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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, INTERNATIONAL
AUTOMATED SYSTEMS, INC., LTB1,
LLC, R. GREGORY SHEPARD,
NELDON JOHNSON, and ROGER
FREEBORN,

Defendants.

Civil No. 2:15-cv-00828 DN

**SUPPLEMENTAL AUTHORITY FOR
THE UNITED STATES' MOTION FOR
RELIEF FROM STANDARD
PROTECTIVE ORDER AND DUCIVR-
26-2**

Judge David Nuffer
Magistrate Judge Brooke C. Wells

In support of its Motion for Relief from the District of Utah's Standard Protective Order and DUCivR 26-2, the United States cited statutes, case law, and other authority to show that the standard protective order violates the United States' substantive rights. (ECF Docs. 39 & 44.) Pursuant to the Court's and the Court's direction at oral argument on July 27, 2016, and its Order dated July 28, 2016 (ECF Doc. 72), the United States respectfully submits the following additional authority in support of its positions.

ANALYSIS

I. The United States has a unique law enforcement mandate and should be permitted to share information with other law enforcement agencies.

The following cases, in addition to the authorities we already cited in support of our motion, note the compelling public interest in the United States' law enforcement purpose. Two cases rejected protective orders limiting the ability of a law enforcement arm of the United States to share information with other enforcement agencies. *U.S. ex rel. Kaplan v. Metro. Ambulance & First-Aid Corp.*, 395 F. Supp. 2d 1, 5 (E.D.N.Y. 2005) (rejecting protective order that would limit the government's use of documents to the subject litigation when an applicable Health Insurance Portability and Accountability Act "HIPAA" regulation governed the use of information and could not be limited by a protective order.); *S.E.C. v. Thorn*, C:01-CV-290, 2001 WL 1678787 (S.D. Ohio Nov. 16, 2001) (observing that "the SEC is an independent federal agency with the responsibility of enforcing the securities laws and protecting the investing public," and there was "no evidence that [the civil] action was brought for any other purpose," the district court adopted and affirmed a magistrate judge's order denying a motion for protective order, which reasoned that "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”). The third case, while between private parties, noted that “[a]voiding embarrassment may be a reason for a party to seek confidentiality. It is not by itself a valid reason for courts to uphold confidentiality as against a legitimate law enforcement need for the information. . . . [H]iding possible criminal violations from law enforcement authorities is hardly a ground for judicial protection of confidentiality.” *Chem. Bank v. Affiliated FM Ins. Co.*, 154 F.R.D. 91, 94 (S.D.N.Y. 1994).

II. Disgorgement is, and has always been, relief requested in this case.

At the July 27 hearing, counsel for Defendants claimed that a statement made by the United States at oral argument on the Motion to Strike the Jury Demand indicated that the United States was no longer seeking disgorgement in this case. To the contrary, the United States has pursued disgorgement throughout this case and will continue to do so. (*See* ECF Docs. 31, 32, 33, 43 & 73.) Disgorgement was not at issue in the jury demand dispute. Instead, as this Court noted, “[a]t oral argument, Defense counsel represented that they would waive their right to a jury trial if the Government would stipulate to not seeking penalties. The Government declined to do so.” (ECF Doc. 43 at 2.) Defendants’ brief in opposition to the United States’ motion to strike the jury demand reveals that the “penalties” discussed at oral argument were penalties under 26 U.S.C. § 6700. (ECF Doc. 32 at 2.) That statute allows the IRS to assess a penalty if a promoter of an abusive tax scheme makes or furnishes a false or fraudulent statement (with knowledge or reason to know that the statement is false or fraudulent) about a tax deduction, credit, or other benefit, or makes or furnishes a “gross valuation overstatement,” as to a “material matter” under the internal revenue laws. § 6700(a). This Court noted that “penalties” – such as an assessment under § 6700(a) – were not part of this litigation. (*See* ECF Doc. 43 at 2-3.) In

contrast, disgorgement is an equitable remedy. *United States Securities and Exchange Commission v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir. 2006). As this Court noted, “based upon the Complaint and current state of the case, the Seventh Amendment right to a jury trial is not implicated. The relief sought here is equitable in nature.” (ECF Doc. 43 at 2.) We seek the equitable remedy of disgorgement in this case.

CONCLUSION

The United States’ substantive rights are violated under the District of Utah’s Standard Protective Order and substantial authority exists to allow the United States the relief that it seeks. The United States respectfully requests relief from the application of DUCivR 26-2 in this case and requests that the Court suspend the application of the Standard Protective Order so that the parties may negotiate a Protective Order. We intend to negotiate a protective order that protects the United States’ substantive rights including the ability to disclose information for law enforcement purposes, share information with the IRS to effectively litigate this case, and otherwise satisfy our recordkeeping duties.

Dated: August 3, 2016

Respectfully submitted,

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***ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on August 3, 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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