in the Federal Rules of Civil Procedure and its potential for abuse. (ECF Doc. 71 at 8-9; ECF Doc. 73 at 8-10; ECF Doc. 77 at 8-10.) Due to changed language the current motion, now Moving Defendants generally seem to be asking this Court to give the *third-party customers* more time to review the requested documents before they produce them (rather than asking that the production go through Defendants, as they did in prior motions). Nonetheless, Moving Defendants claim, in what could be a typographical error, that the “documents and information” requested are in “Defendants’ possession.” (ECF Doc. 83 at 4.) Accordingly, the United States reiterates its objections to any proposal that Defendants review, designate, and produce third-party documents to the United States, and incorporates by reference its cited prior opposition briefs on this issue.

D. Moving Defendants' motion should be denied for procedural failures.

1. The motion to quash was filed long out of time.

Under Fed. R. Civ. P. 45(a)(4) and DUCivR 45-1, a party seeking to issue a third-party subpoena for the production of documents must provide at least four days' notice to all parties before serving the subpoena. This requirement "is imposed as a precautionary measure and is designed to give an opposing party the opportunity to object to a subpoena prior to service." *Nunes v. Rushton*, 2015 U.S. Dist. LEXIS 73207, at *5 (D. Utah Jun. 4, 2015) (Pead, M.J.); accord *Sanders v. Yellow Cab Drivers Ass'n*, 2012 U.S. Dist. LEXIS 18474 (D. Utah Feb. 13, 2012) (Warner, M.J.) ("[O]ne obvious purpose of the . . . notice period[] is to provide parties with an opportunity to conduct a meet-and-confer concerning a subpoena and, if necessary, move to quash that subpoena before it is actually served on the nonparty."). At the very latest, "a motion under Fed.R.Civ.P. 26(c) for protection from a subpoena is timely filed if made before the date set for production." *In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 669 F.2d 620, 622 n.2 (10th Cir. 1982).

Here, Moving Defendants were notified no later than March 14 and April 29, 2016, that the United States would be issuing the customer subpoenas. (Pl. Exs. E, F.) They did not file a motion to quash or modify the subpoenas until 158 days and 112 days, respectively, after such notice. Compliance for all customer subpoenas was long past due by the time the motion was filed. Moving Defendants offer no explanation for their failure to timely file, nor do they claim that the documents requested by the United States are outside the scope of the original subpoena. It is no excuse that current counsel for Moving Defendants entered this case after the subpoenas were served; Moving Defendants were represented by experienced attorneys at the time the

subpoenas were noticed. Moving Defendants should not now be permitted to interfere with the United States' appropriate, proportional requests that third-party customers provide documents responsive to the issued subpoenas – documents that should have been provided to the United States long before Moving Defendants filed this motion.

2. The motion to quash was filed, at least in part, in the wrong court.

A “person subject to or affected by a subpoena” may seek relief from the “court for the district where compliance is required” if the subpoena purportedly requires disclosing “a trade secret or other confidential research, development, or commercial information.” Fed. R. Civ. P. 45(d)(3)(B). The Williams and Olsen subpoenas require compliance in the District of Utah, so this motion was filed in the appropriate venue with respect to them. But the Lunn and Zeleznik subpoenas seek compliance outside the District of Utah. Therefore, the motion to quash the latter subpoenas should be denied by this Court.

3. Counsel for Moving Defendants failed to meet and confer before filing the motion to quash.

DUCivR 37-1(a) states that “[w]hen parties or non-parties are represented by counsel in a discovery dispute, the court will not entertain any discovery motion, unless counsel for the moving party files with the court, at the time of filing the motion, a statement showing that counsel making the motion has made a reasonable effort to reach agreement with opposing counsel on the matters set forth in the motion.” *See also* Fed. R. Civ. P. 26(c)(1) (requiring a party moving for a protective order to certify “that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action”). Contrary to Moving Defendants' representations in their reply briefs regarding their three prior motions to quash (ECF Docs. 78, 18, 82), on its face DUCivR 37-1(a) applies to *all*

discovery motions, not just a motion to compel. According to the local rule, “such statement must provide the date, time, and place where counsel conferred and the names of all participants present at the conference.” *Id.*

The current motion contains no such statement. (*See* ECF Doc. 83.) Moving Defendants have had notice for months that the United States’ intended to, and actually did, serve the customer subpoenas. Counsel for Moving Defendants made no attempt to discuss their objections to the United States’ requests for a supplemental production from the customers before filing their motion to quash. Moving Defendants themselves cite a case in their prior reply briefs that sets out the local rule regarding discovery motions practice and the reasons for it, and admonishes a party for its failure to meet and confer before filing a discovery motion. *Am. Charities for Reasonable Fundraising Regulation, Inc. v. O’Bannon*, 2015 U.S. Dist. LEXIS 103814 (D. Utah Aug. 5, 2015) (Pead, M.J.) (regarding a motion to compel); (ECF Docs. 78, 18, 82). It is unclear why Moving Defendants would continue to ignore this rule in filing multiple motions to quash, particularly when this Court has stated that “[t]he meet and confer requirement adheres to all motions to compel and is not dispensed with based upon the passage of time or prior communications addressing similar issues.” *Am. Charities*, 2015 U.S. Dist. LEXIS 103814, at *4-5. The motion at issue here is not a motion to compel, but the principle underlying DUCivR 37-1 does not change, regardless of the style of a discovery motion.

III. Conclusion

For all of the substantive and procedural reasons above, the motion to quash the customer subpoenas (ECF Doc. 83) should be denied and the subpoena should not be modified in any respect.

Dated: September 2, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 2, 2016, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to the following:

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