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

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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

**UNITED STATES' RESPONSE TO  
DEFENDANTS' EVIDENTIARY  
OBJECTIONS ON ITS MOTION FOR  
PARTIAL SUMMARY JUDGMENT**

Chief Judge David Nuffer  
Magistrate Judge Evelyn J. Furse

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The United States filed its motion for partial summary judgment on November 17, 2017.<sup>1</sup> On December 17, 2017, Defendants opposed the motion.<sup>2</sup> Defendants included evidentiary objections to certain materials the United States cited in support of its statement of undisputed material facts. Pursuant to DUCivR 7-1(b)(1)(B), the United States submits the following responses to those evidentiary objections:

149. In December 2015, Shepard heard from a customer who was “a little worried about the amount of time that it is taking to get those lenses on towers and generating rental income.”<sup>3</sup>

DEFENDANTS’ OBJECTION: Defendants object to Plaintiff’s Exhibit 159 ([Doc. 254-37](#)) on hearsay grounds. [FRE 802](#). There does not appear to be any recognized exception to admitting the statements of the declarant (Preston Olsen) in [Plaintiff’s Exhibit 159](#).

150. Shepard assured the customer that “The extra time was getting the mass production and installation capabilities up to 25 towers a day. That has pretty much been completed. I’m pretty sure that the first quarter of 2016 will be a very good one for us. It will all work out.”<sup>4</sup>

DEFENDANTS’ OBJECTION: Based on the hearsay nature of [Exhibit 159](#), Defendants object to the statements attributed to Mr. Shepard, without some basis or foundation.

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<sup>1</sup> [ECF No. 251](#).

<sup>2</sup> [ECF No. 265](#).

<sup>3</sup> Pl. Ex. 159, [ECF No. 254-37](#).

<sup>4</sup> Pl. Ex. 159.

151. When the customer asked if Shepard could say if he thought “the lenses will be on towers and generating rental income in 2016,” Shepard responded “I very much think so!”<sup>5</sup>

DEFENDANTS’ OBJECTION: Defendants object to Plaintiff’s Exhibit 159 (Doc. 254-37) on hearsay grounds. FRE 802. There does not appear to be any recognized exception to admitting the statements of the declarant (Preston Olsen) in Plaintiff’s Exhibit 159. In addition, based on the hearsay nature of Exhibit 159, Defendants object to the statements attributed to Mr. Shepard, without some basis or foundation.

UNITED STATES’ RESPONSE TO DEFENDANTS’ OBJECTIONS TO FACTS 149-151: Plaintiff’s Exhibit 159 is an email chain between Defendant R. Gregory Shepard and RaPower-3 customer Preston Olsen, dated December 30, 2015.<sup>6</sup> As Olsen testified, in the topmost email Shepard wrote to Olsen “**Responses in Bold.**”<sup>7</sup> This means that Olsen wrote questions and comments in his initiating email (which begins with “Hi Greg,” approximately one-third of the way down Pl. Ex. 159), and Shepard answered the questions and comments in bold text at the end of each paragraph.<sup>8</sup>

“Hearsay” is a statement that is 1) made by a declarant while not testifying in the current trial or hearing and 2) offered by a party into evidence “to prove the truth of the matter asserted in the statement.”<sup>9</sup> Certain statements that satisfy these two elements are nonetheless excluded

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<sup>5</sup> Pl. Ex. 159.

<sup>6</sup> Pl. Ex. 159; Excerpts from Pl. Ex. 694, ECF No. 256-34, Deposition of Preston Olsen (“Olsen Dep.”), August 10, 2016, 189:1-190:24.

<sup>7</sup> Pl. Ex. 159; Olsen Dep. 189:1-190:24.

<sup>8</sup> Pl. Ex. 159; Olsen Dep. 189:1-190:24.

<sup>9</sup> Fed. R. Evid. 801(c).

from the definition of hearsay by [Fed. R. Evid. 801\(d\)](#). Such non-hearsay statements include a statement “offered against an opposing party” that was “made by the party in an individual or representative capacity”; “was made by a person whom the party authorized to make a statement on the subject”; or “was made by the party’s coconspirator during and in furtherance of the conspiracy.”<sup>10</sup>

Shepard’s statements in Pl. Ex. 159 are not hearsay under [Fed. R. Evid. 801\(d\)\(2\)](#) because the United States offers the statements against him and other Defendants with whom Shepard was promoting the solar energy scheme. Olsen’s statements in Pl. Ex. 159 are not offered for the truth of the matters asserted. His statements are included in Pl. Ex. 159 for non-hearsay purposes including providing context for Shepard’s non-hearsay assertions about the state of Defendants’ technology to a customer in December 2015.<sup>11</sup>

171. Shepard and Freeborn also assisted customers with preparing their federal income taxes to claim a depreciation deduction and solar energy tax credit as a result of buying solar lenses.<sup>12</sup>

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<sup>10</sup> [Fed. R. Evid. 801\(d\)\(2\)\(A\)](#), (C), (E).

<sup>11</sup> [United States v. Cesareo-Ayala](#), 576 F.3d 1120, 1127-30 (10th Cir. 2009).

<sup>12</sup> *E.g.*, Pl. Ex. 88, [ECF No. 254-23](#); Pl. Ex. 109, [ECF No. 254-28](#); Pl. Ex. 674, [ECF No. 256-18](#), (“TAX TIME SUCCESS STORIES” note customers having received help from Shepard and Freeborn to complete taxes). Pl. Ex. 323, [ECF No. 255-13](#); Excerpts from Pl. Ex. 689, [ECF No. 254-31](#), Deposition of Peter Gregg, Nov. 16, 2016, 127:19-128:8; *see also* Pl. Ex. 218, [ECF No. 254-50](#) (offering information from RaPower-3 to support claimed tax benefits on customers’ returns); Pl. Ex. 217, [ECF No. 254-49](#) (offering instructions on how to use TurboTax to claim tax benefits).

DEFENDANTS' OBJECTION: Defendants object to Ex. 674 ([Doc. 256-18](#)) as hearsay, not subject to any exception.

176. RaPower-3 has touted "success stories" on its website. None of the "success stories" involved the actual production of solar energy.<sup>13</sup>

DEFENDANTS' OBJECTION: Defendants object to Ex. 674 ([Doc. 256-18](#)) as hearsay, not subject to any exception.

177. Rather, all of the so-called "success stories" involved customers receiving the substantial tax benefits that Defendants promote.<sup>14</sup>

DEFENDANTS' OBJECTION: Defendants object to Ex. 674 ([Doc. 256-18](#)) as hearsay, not subject to any exception.

UNITED STATES' RESPONSE TO DEFENDANTS' OBJECTIONS TO FACTS 171, 176-77: Plaintiff's Exhibit 674 is a website capture from [www.rapower3.com](http://www.rapower3.com), which Shepard runs.<sup>15</sup> Defendants RaPower-3 and/or Shepard made the statements in Pl. Ex. 674 while promoting the solar energy scheme with Defendant Neldon Johnson and while Johnson authorized him to sell solar lenses through RaPower-3. Therefore, Pl. Ex. 674, which the United States offers against Defendants, is not hearsay under [Fed. R. Evid. 801\(d\)\(2\)](#).

To the extent that Defendants may argue that the customer comments within Pl. Ex. 674 are hearsay, Shepard and/or RaPower-3 have "manifested that [they] adopted or believed [the

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<sup>13</sup> *E.g.* Pl. Ex. 674.

<sup>14</sup> *E.g.* Pl. Ex. 674.

<sup>15</sup> [ECF No. 265 ¶¶ 48-49](#); Pl. Ex. 685, [ECF No. 256-27](#), Deposition of R. Gregory Shepard ("Shepard Dep.") 25:1-26:8 (authenticating website printouts identified in Pl. Ex. 459, [ECF No. 255-27](#)); *compare* Pl. Ex. 459 at 1 (noting that US000678-79 is a website capture from December 2010) *with* Pl. Ex. 674 (containing pages bates numbered US000678-79).

customer comments] to be true<sup>16</sup> by posting them on the RaPower-3 website. Therefore, the customer comments within Pl. Ex. 674, which the United States offers against Defendants, is not hearsay under [Fed. R. Evid. 801\(d\)\(2\)](#). Further, the customer comments (whether true or not) are also offered for the non-hearsay purpose of showing how RaPower-3 and Shepard promoted the solar energy scheme.

168. Put more simply, Shepard showed customers exactly where and how, on a federal individual income tax return, to enter numbers to “zero out” their tax liability<sup>17</sup>:

|   |                    |                                 |  |  |
|---|--------------------|---------------------------------|--|--|
| <b>Form 1040</b> Department of the Treasury—Internal Revenue Service (105)  |                    | <b>2011</b>                     | OMB No. 1545-0074  | IRS Use Only—Do not write or staple in this space. |
| For the year Jan. 1–Dec. 31, 2011, or other tax year beginning              |                    | 2011, ending                    | 20   | See separate instructions.                         |
| Your first name and initial   | Last name          | Your social security number     |  |  |
| <b>RAPOWER 3</b>  | <b>TEAM MEMBER</b> |                                 |  |  |
| If a joint return, spouse's first name and initial                          | Last name          | Spouse's social security number |  |  |
| Home address (number and street). If you have a P.O. box, see instructions. |                    | Apt. no.                        | ▲ Make sure the SSN(s) above and on line 0c are correct. |  |

|   |     |   |     |                                |
|---|-----|---|-----|--------------------------------|
| 1099-R If tax was withheld.                 | 11  | Alimony received  | 11  |                                |
|   | 12  | Business income or (loss). Attach Schedule C or C-EZ <b>DEPRECIATION</b>                                    | 12  | <b>2,973</b> <b>Per System</b> |
| If you did not get a W-2, see instructions. | 13  | Capital gain or (loss). Attach Schedule D if required. If not required, check here <input type="checkbox"/> | 13  |                                |
|   | 14  | Other gains or (losses). Attach Form 4797   | 14  |                                |
|   | 15a | IRA distributions   | 15a |                                |
|   |     | b Taxable amount  | 15b |                                |

<sup>16</sup> [Fed. R. Evid. 801\(d\)\(2\)\(B\)](#).

<sup>17</sup> Shepard Dep. 239:16-240:10; Pl. Ex. 40, [ECF No. 254-12](#), at 13; Excerpts from Pl. Ex. 693, [ECF No. 256-33](#), Deposition of Frank Lunn, Aug. 1, 2016, (“Lunn Dep.”) 164:12-171:1; *see also* Shepard Dep. 241:18-243:8; Olsen Dep. 191:6-192:6; Pl. Ex. 158, [ECF No. 254-36](#).

Get this number low enough for zero taxes ↓

Form 1040 (2011) Page 2

|   |     |  |                 |
|---|-----|--|-----------------|
| <b>Tax and Credits</b>  | 38  | Amount from line 37 (adjusted gross income)  | 38              |
|   | 39a | Check <input type="checkbox"/> You were born before January 2, 1947, <input type="checkbox"/> Blind, <input type="checkbox"/> Total boxes checked <input type="checkbox"/> 38a |                 |
|   |     | If: <input type="checkbox"/> Spouse was born before January 2, 1947, <input type="checkbox"/> Blind, <input type="checkbox"/> checked <input type="checkbox"/> 38a             |                 |
|   | b   | If your spouse itemizes on a separate return or you were a dual-status alien, check here <input type="checkbox"/> 38b  |                 |
| <b>Standard Deduction for:</b>  | 40  | Itemized deductions (from Schedule A) or your standard deduction (see left margin)   | 40              |
| • People who check any box on line 39a or 39b or who can be claimed as a dependent. | 41  | Subtract line 40 from line 38  | 41              |
|   | 42  | Exemptions. Multiply \$3,700 by the number on line 5d.   | 42              |
|   | 43  | Taxable income. Subtract line 42 from line 41. If line 42 is more than line 41, enter -0-  | 43 GOAL IS ZERO |
|   | 44  | Tax (see instructions). Check if any from: a <input type="checkbox"/> Form(s) 6014 b <input type="checkbox"/> Form 4872 c <input type="checkbox"/> 862 election                | 44              |

|                            |     |  |                         |
|----------------------------|-----|--|-------------------------|
| widow(er), \$11,600        | 52  | Residential energy credits. Attach Form 5695   | 52                      |
| Head of household, \$8,500 | 53  | Other credits from Form: a <input type="checkbox"/> 3800 b <input type="checkbox"/> 8901 c <input type="checkbox"/>    | 53 TAX CREDIT IF NEEDED |
|                            | 54  | Add lines 47 through 53. These are your total credits  | 54                      |
|                            | 55  | Subtract line 54 from line 46. If line 54 is more than line 46, enter -0-  | 55 \$1,150 PER SYSTEM   |
| <b>Other Taxes</b>         | 56  | Self-employment tax. Attach Schedule SE  | 56                      |
|                            | 57  | Unreported social security and Medicare tax from Form: a <input type="checkbox"/> 4137 b <input type="checkbox"/> 8919 | 57                      |
|                            | 58  | Additional tax on IRAs, other qualified retirement plans, etc. Attach Form 5320 if required                            | 58                      |
|                            | 59a | Household employment taxes from Schedule H   | 59a                     |
|                            | b   | First-time homebuyer credit repayment. Attach Form 5405 if required  | 59b                     |
|                            | 60  | Other taxes. Enter code(s) from instructions   | 60                      |
|                            | 61  | Add lines 55 through 60. This is your total tax  | 61 GOAL IS ZERO         |
| <b>Payments</b>            | 62  | Federal income tax withheld from Forms W-2 and 1099  | 62                      |

|                                  |     |   |                               |
|----------------------------------|-----|---|-------------------------------|
|                                  | 72  | Amount from line 61, plus lines 63, 64, and 65 through 71. These are your total payments                  | 72                            |
| <b>Refund</b>                    | 73  | If line 72 is more than line 61, subtract line 61 from line 72. This is the amount you overpaid           | 73                            |
|                                  | 74a | Amount of line 73 you want refunded to you. If Form 8888 is attached, check here <input type="checkbox"/> | 74a GOAL IS ALL TAX WITH HELD |
| Direct deposit? See instructions | b   | Routing number  |                               |
|                                  | c   | Account number  |                               |
|                                  | d   | Type: <input type="checkbox"/> Checking <input type="checkbox"/> Savings                                  |                               |
|                                  | 75  | Amount of line 73 you want applied to your 2012 estimated tax   | 75                            |
| <b>Amount You Owe</b>            | 76  | Amount you owe. Subtract line 72 from line 61. For details on how to pay, see instructions                | 76                            |
|                                  | 77  | Estimated tax penalty (see instructions)  | 77                            |

DEFENDANTS' OBJECTION: The documents relied on by Plaintiff should be excluded on grounds of hearsay without any recognized exception.

UNITED STATES' RESPONSE TO DEFENDANTS' OBJECTIONS TO FACT 168:

Defendants object to all documents cited in support of this fact: Pl. Ex. 40, Pl. Ex. 158, excerpts from the deposition of Gregory Shepard, excerpts from the deposition of Frank Lunn, and excerpts from the deposition of Preston Olsen. Plaintiff's Exhibits 40 and 158 are documents that Shepard prepared, and therefore are his "statements." Shepard's deposition is, by definition, Shepard's statements. Generally, Shepard's statements about what he thinks the tax laws are, and

how people should fill out their tax returns, are not offered for the truth of the matters asserted. Such statements are offered for the fact that he made them to customers in promoting the solar energy scheme. Therefore, they are not hearsay. To the extent, however, that Shepard's statements are offered for the truth of the matters asserted, all of Shepard's statements are excluded from the definition of hearsay under [Fed. R. Evid. 801\(d\)\(2\)](#).

Excerpts from the deposition of Frank Lunn, a RaPower-3 customer, are not hearsay and are available for the United States' use in this case, including trial.<sup>18</sup> All parties had reasonable notice of Lunn's deposition.<sup>19</sup> Lunn is an "unavailable witness" because he lives more than 100 miles from Salt Lake City, Utah.<sup>20</sup> If Lunn were present at trial and testifying, his testimony would be admissible;<sup>21</sup> he did not testify to hearsay. To the extent Lunn testified to what any Defendant told him, his testimony is admissible under [Fed. R. Evid. 801\(d\)\(2\)](#).

Olsen lives within 100 miles of Salt Lake City, so his testimony would be required live at trial.<sup>22</sup> But the United States may establish a fact on summary judgment by using excerpts from his deposition to show what he would testify to, if called live.<sup>23</sup> Olsen's testimony does not include hearsay. To the extent Olsen testified to what any Defendant told him, his testimony is

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<sup>18</sup> [Fed. R. Civ. P. 32\(a\)](#); [Fed. R. Evid. 804\(b\)\(1\)](#); *Angelo v. Armstrong World Indus., Inc.*, 11 F.3d 957, 962–63 (10th Cir. 1993) ("Deposition testimony is normally inadmissible hearsay, but Fed.R.Civ.P 32(a) creates an exception to the hearsay rules.").

<sup>19</sup> [Fed. R. Civ. P. 32\(a\)\(1\)\(A\)](#); Pl. Ex. 701, United States' Notice of Witness Depositions, including Frank Lunn, July 5, 2016.

<sup>20</sup> [Fed. R. Civ. P. 32\(a\)\(4\)\(B\)](#); Lunn Dep. 6:21-7:2.

<sup>21</sup> [Fed. R. Civ. P. 32\(a\)\(1\)\(B\)](#).

<sup>22</sup> *See* [Fed. R. Civ. P. 32\(a\)\(4\)\(B\)](#).

<sup>23</sup> [Fed. R. Civ. P. 56\(c\)\(1\)\(A\)](#).



admissible under [Fed. R. Evid. 801\(d\)\(2\)](#). Olsen's testimony would be admissible if he were testifying live at trial.<sup>24</sup>

243. For example, one customer who purportedly purchased 500 lenses in January 2012 has not yet paid the "full down payment" of \$1,050 on all 500.<sup>25</sup>

DEFENDANTS' OBJECTION: Defendants object to paragraph 243 as hearsay, not subject to any exception.

244. This customer has not done so yet because he has not yet received the benefit of using all 500 to reduce his tax liability.<sup>26</sup>

DEFENDANTS' OBJECTION: Defendants object to paragraph 244 as hearsay, not subject to any exception.

245. RaPower-3 has not taken action to collect the remaining down payment.<sup>27</sup>

DEFENDANTS' OBJECTION: Defendants object to paragraph 245 as hearsay, not subject to any exception.

UNITED STATES' RESPONSE TO DEFENDANTS OBJECTIONS TO FACTS 243-245: Excerpts from the deposition of Robert Aulds, a RaPower-3 customer, are not hearsay and

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<sup>24</sup> *C.f.* [Fed. R. Civ. P. 56\(c\)\(2\)](#).

<sup>25</sup> Excerpts from Pl. Ex. 687, [ECF No. 256-29](#), Deposition of Robert Aulds ("Aulds Dep."), Mar. 14, 2017, 140:15-146:5.

<sup>26</sup> Aulds Dep. 140:15-146:5.

<sup>27</sup> Aulds Dep. 140:15-146:5.

are available for the United States' use in this case, including trial.<sup>28</sup> All parties had reasonable notice of Aulds' deposition.<sup>29</sup> Aulds is an "unavailable witness" because he lives more than 100 miles from Salt Lake City, Utah.<sup>30</sup> If Aulds were present at trial and testifying, his testimony would be admissible;<sup>31</sup> he did not testify to hearsay. To the extent Aulds testified to what any Defendant told him, his testimony is admissible under [Fed. R. Evid. 801\(d\)\(2\)](#).

260. For example, in early 2014, one long-time RaPower-3 customer wrote to Shepard asking whether LTB has "a website, e-mail, contact #, or all of the above . . . ? I was unable to find anything online."<sup>32</sup>

DEFENDANTS' OBJECTION: Defendants object to [Ex. 77](#) on grounds of hearsay, not subject to any exception.

261. This customer, who was being audited by the IRS for having claimed the tax benefits Defendants promote, noted that none of this information is in his O&M, and "[w]hen you google the company name and address there is zero information about the company."<sup>33</sup>

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<sup>28</sup> [Fed. R. Civ. P. 32\(a\)](#); [Fed. R. Evid. 804\(b\)\(1\)](#); *Angelo*, 11 F.3d at 962–63.

<sup>29</sup> [Fed. R. Civ. P. 32\(a\)\(1\)\(A\)](#), Pl. Ex. 702, United States' Notice of Witness Depositions, including Robert Aulds, Feb. 1, 2017.

<sup>30</sup> [Fed. R. Civ. P. 32\(a\)\(4\)\(B\)](#); Aulds Dep. 10:8-11.

<sup>31</sup> [Fed. R. Civ. P. 32\(a\)\(1\)\(B\)](#).

<sup>32</sup> Pl. Ex. 77, [ECF No. 254-20](#), at 1.

<sup>33</sup> Pl. Ex. 77 at 1-2.

DEFENDANTS' OBJECTION: Defendants object to [Ex. 77](#) on grounds of hearsay, not subject to any exception.

262. This customer told Shepard "I just want to be able to provide contact information for LTB if asked about it. . . . I fear it would be a big red flag if I cannot provide any contact information about the company who is supposed to be paying my rental fees."<sup>34</sup>

DEFENDANTS' OBJECTION: Defendants object to [Ex. 77](#) on grounds of hearsay, not subject to any exception.

UNITED STATES' RESPONSE TO DEFENDANTS' OBJECTIONS TO FACTS 260-262: Plaintiff's Exhibit 77 is an email chain between Gregory Shepard and RaPower-3 customer Brian Zeleznik, dated February 18, 2014.<sup>35</sup> Shepard's statements in Pl. Ex. 77 are excluded from the definition of hearsay because they are statements "offered against an opposing party" that were "made by the party in an individual or representative capacity."<sup>36</sup>

Zeleznik's statements in Pl. Ex. 77 are not offered for the truth of the matters asserted. Instead, his statements are included in Pl. Ex. 77 for non-hearsay purposes including providing context for Shepard's assertions about who to contact at LTB.<sup>37</sup> Further, Zeleznik's statements provide notice to Shepard that this RaPower-3 customer had no basic facts about LTB, the entity

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<sup>34</sup> Pl. Ex. 77 at 1-2; Shepard Dep. 250:13-251:3; Pl. Ex. 72; *see also* Excerpts from Pl. Ex. 690, [ECF No. 256-32](#), Deposition of Roger Halverson, Oct. 18, 2016, 61:13-65:14; Pl. Ex. 189, [ECF No. 254-43](#), at 1-3 (In 2011, a customer's accountant wrote to Shepard asking what, if anything, was happening with the customer's 2009 lens "purchase.")

<sup>35</sup> Pl. Ex. 77; Excerpts from Pl. Ex. 697, [ECF No. 256-37](#), Deposition of Brian Zeleznik, Aug. 2, 2016, 172:18-137:21.

<sup>36</sup> [Fed. R. Evid. 801\(d\)\(2\)\(A\)](#).

<sup>37</sup> [Cesareo-Ayala](#), 576 F.3d at 1127-30.

to which the customer was purportedly leasing solar lenses in order to have a solar lens leasing business.<sup>38</sup>

Dated: January 12, 2018

Respectfully submitted,

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**ATTORNEYS FOR THE  
UNITED STATES**

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<sup>38</sup> *United States v. Dupree*, 706 F.3d 131, 136-37 (2d Cir. 2013).

**CERTIFICATE OF SERVICE**

I hereby certify that on January 12, 2018, the foregoing document and its exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

*/s/ Erin Healy Gallagher*  
ERIN HEALY GALLAGHER  
Trial Attorney