

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF UTAH

CENTRAL DIVISION

In re:	)	
	)	
UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 2:15-CV-828DN
	)	
RAPOWER-3, LLC, INTERNATIONAL	)	
AUTOMATED SYSTEMS, INC., LTBl,	)	
NELDON JOHNSON, and ROGER	)	
FREEBORN,	)	
	)	
----- <u>Defendants.</u> -----	)	

Transcript of Electronically-Recorded Hearing for  
Sanctions and Extension of Time  
to Complete Discovery

BEFORE THE HONORABLE EVELYN J. FURSE

October 23, 2017

Karen Murakami, CSR, RPR  
8.430 U.S. Courthouse  
351 South West Temple  
Salt Lake City, Utah 84101  
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APPEARANCES OF COUNSEL:

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1           **Salt Lake City, Utah, Monday, October 23, 2017**

2                               \*   \*   \*

3                   THE COURT:   We're here in RaPower-3.   My  
4   name is Judge Evelyn Furse.

5                   Could I have counsel please put their  
6   appearances on the record.

7                   MS. HEALY GALLAGHER:   Erin Healy Gallagher  
8   for the United States.

9                   MR. PAUL:   Steve Paul here on behalf of all  
10   of the defendants.

11                  THE COURT:   Thank you.   And we are here  
12   today on the government's motion to compel -- or, sorry,  
13   motion for sanctions.   So if I could hear first from  
14   you, Ms. Healy Gallagher.

15                  MS. HEALY GALLAGHER:   Thank you, Your Honor.

16                  May it please the court, you are correct,  
17   Your Honor, we are here on the United States' motion for  
18   discovery sanctions against defendants Neldon Johnson,  
19   International Automated Systems, RaPower-3, and LTB1,  
20   LLC.   This motion for discovery sanctions has a history,  
21   of course, that comes before on United States' motion to  
22   compel certain documents.   I was not planning on  
23   rehashing that whole situation because the United States  
24   moved to compel certain categories of documents.   This  
25   court found that those documents were both responsive to

1 the United States' long ago issue of discovery requests  
2 and relevant to the case. Further, before the court  
3 were sworn statements from Neldon Johnson attesting to  
4 the existence of those documents.

5 Now, in particular -- I should say as a  
6 result of the United States' motion to compel, this  
7 court entered an order, and that order requires the  
8 defendants to produce five categories of documents.  
9 Now, only three categories of documents are at issue  
10 today because the other two were either produced or  
11 adequately explained by the defendants. So in  
12 particular, this court's order, which I believe issued  
13 from the bench on August 29th and was reduced to a  
14 written order, dated September 13th, and I'm looking at  
15 ECF document two one eight, 218, the -- I'm sorry, the  
16 three categories of documents that are at issue today  
17 are category 1, a computer program, or data extracted  
18 from it that, among other things, purportedly tracks  
19 solar lens customer names and sales, serial number of  
20 lenses and the location of any customer's lens. The  
21 second category of documents is all RaPower-3 solar lens  
22 purchase agreements with customers since 2010. And the  
23 third category is the solar lens purchase contracts  
24 between SOLCO-1, which is a related company in this  
25 case, and a company back east with a down payment of \$1

1 million.

2           Now, in this court's order of August 29th  
3 the court ordered that the defendants shall produce the  
4 documents in those three categories, 1 through 3, no  
5 later than September 28th, 2017. Defendants' only  
6 option if they were not going to produce those documents  
7 comes in the last paragraph of the order at ECF 218  
8 where the court order says if any of the documents in  
9 those categories do not exist after a diligent search,  
10 the defendants shall so state that under penalty of  
11 perjury on or before the date that the documents are due  
12 for production. So for these three categories  
13 defendants had two options: One, produce; two, swear  
14 under penalty of perjury; and, contrary to Neldon  
15 Johnson's prior testimony under penalty of perjury, that  
16 the documents did not exist.

17           Well, September 28th came and went.  
18 Actually I should say before -- I believe before the  
19 date expired, Mr. Paul asked on behalf of defendants for  
20 a few days' extension to October 3rd. That date came  
21 and went. And by the time the United States filed its  
22 motion for sanctions on October 11th, no documents that  
23 were in categories 1 through 3 had been produced to the  
24 United States.

25           So that, Your Honor, on its face under Rule

1 37 would -- basically it violates this court's order  
2 anyway, so nothing happened, there was neither a  
3 production, nor was there a statement that the documents  
4 didn't exist. In fact, on September 28th, the  
5 defendants, through Mr. Paul, sent me an e-mail with,  
6 for example, screen shots from the computer program in  
7 category 1 showing what information was available in  
8 that program. I have that for Your Honor. It's not --  
9 I'll have to throw a number on there, but I would like  
10 to show that to the court.

11 THE COURT: Okay.

12 MS. HEALY GALLAGHER: So the e-mail is  
13 lengthy and has a good bit of information in it, so I'll  
14 just hit the highlights. In particular, Mr. Paul's  
15 e-mail that starts off Plaintiff's Exhibit 668 describes  
16 what we will then see in the attachments. In  
17 particular, I would like to note Mr. Paul's final  
18 paragraph, and I would encourage the court to take a  
19 look at the whole thing, which starts off with, Our  
20 intention is to make the Website data available to the  
21 government in a format that it can open the member tree,  
22 which you'll see in the following pages, and see what  
23 lenses have been purchased, when and for what amount.  
24 And then Mr. Paul goes on to propose how that will be  
25 produced. So then if we take a look at the attachments

1 we see the screen shots of what, at least as far as this  
2 document goes, shows at least some of the information  
3 that is available in this database.

4 And of course Your Honor is familiar with  
5 the setup we have here. RaPower-3 purports to sell  
6 solar lenses to members of the public. The first  
7 attachment, second or third page of the exhibit, shows  
8 what I understand to be a multilevel marketing  
9 relationship visualization. For example, the top most  
10 sales person here is Gefco, and the remaining people on  
11 this list are in Gefco's downline.

12 Then if we take a look at the other  
13 attachments, we see that this database, this Website  
14 database in fact contains a great deal of information,  
15 which not only includes the relationships among the  
16 buyers and sellers of lenses, but it has the customer's  
17 name, has the customer's sponsor, the customer's  
18 address, contact information. Then we have the dates  
19 that a customer made purchases, how many lenses the  
20 customer purchased, and how much money the customer paid  
21 in to RaPower-3. It also appears, Your Honor, that we  
22 could extract from this database a placed-in-service  
23 letter to this customer, perhaps a bonus contract as  
24 well. If you look at the buttons that say export placed  
25 in service and export 2 percent bonus.

1           Looking at the subsequent exhibit there are  
2   also order notes that someone with RaPower-3 has entered  
3   into their system and has connected up with a customer's  
4   purchase.

5           So I appreciated Mr. Paul sending me this  
6   information because we still don't have an idea of the  
7   entire universe of information that the RaPower-3  
8   database contains. I know what we see in these  
9   exhibits, and that's very helpful. So, in fact, I  
10   called Mr. Paul after receiving this e-mail saying this  
11   looks good and I would like to make a suggestion for  
12   production. He was suggesting to produce screen shots  
13   of every single customer and every single page that  
14   might exist. I look at these attachments and I see a  
15   database from which data can be extracted. I don't need  
16   the nice visual. What we need is the information, we  
17   need this information because the defendants are the  
18   only people who have a complete picture of how many  
19   people they have sold to, what the net of their earnings  
20   are from these various sales. They are the only people  
21   who have a complete picture of their customers'  
22   multilevel marketing sales activities.

23           Not to get too far afield, but one of the  
24   defendant's arguments in this case, or at least what  
25   some have argued at some point along the line, is that



1 if a customer has a multilevel marketing business with  
2 respect to these lenses, then any and all tax benefits  
3 related to depreciation of a lens, solar energy tax  
4 credits are then available to them. And there are a  
5 number -- I take a number of issues with that statement,  
6 but even assuming that's true, the defendants are the  
7 only ones in possession of information about whether  
8 their customers actually engaged or were successful in  
9 multilevel marketing. So, for example, if we take a  
10 look at the first attachment to Plaintiff's Exhibit 668,  
11 now there are a number of people on this list, this  
12 downline, that don't appear to have sponsored anyone  
13 else into the multilevel marketing system. So those  
14 people by definition would likely not have a trade or  
15 business of any kind, even if we're assuming multilevel  
16 marketing business could qualify someone for the tax  
17 benefits that are at issue.

18 So as of September 28th and my conversations  
19 that week with Mr. Paul there was a clear understanding  
20 about what this order meant with respect to the  
21 information that should come out of this computer  
22 program. Now, what we ended up receiving with respect  
23 to the computer program was quite different.

24 MR. PAUL: Your Honor, I'm going to enter an  
25 objection to having this placed in the record. This is

1 a list of all of the individuals who have purchased  
2 lenses from RaPower. It's certainly -- I don't mind if  
3 we use this as illustrative evidence today so she can  
4 make her arguments, but for it to be placed in the court  
5 record that's a public document, a public record, we  
6 just don't think it's necessary at this point, nor does  
7 it serve any useful purpose, but there's a lot of  
8 private information on here that we would rather not be  
9 made public.

10 THE COURT: Okay. And your thoughts on  
11 that?

12 MS. HEALY GALLAGHER: Well, actually one of  
13 the reasons we're here is that there's not a lot of  
14 private information on this list that should not be made  
15 public. Your Honor, the point of showing you this list  
16 is that -- is a few things. Number one, it is a list of  
17 names. Names have no reason to be redacted under the  
18 Federal Rules of Civil Procedure. It contains what  
19 appear to be numbers of lenses purchased at an  
20 individual time. So, for example, one person's name  
21 appears multiple times on this list with different  
22 quantities of lenses. So it appears to be each time  
23 someone purchased a set of lenses they have a new entry  
24 on this list. And then it has the purported serial  
25 numbers, which appears to be simply order tracking

1 numbers, because the defendants have admitted repeatedly  
2 that they don't actually connect up a purchaser's name  
3 and information with any particular lens. So these are  
4 order reference numbers that bear no relationship to any  
5 lens that's out on the defendants' property. So, in  
6 fact, there's no information in this list that needs to  
7 be redacted under the Federal Rules. And one of the  
8 reasons that we're here is that there is no information  
9 in here that would need to be redacted under the Federal  
10 Rules because this 190-page pdf list does not comply  
11 with what this court ordered to be produced.

12               However, the list does suggest at least a  
13 few things --

14               THE COURT: Let's just get this issue  
15 resolved though. Mr. Paul, could I hear from you  
16 anything further on that issue.

17               MR. PAUL: Yes. Simply at this point in the  
18 litigation there is no reason that this document needs  
19 to be in the record made available to the public.

20               THE COURT: But what's the reason for it  
21 being confidential?

22               MR. PAUL: Because they're a list of  
23 customer names that really serve no purpose at this  
24 point in the litigation being in the public record.  
25 There hasn't been a foundation laid for it. There are

1 other hearsay issues related to it.

2 THE COURT: I mean we are in a -- we're not  
3 in an evidentiary hearing, and so the rules of evidence  
4 generally do not apply in this setting. And so as far  
5 as that, I think that's a different issue. I'm looking  
6 at the -- I'm considering the issues of confidentiality  
7 and the interests of public access to the business of  
8 the court versus the privacy of these individuals, and  
9 so that's what I'm concerned about at this point.

10 MR. PAUL: I understand that too, and I know  
11 it will go public, and it just doesn't make any sense,  
12 there is no reason why this needs to be part of the  
13 public record right now. She can simply make her  
14 arguments as to why more information needs to be  
15 produced according to your order without introducing  
16 this document into the record. The prejudice, the risk  
17 of prejudice to our client exceeds whatever benefit it  
18 might have to simply have this document in the record  
19 somewhere.

20 THE COURT: So what's the prejudice to your  
21 client?

22 MR. PAUL: If this information is  
23 disseminated. There are people monitoring and watching  
24 this case that will take potentially, and I don't know  
25 whether they will or not, but they are watching this

1 case, they are -- and they take some of the information  
2 that gets filed in this case and they disseminate it to  
3 the public. There just doesn't seem to be a need at  
4 this point to have this information out in the public  
5 domain.

6 THE COURT: And so what purpose are they --  
7 are these people that are watching the case and  
8 disseminating information to the public, are they  
9 disseminating it?

10 MR. PAUL: Critics. Yeah, they're the  
11 censures and critics.

12 THE COURT: Critics of your business.

13 MR. PAUL: Yes.

14 THE COURT: Okay. Okay. Thank you.

15 So I do think it's important to have a  
16 complete record of what the court considers, so I will  
17 allow this to become part of the record. So now I will  
18 seal it and mark it as confidential. And the reason for  
19 that is that it is a number of individuals' names at  
20 this point. It sounds as if there is some public  
21 interest in the case that is -- that is potentially --  
22 that could potentially have detriment to the  
23 individuals, but also it does create the possibility, if  
24 those people did want -- did feel that they had a  
25 legitimate need for the information or a basis to see

1 it, that they could certainly move to intervene and  
2 unseal if they feel it's important, but I think at this  
3 point we'll leave it sealed and see where we go.

4 MR. PAUL: Thank you, Your Honor.

5 THE COURT: Thank you.

6 MS. HEALY GALLAGHER: Your Honor, I would  
7 note just in light of your concerns, the attachments for  
8 Plaintiff's Exhibit 668 have been designated by the  
9 defendants as protected information under the protective  
10 order. The United States doesn't agree with that or  
11 with the need to protect anything about Plaintiff's  
12 Exhibit 669, but in light of your ruling on 669, I just  
13 wanted to point that out.

14 THE COURT: Okay. And I take it you would  
15 also want to seal the exhibit on 668.

16 MR. PAUL: Yes, Your Honor, for the same  
17 reasons.

18 THE COURT: Okay. At this time I will do  
19 that. Obviously the court can revisit the decision at a  
20 later date, or the information, depending on the  
21 proceedings and trial it may all come out. But for now  
22 let's go ahead and make that exhibit to 668 also sealed.

23 Please continue.

24 MS. HEALY GALLAGHER: Okay. So with that,  
25 Your Honor, there are a number of issues with this list

1 in itself. First, the style of production of the list  
2 strongly suggests to me that it is in fact data  
3 extracted from the database. As I had suggested to  
4 Mr. Paul, all of the information could be extracted.  
5 And, you know, the simple fact is that this is a partial  
6 response. Mr. Paul, at least as of September 28th,  
7 recognized that this order, that this court's order was  
8 not simply about customer names and sales numbers. This  
9 court's order has to do with the computer program that  
10 Neldon Johnson testified about in his deposition that  
11 does any number of things, as we see in the attachments  
12 to Plaintiff's Exhibit 668. The names, sales and serial  
13 numbers and location, that was an example of the data  
14 that we were looking for. But, clearly, the order  
15 anticipates that the actual data that would come out of  
16 this program would encompass far more. And, in fact, in  
17 my conversations with Mr. Paul, and as I see in his  
18 e-mail, that understanding was shared.

19 Further, further, Your Honor, the list  
20 itself appears to be incomplete, and that is based on  
21 the partial information about defendants' activities  
22 that we've been able to gather over time mostly from  
23 third-party discovery. For example, known -- let me  
24 back up real quick.

25 Before RaPower-3 came into existence,

1 International Automated Systems sold lenses through  
2 sales people directly to customers. So in the past  
3 purchase agreements were between International Automated  
4 Systems and a customer, rather than RaPower-3 and a  
5 customer. Further, Mr. Johnson has testified that other  
6 entities that he created, that he directs, that he owns,  
7 that he manages, that he makes decisions for also sell  
8 lenses, simply not through the multilevel marketing  
9 arrangement that RaPower-3 uses. And those entities  
10 include, but may not be limited to, SOLCO-1, which we'll  
11 talk about in a moment as well, and a company named XSun  
12 Energy. It's the letter X capital S-u-n Energy. So  
13 there's a reason that the United States was looking for  
14 the database that purportedly tracks solar lens customer  
15 names without limiting it to RaPower-3, because we've  
16 learned over the course of this case that Neldon  
17 Johnson's activity in selling these lenses and promoting  
18 what we believe are abusive tax deductions and credits  
19 that's not limited to RaPower-3. And this court has  
20 already concluded that Neldon Johnson is in possession,  
21 custody or control of documents with respect to SOLCO,  
22 and therefore ordered him to produce the SOLCO purchase  
23 agreement. The same thing is true with respect to  
24 Mr. Johnson's relationship with XSun Energy. He owns,  
25 manages and directs that business just as he does SOLCO.



1 And he testified to that in his deposition.

2 So with that background, we've been able to  
3 analyze the list a little bit, and there are some  
4 examples of why this list is not reliable and that it  
5 does not include all of the customers that we know have  
6 paid money in to a Neldon Johnson entity in exchange  
7 purportedly for solar lenses.

8 So, for example, I proffer to the court  
9 what's previously been marked as Plaintiff's  
10 Exhibit 181. This is an Equipment Purchase Agreement  
11 between International Automated Systems and an entity  
12 called Ilios, LLC. And we can see at the end of the  
13 document that Ilios, LLC was bound to this contract by  
14 Patricia Lambrecht, who is a member purportedly of  
15 Ilios, LLC. And this contract -- well, I'm not seeing  
16 the exact number jump out at me, but if you do the math,  
17 this is for 50 lenses, purportedly for 50 lenses,  
18 because if we see the dollar amounts in paragraph 3, the  
19 total amount that this person purports to pay is for a  
20 total of what would have been 50 lenses, five zero  
21 lenses. But the number connected with Patti Lambrecht  
22 on -- well, first off, Ilios does not appear on the list  
23 that Mr. Paul provided in Plaintiff's Exhibit 669. And  
24 the number connected with Patricia Lambrecht I believe  
25 is two lenses. And I sincerely apologize, I didn't

1 write down the page number. I can find that in a moment  
2 on my electronic copy.

3 THE COURT: I'll assume it's --

4 MS. HEALY GALLAGHER: Sure. And I can of  
5 course supplement, if the court requires, I can  
6 supplement with an e-mail.

7 THE COURT: It's very -- and they seem to be  
8 in alphabetical order.

9 MS. HEALY GALLAGHER: They're in rough  
10 alphabetical order, but the alphabet resumes later in  
11 the document.

12 THE COURT: Okay. I've got three Patti  
13 Lambrechts on 100, on page 100.

14 MS. HEALY GALLAGHER: Right.

15 THE COURT: Is that what you were referring  
16 to?

17 MS. HEALY GALLAGHER: Yes. Maybe it's just  
18 the last couple of pages, but I've been dealing with  
19 this in electronic form, so I apologize.

20 THE COURT: Yes.

21 MS. HEALY GALLAGHER: So the number  
22 connected with Patti Lambrecht is clearly far fewer than  
23 was in her actual contract with IAS.

24 Then in another example, showing the court  
25 what's been marked as Plaintiff's Exhibit 613, that's

1 six one three, this is -- and I'll represent to the  
2 court that this exhibit, Mr. Cody Buck, who used to be  
3 an auditor for International Automated Systems,  
4 testified that this was a list that his staff built  
5 based on contracts that he had received from IAS to do  
6 its year-end SEC reporting. So, for example, on this  
7 list, on the first page we see a Gordon P. Larsen in  
8 very tiny print, which I apologize for. He has at least  
9 six lenses. But on the list in Plaintiff's Exhibit 669,  
10 the most that he could have are two, and that's even one  
11 for him and one for his wife. And there are other  
12 examples. Also in Plaintiff's Exhibit 613, Rebecca  
13 Williamson has two lenses that doesn't even appear on  
14 the Paul list. And Kevin Mower has two lenses in  
15 Plaintiff's Exhibit 613, but does not appear in  
16 Plaintiff's Exhibit 669.

17 So there are a number of inconsistencies  
18 with respect to IAS customers. And some -- and this is  
19 the simple fact of this case, Your Honor. We just don't  
20 know what we don't know. We don't know who is missing,  
21 we don't know what data the defendants have chosen not  
22 to provide, even though they were ordered to produce or  
23 explain that these documents or data didn't exist.

24 I also have some examples of XSun Energy  
25 customers, who do not appear on Mr. Paul's list. And I

1 can -- I can submit here, Your Honor, Plaintiff's  
2 Exhibit 510. These are documents related to XSun Energy  
3 customer Richard Rowe. He did not appear on Mr. Paul's  
4 list. And there are other names of known XSun Energy  
5 customers that simply don't exist on the list that  
6 Mr. Paul produced.

7           So in every case there are discovery  
8 scuffles, and if a litigator doesn't expect it or can't  
9 deal with it, then she should find another practice.  
10 But Rule 37 is expressly designed to combat discovery  
11 obstruction like we're seeing in this case, because the  
12 data from the defendants' database should have been  
13 produced nearly 17 months ago, and it's because of  
14 delays and obstruction that we only figured out, like we  
15 only had Mr. Johnson testify about this in late June of  
16 this year. And no later than June 30th we put counsel  
17 for the defendants on notice, these are things that he  
18 had just testified to that had not been produced to the  
19 United States.

20           So especially with respect to this data from  
21 this database, this court cannot trust that these  
22 defendants will make a full and adequate production  
23 that's responsive both to the United States' discovery  
24 request issued long ago, much less to this court's  
25 order, because meeting and conferring with opposing

1 counsel didn't accomplish this. Filing the motion to  
2 compel didn't accomplish a production that was adequate.  
3 This court's order did not accomplish a production  
4 that's adequate. The United States' motion for  
5 sanctions letting the defendants know, hey, we're going  
6 to file this and this is the relief, this is the express  
7 relief we're going to ask for didn't bring them to the  
8 table. And then filing the actual motion for sanctions  
9 didn't do it either. So the only option left for us to  
10 actually get this information is for this court to enter  
11 the proposed order that the United States submitted, and  
12 that is for someone from the United States, one of the  
13 attorneys, to travel down to wherever this database  
14 exists with a forensic computer expert so that expert  
15 can enter onto the property with the help of someone who  
16 knows about this database there for the defendants to do  
17 what's needed to create a forensic copy of this database  
18 so that we can finally have the information that we  
19 requested in April 2016 and should have been produced  
20 shortly thereafter. That's what Rule 37 requires in  
21 this instance, at least with respect to the database.  
22 So that's one category of documents that are in the  
23 court's order.

24           The other items have to do with lens  
25 purchase agreements, either with RaPower-3 or with

1 SOLCO.

2 THE COURT: Let me just ask you going back  
3 to the relief as far as a forensic expert, would that  
4 person be an outside forensic expert or a government  
5 employee?

6 MS. HEALY GALLAGHER: That would be an  
7 outside forensic expert.

8 THE COURT: Okay.

9 MS. HEALY GALLAGHER: And I won't go through  
10 the whole litany of what's requested in the order, but  
11 in particular the defendants would be required to pay  
12 for that and for the United States' trip, other costs of  
13 enforcing this court's order, among other things.

14 Now, in part, because we wanted to be, you  
15 know, clear and ask for what we wanted to ask for, we  
16 did ask for all the lens purchase agreements from  
17 RaPower-3 since 2010, and this court ordered that those  
18 be produced, or the defendants swear under penalty of  
19 perjury that they don't exist. Similarly solar lens  
20 purchase contract between SOLCO-1 and a company back  
21 east, that too this court ordered defendants to produce  
22 or swear under penalty of perjury that it didn't exist.

23 Now, in Mr. Paul's opposition, which is all  
24 hearsay, there are no actual facts or affidavits from  
25 any records custodians, for example, in support of his

1 opposition. Nowhere does Mr. Paul say that these  
2 documents don't exist. The defendants just don't want  
3 to produce them. And that was not an option that this  
4 court offered them in response to the United States'  
5 motion to compel. Their choice was to produce or swear  
6 under penalty of perjury that the documents don't exist.  
7 There is no third option.

8 And, once again, defendants' obstruction is  
9 exactly what Rule 37 was designed to prevent. And if it  
10 can't prevent such behavior, then it will punish it.

11 Now, one of the reasons we filed the  
12 proposed order that we filed which grants 100 percent  
13 relief in response to the court's order is that we had  
14 no confidence that further communication with the  
15 defendants would result in any sort of adequate  
16 production. And we're not trying to run up the bill.  
17 So if we get the data, if this court allows us to go  
18 down there with our forensic expert to get the data,  
19 it's -- we would be willing to not require production of  
20 the purchase agreements and the contract with SOLCO-1.  
21 Now, that's anticipating that we actually get the data  
22 about SOLCO-1 because the data, presumably, I don't know  
23 this because I still don't know the whole universe of  
24 what's in this database, but the information about the  
25 numbers of -- the number of lenses purchased and the

1 money that came in and everything, the dates, everything  
2 related to the purchase contract between SOLCO-1 and the  
3 company back east, my assumption is that that would be  
4 in the database. So we would end up with that  
5 information if we're allowed to go down and extract this  
6 data.

7 All that said, we can have no confidence  
8 that if the defendants are given another chance to  
9 produce this database that they're actually going to do  
10 it in a complete way.

11 So in short, the opposition filed by the  
12 defendants may have been an adequate response at some  
13 time a long time ago with respect to how they felt about  
14 these document requests from the United States, but the  
15 time for that has long passed. The defendants were  
16 facing a court order to produce information or swear  
17 under penalty of perjury they didn't exist. We have  
18 neither. Thank you.

19 THE COURT: Thank you.

20 And, Mr. Paul, if I could hear from you.

21 MR. PAUL: Yes. Thank you, Your Honor.

22 Good afternoon Your Honor, if it please the  
23 court.

24 THE COURT: Good afternoon.

25 MR. PAUL: We obviously are coming in here



1 today we don't believe that the motion for sanctions,  
2 sanctions are warranted. We believe that we've provided  
3 the information that is capable of being provided by the  
4 court's order. We've provided either the documents or  
5 an explanation of why those documents are not able to be  
6 produced at this time, and that explanation is in our  
7 brief.

8           And I would, rather than just reargue the  
9 efforts that we undertook and the documents that were  
10 produced, unless the court has any specific questions  
11 related to that, but I would raise for the court's  
12 consideration the limitation on discovery in Rule  
13 26(b)(1) suggesting that the discovery should be  
14 proportional to the needs of the case. Particularly  
15 with these requests, it has proved to be an overwhelming  
16 burden to produce the data and the documents that are  
17 being requested. There are thousands of individual  
18 clients that are demonstrated in the 190 pages of  
19 Exhibit 669 that was provided, and each one of those  
20 individuals would have a purchase contract and  
21 additional information, but the burden of providing that  
22 information and documenting that information is  
23 overwhelming, and our position does not seem to be  
24 proportional to the needs of the case.

25           This case is about whether individuals who

1     were marketed this tax proposal is the sale of these  
2     lenses and were -- part of the marketing strategy of the  
3     company was that there are available tax credits  
4     available to these individuals that they can take  
5     advantage of when they purchase the lenses and undertake  
6     a business, a solar business. Many of those individuals  
7     did that. Not all individuals did that. And yet the  
8     government seems to be taking the position that all of  
9     the information, every sale that was undertaken by the  
10    company back from its birth in the early 2000s to the  
11    present is relevant to the issue of whether an  
12    individual is taking a tax benefit related to purchasing  
13    solar lenses or operating a solar business. And so the  
14    benefit of receiving this documentation and this  
15    information is greatly exceeded by the burden on us to  
16    produce that information.

17                 And by illustration, particularly related to  
18    the purchase contracts, as stated in the brief, there  
19    are thousands, and I believe the number is between 6 and  
20    8,000 purchasers of these solar lenses. And each one of  
21    those individuals have, in theory, a purchase contract  
22    they have signed with the company, and that purchase  
23    contract again in theory is saved on a computer system  
24    somewhere. And for someone at one of the defendant  
25    entities to go in, open up that particular file,

1 download that particular document, or save it in a file,  
2 lump those together, put a Bates number on that, produce  
3 that, we're talking thousands of man hours to be able to  
4 do that as well. Like we estimated three weeks of at  
5 least one person working full time is probably a  
6 conservative estimate of how long it would take to  
7 produce those documents. And we believe that the  
8 proportionality requirement of Rule 26 weighs in our  
9 favor in that the importance of this particular issue on  
10 the overall issues of the case seems very low, a one or  
11 a two out of a ten, on a scale of ten.

12           The amount in controversy in this case,  
13 based on the amount that's already been expended in  
14 discovery and production and the amount of information  
15 the government already has on this information and these  
16 people, obviously from what she's brought forward in her  
17 arguments today --

18           THE COURT: What Ms. Healy Gallagher.

19           MR. PAUL: Ms. Healy Gallagher has  
20 demonstrated, the government is in possession of an  
21 overwhelming amount of information on their claims  
22 already. And to produce this additional information,  
23 based on the amount in controversy and the amount that's  
24 already been spent on discovery is a very low benefit,  
25 again, I would think a one or a two on a scale of ten.

1           THE COURT: I guess my question is that this  
2 whole issue of the importance of the information to the  
3 case, the proportionality in light of the amount in  
4 controversy, all of those things are definitely  
5 important things that we do consider that are considered  
6 in the initial response to discovery and then certainly  
7 the motion to compel is brought up. But we're now at a  
8 motion for sanctions, and these arguments weren't made,  
9 and more concerning is that these particular documents  
10 weren't identified as we have a database, but we can't  
11 produce it to you, or we have -- we will not produce to  
12 you all of the -- all of the sales agreements because  
13 it's too voluminous, instead we will produce these  
14 prototypes and whatever you were going to do. So I mean  
15 the concern -- those arguments are past. They weren't  
16 made. An order was entered, and then to only be coming  
17 up with these arguments now seems too late.

18           MR. PAUL: Well, as the court will remember,  
19 we only came in to represent the parties in June. The  
20 depositions were taken at the end of June. Counsel's  
21 letter asking for the documents was at the end of July,  
22 and the motion to compel was mid to late August.

23           THE COURT: But there was counsel prior to  
24 you and the clients have been part of the case the whole  
25 time. And I mean I appreciate that you're new, but

1 they're not, and these are their documents and they have  
2 an obligation.

3 MR. PAUL: There was not a -- as far as I'm  
4 aware, and Ms. Healy Gallagher may correct me, but I  
5 don't believe that there was a followup to the  
6 production responses, the discovery responses back in  
7 April and May of the deficiency of those -- of the  
8 responses. It was only became apparent I guess to the  
9 government during the Neldon Johnson depositions that  
10 there was a deficiency. So when they brought that up, I  
11 believe, and you can read the exchange of information,  
12 the e-mails, I believe that that information was readily  
13 available, readily accessible. And I undertook to be  
14 able to try to download that information to be able to  
15 provide it to counsel. It turned out that that was not  
16 the case, that it is not in a readily downloadable  
17 format. And the document that was produced is nearly  
18 the limit, I don't know what the limit is, but it is  
19 nearly the limit of what can be produced. And based on  
20 the court's order of providing names and lens  
21 information, we believe that that was sufficient to  
22 satisfy the court's order because the specific language  
23 of the order provided that we produce the information,  
24 including customer names and lens purchase information.

25 THE COURT: So is this -- does this database

1 live on your clients' servers, or is it -- or does a  
2 third party provide the platform?

3 MR. PAUL: My understanding is that it is an  
4 Internet-based platform, it is not a server-based  
5 platform.

6 THE COURT: And so they have a contract with  
7 somebody; is that right?

8 MR. PAUL: They would have to have some kind  
9 of access.

10 THE COURT: Okay. And so what -- as far as  
11 whether this list -- whether this list is complete or  
12 not, how do you respond to that?

13 MR. PAUL: This is everything that my client  
14 was able to download and produce to us. You know, the  
15 problem with data extraction is it's only as good as the  
16 data input. And this company has gone through -- this  
17 has been a long time. Some of those earliest entries  
18 that were argued by Ms. Healy Gallagher are from 2008 or  
19 2005, and so the database has evolved during a period of  
20 time, that's 15 years ago or so. And so I think there  
21 may be -- there may be other transactions that have  
22 happened during the course of time, there are  
23 different -- I assume that there have been upgrades to  
24 the database where some information perhaps has dropped  
25 off. There are a lot of explanations as to why data is

1 not included in the data -- the printout that has been  
2 provided simply because there may not have been input  
3 correctly when it was originally done.

4 THE COURT: And so looking at the exhibit,  
5 at 668, it's got a box in the upper corner that shows  
6 RATHREE, and is it -- and so I'm wondering were  
7 searches -- so this -- were searches done -- are there  
8 other boxes for the other companies and does this list  
9 of the 190-page list is that just from this RATHREE  
10 category or --

11 MR. PAUL: I don't think the list that's  
12 Exhibit 669 was extracted from the Web base information  
13 that's in 668. I don't think that -- according to my  
14 understanding, it is not accurate. I think 669 was  
15 created outside of this particular Website information.

16 THE COURT: Okay. So how was --

17 MR. PAUL: -- it should be shared. But let  
18 me explain what Exhibit 668, at least what my  
19 understanding of this is. Everybody that is a member of  
20 RaPower-3 having purchased lenses or having a business  
21 relationship with RaPower-3 registers as a member, and  
22 this is the database of members. And much like Wells  
23 Fargo Bank has a Website where its members can go log on  
24 and see their account information, this is the same  
25 portal that an owner of RaPower-3 lenses or another that

1     somehow was a registered member of RaPower-3 Energy  
2     Systems can log on and see its -- that person's history  
3     with the company.

4             So the reason this document is as extensive  
5     as it is is because I was given a particular high  
6     access. If, for example, I owned lenses in that and  
7     logged on I don't think I could see anything but perhaps  
8     my upline, my downline. I wouldn't have the extent of  
9     information that's here, and I would only be able to see  
10    the boxes that are shown in the other screen grabs, I  
11    would only be able to see that information for my own  
12    exchanges or transactions with the company.

13            And so with that information when we asked  
14    that we get a complete document with the information  
15    sought with the court, Exhibit 669 is what was provided  
16    to us. Because all of the information that's in 668 is  
17    not necessarily in exportable format.

18            THE COURT: So you don't know where 669,  
19    whether that was exported or whether that's from a  
20    different source entirely.

21            MR. PAUL: I don't believe that Exhibit 669  
22    came out of Exhibit 668 Web program.

23            THE COURT: Okay.

24            MR. PAUL: I think they are different kinds  
25    of programs.



1 THE COURT: Okay. So what's the program  
2 that produced 669?

3 MR. PAUL: I do not know the answer to that  
4 question.

5 THE COURT: Okay.

6 MR. PAUL: Like I said, when we asked the  
7 clients to provide us information that had everything  
8 that was in the court's order, the names and the lens  
9 purchases from those individuals, we received the  
10 document that's included in 669. And when we asked if  
11 we could get additional information, the answer was  
12 there really isn't any other -- we can't get --  
13 specifically I asked for the address information and  
14 personal contact information, and they said, no, that is  
15 kept in a different format and would not be exportable  
16 the way this information is, if that makes any sense.

17 THE COURT: Is it possible to give the  
18 government that same high-level access to be able to  
19 access the program that produced 668?

20 MR. PAUL: Well, obviously the answer is  
21 yes, it is possible, because I have that information,  
22 but I was given a personal login of one of my clients.  
23 And so that would be like handing over an account number  
24 and a password so they can see that client's Wells Fargo  
25 Bank account.

1           THE COURT:   So -- but in theory your clients  
2   could create a separate login and password that would  
3   give access and also then, of course, be able to trace,  
4   you know, sort of with different rights, I guess.

5           MR. PAUL:   That was my goal.   And during my  
6   conversations with Ms. Healy Gallagher was to be able to  
7   do that and in fact download it onto a hard drive so it  
8   could be a closed universe that could be delivered to  
9   them.   My efforts to do that were frustrated by the  
10   technology that I had access to.   There may be, and I  
11   was not able to -- I didn't have enough time to chase  
12   down that same -- those same efforts from, for example,  
13   my clients' home office.   So if the court is inclined to  
14   grant further access, I would ask for the time to be  
15   able to do that on our end to do what I thought I could  
16   do remotely to do that locally at the clients' place of  
17   business and put that Web information onto a hard drive  
18   and produce that in a closed universe.

19          THE COURT:   So why didn't you do that before  
20   today?

21          MR. PAUL:   (A) time, and (B) we believe that  
22   the information -- the information that was requested is  
23   the name and lens information.   Having the additional  
24   information seems overbroad to have their address, phone  
25   number, e-mail address, the multilevel marketing

1 information seems much more information than they need,  
2 given the claims that they've made in the lawsuit. The  
3 issues, the fundamental issues in the lawsuit are which  
4 individuals have obtained tax benefits based on their  
5 purchase of solar lenses, not the entire universe of  
6 RaPower-3 customers. And, in particular, really when  
7 you talk about XSun or IAS or other purchasers, again  
8 the information that's going to be admissible at the  
9 time of trial is the information that leads to a  
10 category of their damages. Their damages are only for  
11 those people who were induced to take tax benefits that  
12 they were not otherwise entitled to.

13           And that is also the related argument to the  
14 SOLCO-1 document. Mr. Johnson testified during his  
15 deposition that there was a company back east that had  
16 contracted with SOLCO-1 to purchase a multimillion  
17 dollar array of solar lenses and to purchase that solar  
18 energy, and to that end had given them a million dollar  
19 deposit that was being held in escrow. And so counsel  
20 asked for that documentation. We provided counsel a  
21 copy of the escrow agreement that specified that there  
22 was -- demonstrated that there was a contract in which  
23 money was set aside and that was for a term period, and  
24 that term, I think it was a five-year escrow agreement.  
25 That agreement ended, and so that contract has expired.

1 And so we've stated that we don't believe that the  
2 document is relevant in any way to the claims of the  
3 case because it is a separate party, unrelated to any of  
4 the claims made in the complaint. There was no tax --  
5 there's been no implication or allegation that this  
6 party took -- claimed any tax benefit related to the  
7 purchase of solar lenses because there wasn't a sale, so  
8 they couldn't claim a tax benefit when there was never a  
9 consummated sale, so they couldn't take that claim for  
10 purchasing lenses or depreciating lenses because there  
11 was no transaction. So we objected to producing that  
12 document -- any further documents or information related  
13 to that because of relevance.

14 THE COURT: But on that document, I mean we  
15 clearly talked about that at the last hearing when we  
16 talked about that that was not -- that that entity was  
17 not a party, and yet because it was in his possession,  
18 custody -- in Mr. Johnson's possession, custody and  
19 control it needed to be produced, and you just decided  
20 that we should talk about it again?

21 MR. PAUL: Well, we discussed and we  
22 provided the escrow agreement, which is the information  
23 that was solicited during the deposition that we believe  
24 would satisfy the government's curiosity as to the  
25 transaction.

1           THE COURT: And when it didn't, and my order  
2       said purchase contract, you just figured that's not  
3       necessary? I'm just trying to understand.

4           MR. PAUL: Without wanting to throw anyone  
5       under the bus other than myself, it put me in a  
6       difficult situation, if I may be delicate, as far as  
7       explaining to the court what we thought covered the  
8       subject matter of the court's order and the document,  
9       the sales -- the purchase agreements did not provide the  
10      same information that the escrow agreement would  
11      demonstrate, and so I was told to await the court's  
12      further order.

13          THE COURT: Okay.

14          MR. PAUL: For lack of a more delicate way  
15      of phrasing it.

16          THE COURT: All right. On the purchase  
17      agreements is there a way to allow inspection of those  
18      that would be less burdensome?

19          MR. PAUL: Um, theoretically, if the  
20      government has someone that it would like to sit down  
21      and do the busy work of opening, downloading, saving,  
22      collecting, then my understanding is, and it's not a  
23      perfect understanding, my belief is that those purchase  
24      agreements are, to whatever extent they have been saved  
25      to an Internet-based or a server-based program, that it

1 is capable of opening, retrieving, printing and  
2 categorizing those purchase agreements. Now, I think we  
3 may run into a similar problem of the data download or  
4 the data output is subject to the same restriction that  
5 happened in data inputted to begin with. And when I  
6 asked about hard copy versions of the purchase  
7 agreements, other than what was already taken by the  
8 government in the raid in 2012, my understanding is that  
9 all of those are saved digitally only. I don't think  
10 there's a hard copy.

11 THE COURT: So would your client be willing  
12 to let the government come in and do an inspection of  
13 the electronic purchase agreements and do that by  
14 themselves?

15 MR. PAUL: My clients would not be happy  
16 with such an order, but I understand you do have the  
17 authority to make that requirement in this case.  
18 Although for the same argument as proportionality, as to  
19 the benefit of having those thousands of contracts as  
20 opposed to the -- just the burden of making them  
21 available and the inconvenience of having a government  
22 employee in my client's home while this is undertaken, I  
23 fail to see the benefit of having those documents  
24 printed out.

25 THE COURT: So for there to be an exception,

1 it would be at one of your clients' homes, it's not at  
2 the workplace?

3 MR. PAUL: I think the workplace is  
4 Mr. Johnson's home.

5 THE COURT: Okay. I didn't understand that.

6 MR. PAUL: I don't think there's a separate  
7 office that I'm aware of.

8 THE COURT: Is there -- I'm trying to  
9 understand what's in these things before I make any  
10 orders. Is there -- I mean I understand the analogy  
11 you're drawing to a Wells Fargo client going in and  
12 looking at their accounts and concern about that there  
13 may be, you know, personal financial information in this  
14 database. And certainly there's a protective order in  
15 this case that imposes penalties for a failure to  
16 protect that kind of information, but -- and a  
17 prohibition of using it in other cases. Is there other  
18 personal information, or is there other types of  
19 information in particular that your client is concerned  
20 about in providing access to these?

21 MR. PAUL: The information that I think is  
22 cleanable, if that's a word, from the Website would be  
23 address, telephone, e-mail. And the concern that the  
24 client has is that those people become contacted by the  
25 government and harassed by the government to become

1 involved in the case where there isn't a need to involve  
2 them in the case if they're not taxpayers that the  
3 government is already aware of because they've made  
4 claim on their tax returns for some kind of a benefit.  
5 There may be, I'm not -- I don't believe there is, but  
6 there may be personal payment information. As shown in  
7 Exhibit 668, there are notes that are entered by a  
8 secretary-level person who has contact with the members  
9 that could include theoretically credit card information  
10 related to payments or other information related to how  
11 payment is to be made, and I would be concerned with  
12 having that information exposed.

13 But really just having that third-party  
14 information publicly out in the open I think the  
15 government has already stated that they don't agree that  
16 information in this case needs to be confidential, it  
17 should be public. A lot of information has been made  
18 public during the course of this case that has come back  
19 to our clients in the form of criticism. And people  
20 have been contacted that have reached out at our clients  
21 how did the government find out about me, what's going  
22 on here? So, yeah, there -- I think there is sensitive  
23 information that would have to be held closely.  
24 Certainly those people don't want to be audited in their  
25 tax returns simply because they're members and purchased



1 solar lenses, and so I think there's a practical reason  
2 why it makes sense that just because someone bought a  
3 solar lens the IRS shouldn't be given their information.

4 THE COURT: I mean if we designated the  
5 information about the customer -- private customer  
6 information so the -- if that was designated as  
7 confidential, then neither party can use it in --  
8 outside of the case. So I would understand that to mean  
9 if as -- if that designation is appropriate, that that  
10 would prohibit using that as to lead into audit. Now,  
11 of course, the IRS could choose to audit a person for a  
12 different reason, but it would have to protect this  
13 information in a way that it did not -- it is not shared  
14 for that purpose and that sort of thing.

15 MR. PAUL: We would hope that's the case.  
16 Thank you.

17 THE COURT: All right. All right.

18 MR. PAUL: I think that covers the three  
19 areas at issue in the motion, unless you have any other  
20 questions or --

21 THE COURT: That's everything I have right  
22 now.

23 MR. PAUL: Okay. Thank you, Your Honor.

24 THE COURT: Thank you.

25 And Ms. Healy Gallagher.

1 MS. HEALY GALLAGHER: Thank you, Your Honor.  
2 First, I do just want to flag that the protective order  
3 that has been entered in this case has an express  
4 carveout for the United States. We fought for that as  
5 appropriate. We are a law enforcement component of the  
6 an executive agency, so there is a provision for DOJ  
7 attorneys to share information with the IRS, and, in  
8 fact, that is critical for the fair and effective  
9 enforcement of Internal Revenue laws. So that  
10 protective order was extensively negotiated between the  
11 parties. Judge Wells -- there was a motions practice  
12 regarding this, because immediately before any discovery  
13 the United States moved for relief from the standard  
14 protective order in order to have this explicit  
15 carveout. So I just want the court to know that that's  
16 there. So no matter what the designation, even if the  
17 defendants would want to add that, we have the ability  
18 to share that information. And, in fact, that's  
19 entirely appropriate and consistent with our law  
20 enforcement mandate.

21 A few things with respect to what we just  
22 heard: Mr. Paul just stood up here and told this court  
23 that his clients are not going to obey the order that  
24 was entered given from the bench on August 29th and  
25 written down on September 13th.

1           The court's questions about the SOLCO  
2 contract were directly on point. And that is the issue  
3 here. We have cycled through three sets of attorneys  
4 for the defense in this case, and one thing remains  
5 constant, the defendants themselves. So this motion for  
6 sanctions is against the defendants for their  
7 obstruction, which continues to this day. And I think  
8 it's abundantly clear that this court can have no  
9 confidence in any materials that the defendants  
10 themselves are allowed to proffer, because I will note  
11 Mr. Paul mentioned, you know, the vagaries of time and  
12 databases, garbage in, garbage out. There are names on  
13 the exhibit that I've given the court today  
14 contemporaneous with the examples I've provided about  
15 names of people who are on the International Automated  
16 Systems list that are not on Mr. Paul's list. There are  
17 plenty of names that are on that list that are also on  
18 Mr. Paul's list. So it doesn't seem to be an issue of  
19 time. Of course, any database could be subject to  
20 somebody gets missed or this contract doesn't get put  
21 in, but we've been able to identify enough discrepancies  
22 that give us serious pause as to whether this customer  
23 list is complete.

24           Further, Mr. Paul stood up here and told  
25 this court that this information exists. And this is

1 the first I've heard that there's not one database,  
2 there's two, one database that created Plaintiff's  
3 Exhibit 668, one that created Plaintiff's Exhibit 669.  
4 I didn't know that.

5 MR. PAUL: And I didn't mean to create that  
6 idea. My point was that they're not necessarily an  
7 identical database, but I think that the Exhibit 668 is  
8 a Website portal where people can access the information  
9 and view their information. Whether or not those --  
10 that information is extracted from another database, I'm  
11 not saying that there are two databases, I'm not saying  
12 that, because I don't know if that's true.

13 MS. HEALY GALLAGHER: Well, with that  
14 explanation, that simply reminds me of what the court  
15 said in speaking with Mr. Paul, that you're trying to --  
16 you're struggling to understand what's in these  
17 databases. We are too. And, in fact, long story,  
18 discovery requests issued in April 2016 defendants  
19 ultimately didn't produce until mid-January 2017. I did  
20 follow up with then opposing counsel, and we had a  
21 conversation about the defendants' document production.  
22 And they represented to me -- and I do not have a  
23 letter, I don't have an e-mail, I do remember this  
24 conversation however -- they represented to me you got  
25 what we got. And that's what we knew. And I, perhaps

1     wrongly, accepted a representation from a fellow officer  
2     of the court.

3                     THE COURT:    Okay.

4                     MS. HEALY GALLAGHER:   And so it was not  
5     until Mr. Johnson's deposition that it became clear that  
6     there was actually abundant information that we did not  
7     have from their document production in mid-January.

8                     One -- a couple of other things that I would  
9     like to point out, Mr. Paul I firmly believe tried to  
10    get the information that's in the court's order.  The  
11    difficulty is that, and he'll correct me if I'm wrong,  
12    that he's not a computer expert.  And one of the reasons  
13    that we asked for a forensic computer expert to travel  
14    to the site of where this database is stored is that  
15    that computer expert cannot only mirror the entire  
16    database, basically take a forensic copy of the  
17    database, but that expert can also tell whether  
18    information is being hidden, has been deleted, has been  
19    added in some funky way that is suspicious.  That's what  
20    this person does.  It's their job.

21                    So, once again, if we had gotten this  
22    adequate information from the very beginning, we could  
23    have explored all these things.  And the time for  
24    defendants to continue to offer piecemeal solutions that  
25    they think are fine and are not consistent with our

1 request in this court's order long over.

2 I also would like to point out, Your Honor,  
3 that, yes, this court did issue its order granting the  
4 United States' motion to compel from the bench on  
5 August 29th, but the actual order that's entered on the  
6 docket defendants agreed to. They knew exactly what  
7 their obligations were, and they said, yes, we agree  
8 with this order. Submit it to the judge.

9 I would also like to point out that the  
10 relevance, responsiveness, the importance of this  
11 information in the case that's being litigated that was  
12 on the motion to compel.

13 Further on the imperfect information that we  
14 have, just so that the court's aware, and this number  
15 could change, but we're looking at around \$45 million,  
16 \$45 million of -- you know, that could be outright harm  
17 to the government, it could be the number that these  
18 defendants collected. But we're not sure because we  
19 don't have all the information about these things. Only  
20 the defendants are in possession of this information.

21 And I would also like to point out it's  
22 abundantly clear that in fact we don't know how many  
23 people have bought these lenses and made tax claims,  
24 claimed depreciation and credits related that the IRS  
25 does not know about. It's not like the IRS has a giant

1 mainframe computer where you type in RaPower-3 and  
2 everyone who's bought a lens and claimed attendant --  
3 purportedly attendant tax benefits will be returned. We  
4 heard from Mr. Jameson, who we'll talk about in a  
5 moment, that he has tax return preparation customers who  
6 have been audited from the IRS in relationship to the  
7 RaPower-3 purchases, and he has customers who have  
8 bought lenses who have not been audited. So that in  
9 itself shows that we do not have all of the information  
10 about the breadth of this what we allege to be an  
11 abusive tax scheme. This information goes to  
12 disgorgement, it goes to harm to the government, it goes  
13 to what defendants knew or had reason to know about  
14 whether their customers run a trade or business.

15           Last, and I have to keep returning to this,  
16 Mr. Paul has made a number of representations to this  
17 court, both in the opposition brief and today, and there  
18 is no actual sworn information before this court from  
19 his clients, other than the testimony of Neldon Johnson,  
20 that these items exist, that he has ready access to  
21 them. And it's abundantly clear, and of course there's  
22 some case law under motions to compel, and we're dealing  
23 with discovery objections, that to support any objection  
24 based on burden or things like that, an objecting party  
25 has to provide evidence about the burden, about what

1 would have to be done in order to get these things. We  
2 don't have that here.

3 With that, Your Honor, we would request that  
4 the court enter the order, the proposed order that we  
5 have proposed and submitted.

6 THE COURT: I'm going to take this motion  
7 under consideration and I will issue a written order on  
8 it shortly.

9 MS. HEALY GALLAGHER: Thank you.

10 THE COURT: And then I don't have a lot of  
11 time and I do need to finish here no later than 5:30, so  
12 if I could hear just briefly on the issue of  
13 Mr. Jameson's deposition.

14 MS. HEALY GALLAGHER: Sure. And this  
15 certainly can be brief. So the United States moved to  
16 take Mr. Jameson's expert witness deposition out of time  
17 in part because, again, we attempted to meet and confer  
18 with opposing counsel and did not receive a response.  
19 The United States did depose Mr. Jameson approximately,  
20 I think, eight days before he was disclosed as an expert  
21 witness. And that deposition was thorough, that was  
22 attached to the United States' motion.

23 With respect to this request, we wanted to  
24 put down a marker to allow us to investigate because  
25 there are some things about Mr. Jameson's subsequent



1 report, which I actually have here. And I apologize to  
2 the court for not including that with the original  
3 motion, so I can hand that up. This is Plaintiff's  
4 Exhibit 659. It was previously marked.

5 MR. PAUL: Your Honor, I would raise an  
6 objection to including that document in the record as  
7 well. Simply at this point in the case there is no  
8 benefit of having this document in the record.

9 THE COURT: So I have to disagree on that  
10 because I did find myself in reading your response  
11 feeling that I couldn't decide whether this was going to  
12 be duplicative or not without seeing the content of the  
13 report. So it's not to the -- I'm using it to  
14 understand the comprehensiveness of the prior  
15 deposition. I'm not looking at it for purposes of  
16 weighing the efficacy of the opinion. So from that  
17 perspective I am grateful to have it, and I do want to  
18 have it in the record.

19 Is there any further concern about it beyond  
20 just the concern about it being in the record?

21 MR. PAUL: No, I suppose not. It's not very  
22 long, it's much shorter than the deposition, so if  
23 you're going to read them both, good luck with that.  
24 It's interesting.

25 THE COURT: Okay. Thank you.

1 MR. PAUL: Okay.

2 MS. HEALY GALLAGHER: And just for the  
3 court, I don't believe there are any facts or -- and  
4 there's no information on any particular customer in  
5 Mr. Jameson's report. So there are not personal  
6 confidentiality concerns.

7 It's certainly true there is overlap between  
8 what's in the deposition and what I would plan to ask at  
9 the expert witness deposition, so, you know, I'm fully  
10 prepared to not -- I'm not completely uninterested in  
11 retreading the ground that we walked during  
12 Mr. Jameson's fact witness deposition. That said, there  
13 are a couple of issues that go specifically to his  
14 qualifications and his opinions that I would want to  
15 hone in on in the course of an expert witness  
16 deposition. So there are some solutions. So, for  
17 example, he mentions something about in his education he  
18 attended a for-profit institution where he claims to be  
19 getting his PhD. And I may be remembering specific  
20 facts incorrectly, but it's my understanding that  
21 institution has lost its accreditation in California, so  
22 I would want to know -- things like that that I didn't  
23 know about at the time of his deposition so I wasn't  
24 able to inquire into it.

25 For example, he also mentioned at his

1 deposition and states in his report something that was  
2 news to me, basically that he claimed that a particular  
3 section of the Internal Revenue Code, 26 USC 1231,  
4 somehow has an impact on whether a rental activity is a  
5 pro se passive activity under the Internal Revenue Code,  
6 so I would want to go into that.

7 But I'm not looking for another seven hours.  
8 So I think that what we could do is limit it, you know,  
9 we could say four hours. If Mr. Paul has an objection  
10 that these things are far away and take a lot of time,  
11 we could all agree to do it by phone. I wouldn't have a  
12 problem with that.

13 I would also ask that any objections that  
14 Mr. Paul made in the course of Mr. Jameson's fact  
15 witness deposition on the basis that he had not been  
16 designated as an expert be withdrawn.

17 I believe that's all I have on that, Your  
18 Honor. I would just note that we would ask that the  
19 deadline for that be set for January 31, 2018, in light  
20 of the other things that we have this late fall and  
21 early winter. Thank you.

22 THE COURT: Thank you.

23 And Mr. Paul.

24 MR. PAUL: I think my arguments are stated  
25 in the brief, so I'll submit it on the brief.

1 THE COURT: Okay. All right.

2 Like I said, I did want to have the  
3 opportunity to look at the expert report in light of the  
4 deposition, and so I will take this motion under  
5 advisement as well so that I can have the chance to do  
6 that.

7 And is there anything else I can do for the  
8 parties today?

9 MS. HEALY GALLAGHER: No. Thank you.

10 MR. PAUL: No. Thank you, Your Honor.

11 THE COURT: Thank you both very much. We  
12 will be in recess on this matter.

13 (Whereupon, the matter was concluded.)

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C E R T I F I C A T E

State of Utah

County of Salt Lake

I, Karen Murakami, a Certified Shorthand Reporter for the State of Utah, do hereby certify that the foregoing transcript of proceedings was taken by me from an electronic recording to the best of my ability to hear and understand said recording at the time and place set forth herein, and was taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

IN WITNESS WHEREOF, I have hereunto set my hand this 13th day of November, 2017.

Karen Murakami

Karen Murakami, CSR, RPR