

JOHN W. HUBER, United States Attorney (#7226)  
JOHN K. MANGUM, Assistant United States Attorney (#2072)  
111 South Main Street, Ste. 1800  
Salt Lake City, Utah 84111  
Telephone: (801) 524-5682  
Email: john.mangum@usdoj.gov

ERIN HEALY GALLAGHER, *pro hac vice*  
DC Bar No. 985670, erin.healygallagher@usdoj.gov  
ERIN R. HINES, *pro hac vice*  
FL Bar No. 44175, erin.r.hines@usdoj.gov  
CHRISTOPHER R. MORAN, *pro hac vice*  
NY Bar No. 5033832, christopher.r.moran@usdoj.gov  
Trial Attorneys, Tax Division  
U.S. Department of Justice  
P.O. Box 7238  
Ben Franklin Station  
Washington, D.C. 20044  
Telephone: (202) 353-2452

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><b>UNITED STATES' MOTION TO UNSEAL EXHIBITS</b></p> <p>Judge David Nuffer Magistrate Judge Evelyn J. Furse</p>
---	---

Pursuant to DUCivR 5-3(b)(6), the United States seeks to unseal certain exhibits and ensure that another exhibit (although not yet filed under seal) are all available to the public because they may be used to determine the parties' substantive rights at trial.

This Court entered a Protective Order in this matter on November 29, 2016.<sup>1</sup> Pursuant to the Protective Order, this Court granted Defendants' request that certain exhibits be filed under seal during pretrial proceedings in this matter: Pl. Ex. 668 and Pl. Ex. 669.<sup>2</sup> These exhibits contain names of Defendants' customers, information about the quantity of lenses each customer bought, and a list of customer user names. The United States has identified those exhibits as exhibits it will use at trial.<sup>3</sup> The United States has also disclosed Pl. Exs. 742A and 742B as trial exhibits.<sup>4</sup> They are summaries of the same kind of information the Court ordered sealed in Pl. Ex. 669.<sup>5</sup> Consistent with this Court's earlier order sealing Pl. Ex. 669, the United States recently moved to file Pl. Ex. 742B under seal, which this Court granted.<sup>6</sup>

Last, the United States disclosed Pl. Ex. 749 as an exhibit it will use at trial.<sup>7</sup> Pl. Ex. 749 contains a subset of information extracted from the RaPower-3 customer database collected by the United States on February 28, 2018. Counsel for Defendants verbally designated all

---

<sup>1</sup> ECF No. 116.

<sup>2</sup> See ECF No. 245; ECF No. 246; ECF No. 247 (Transcript) at 13-14.

<sup>3</sup> ECF No. 315 at 35.

<sup>4</sup> See *id.* at 37. The B version of Pl. Ex. 742 was added because counsel for Defendants provided a new version of Pl. Ex. 669 only after the United States made its pretrial disclosures on February 9, 2018. See ECF No. 329 at ECF page 4.

<sup>5</sup> See ECF No. 331.

<sup>6</sup> ECF No. 330; ECF No. 331; see DUCivR 5-3(b)(2)(C)(i).

<sup>7</sup> ECF No. 315 at 38. The United States previewed Pl. Ex. 749 to counsel for Defendants on March 8, and sent a final version of the exhibit to counsel for Defendants on March 14.

information in the database as Protected Information under the Protective Order. The subset of information in Pl. Ex. 749 contains the names of customers who bought solar lenses, dates of purchase, quantity purchased, order identification number, and the amount paid for each order. It does not contain any information that must be protected under [Fed. R. Civ. P. 5.2\(a\)](#).

Although this Court has ordered that these kinds of exhibits be filed under seal, this Court may also “may direct the unsealing of a Document, with or without redactions, after notice to all parties and an opportunity to be heard.”<sup>8</sup> An order unsealing these exhibits for trial is now appropriate.

Courts recognize that “pretrial discovery, unlike the trial itself, is usually conducted in private” and certain privacy concerns may warrant sealing documents or other information during the discovery phase.<sup>9</sup> But once the case moves to the trial phase, the public interest in access to judicial records becomes more compelling.<sup>10</sup> There is a “strong presumption in favor of public access”<sup>11</sup> to the documents a court uses “to determine litigants’ substantive legal rights.”<sup>12</sup> Consistent with that presumption, this Court “highly discourage[s]” sealing exhibits.<sup>13</sup> Instead,

---

<sup>8</sup> DUCivR 5-3(b)(6); *accord United States v. Pickard*, 733 F.3d 1297, 1300 (10th Cir. 2013).

<sup>9</sup> *Citizens First Nat. Bank of Princeton v. Cincinnati Ins. Co.*, 178 F.3d 943, 944 (7th Cir. 1999).

<sup>10</sup> *Citizens First Nat. Bank of Princeton*, 178 F.3d at 944-46.

<sup>11</sup> *Mann v. Boatright*, 477 F.3d 1140, 1149 (10th Cir. 2007) (“Courts have long recognized a common-law right of access to judicial records. This right, however, is not absolute. The presumption of access can be rebutted if countervailing interests heavily outweigh the public interests in access.” (quotation, citations, and alteration omitted)); *see also Allen v. Kline*, No. 07-2037-KHV, 2007 WL 3396470, at \*1-3 (D. Kan. Nov. 13, 2007).

<sup>12</sup> *Colony Ins. Co. v. Burke*, 698 F.3d 1222, 1242 (10th Cir. 2012) (quotation omitted); *accord Pickard*, 733 F.3d at 1302; *PHL Variable Ins. Co. v. Sheldon Hathaway Family Ins. Tr.*, No. 2:10-CV-0067, 2012 WL 12888387, at \*3 (D. Utah Dec. 6, 2012) (Wells, M.J.); DUCivR 5-3(a)(1) (presumption that the records of the District of Utah shall be “open to the public”).

<sup>13</sup> DUCivR 5-3(a)(1).

“the public shall have access to all Documents filed with the court and to all court proceedings,” absent a statute or order requiring otherwise.<sup>14</sup> The Protective Order explicitly anticipates that the public will have access to documents designated as “Protected Information” during discovery if such documents are used at trial.<sup>15</sup> The party seeking to prevent public access to judicial records like trial exhibits must show “good cause” to keep records under seal by “showing some significant interest that outweighs the presumption.”<sup>16</sup>

Here, the public interest in access to the information in Pl. Exs. 668, 669, 742A, 742B, and 749 is more compelling than any purported privacy interest in this information. These exhibits will or may assist the Court in deciding key issues in this case, including the breadth and depth of Defendants’ solar energy scheme and the amount of disgorgement necessary or appropriate for the enforcement of internal revenue laws.<sup>17</sup> The exhibits do not contain the kind of information that must be redacted from public filings. Defendants cannot meet their burden of showing “some significant interest” that outweighs the presumption that the public should have access to judicial records – particularly those that will determine the litigants’ substantive rights in this matter.

---

<sup>14</sup> DUCivR 5-3(a)(1).

<sup>15</sup> ECF No. 116 ¶ 6(f).

<sup>16</sup> *Mann*, 477 F.3d at 1149 (quotation omitted); accord *Colony Ins. Co.*, 698 F.3d at 1242 (The party seeking to keep records sealed “must articulate a real and substantial interest that justifies depriving the public of access to the records that inform our decision-making process.” (quotation omitted)); *Citizens First Nat. Bank of Princeton*, 178 F.3d at 944-46; *Francis v. United States*, No. 2:08CV244, 2010 WL 724375, at \*1 (D. Utah Mar. 2, 2010) (Warner, M.J.).

<sup>17</sup> See *Colony Ins. Co.*, 698 F.3d at 1241-42 (declining to seal appellate records even though they contained sensitive information about a minor when “[t]he parties themselves placed [the information] at the center of this controversy”); *Ostrander v. Customer Eng’g Servs., LLC*, No. 15-CV-01476-PAB-MEH, 2018 WL 1152265, at \*5 (D. Colo. Mar. 5, 2018) (rejecting request to seal information including workers’ “names, dates of employment, dates of overtime work, and individual settlement amounts” in a Fair Labor Standards Act settlement agreement).

Dated: March 20, 2018

Respectfully submitted,

/s/ Erin Healy Gallagher

ERIN HEALY GALLAGHER

DC Bar No. 985760

Email: erin.healygallagher@usdoj.gov

Telephone: (202) 353-2452

ERIN R. HINES

FL Bar No. 44175

Email: erin.r.hines@usdoj.gov

Telephone: (202) 514-6619

CHRISTOPHER R. MORAN

New York Bar No. 5033832

Email: christopher.r.moran@usdoj.gov

Telephone: (202) 307-0834

Trial Attorneys, Tax Division

U.S. Department of Justice

P.O. Box 7238

Ben Franklin Station

Washington, D.C. 20044

FAX: (202) 514-6770

**ATTORNEYS FOR THE  
UNITED STATES**

**CERTIFICATE OF SERVICE**

I hereby certify that on March 20, 2018, 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 all counsel of record.

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