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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.

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Civil No. 2:15-cv-00828 DN

**UNITED STATES' BRIEF IN  
OPPOSITION TO TODD  
ANDERSON'S MOTION TO QUASH  
SUBPOENA**

Judge David Nuffer  
Magistrate Judge Brooke C. Wells

We allege that defendants made false statements about tax benefits that they knew, or should have known, were false.<sup>1</sup> Defendants claim reliance on an attorney's advice.<sup>2</sup> Two defendants identified Todd Anderson as an attorney they consulted.<sup>3</sup> Anderson's advice appears on the RaPower-3 website<sup>4</sup> and defendant Shepard tells RaPower-3 customers to use Anderson's letter in IRS audits.<sup>5</sup> Anderson sent defendants Johnson and RaPower-3 a "cease and desist" letter because his letter was used in an unauthorized manner. He demanded that defendants stop using it.<sup>6</sup> The United States noticed Anderson's deposition to learn the facts and circumstances surrounding Anderson's letter and advice.

Anderson claims that we will solicit testimony prohibited by the attorney-client privilege, Utah Rules of Professional Conduct, and Utah Code Ann. §78B-1-137(2).

Anderson's deposition should proceed because (1) by publishing the Anderson letter to their publically accessible website and relying on it as a defense, the defendants waived any privilege; and (2) privilege was waived with respect to 5 documents Anderson produced.

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<sup>1</sup> Compl. ¶¶ 1, 107, 108, 122, 162.

<sup>2</sup> Doc. Nos. 22 & 23, Sixth Defense.

<sup>3</sup> In interrogatory responses, Shepard and Freeborn state they relied on the Anderson letter. Exh. 353, pp. 36-41.

<sup>4</sup> See Exh. 353, pp. 26-30, letter from Anderson to "Potential RaPower-3 Customer"; Exh. 1 (US-001718-1719, RaPower-3 website stating that the Anderson tax attorney opinion letter the best resource in claiming depreciation). Anderson's letter remains on the RaPower-3 website. See <http://www.rapower3.com/tax-benefits>, last visited February 7, 2017.

<sup>5</sup> Exh. 353, pp. 47-48.

<sup>6</sup> Exh. 353, pp. 23-24. The "cease and desist letter" demonstrates that the defendants had "reason to know" their statements were false or fraudulent as to a material matter. 26 U.S.C. § 6700(a)(2)(A).

In response to a document subpoena, Anderson produced 5 documents and withheld 21, which he claimed were subject to the attorney-client privilege and/or the work product doctrine.<sup>7</sup> On December 1, 2016, we wrote Anderson's former attorney, as well as defendants' counsel, challenging Anderson's claim.<sup>8</sup> We noted the privilege was waived, cited Tenth Circuit precedent, and invited Anderson and the defendants to meet and confer.<sup>9</sup> **No party responded.**

We expect Anderson to testify about:

- 1) The 5 documents,<sup>10</sup> including the facts underpinning Anderson's letter and his "cease and desist letter."
- 2) The nature of the 21 documents withheld.<sup>11</sup>

Anderson's deposition should go forward because the defendants post his advice on their website and rely on his advice in this case. Defendants should not be permitted to use Anderson's advice as a sword and a shield.<sup>12</sup>

We are prepared to provide extended briefing if the Court desires.

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<sup>7</sup> Plaintiff's Exh. 353, pp. 12–35.

<sup>8</sup> Exh. 353, pp. 2–11.

<sup>9</sup> Exh. 353, pp. 4–11.

<sup>10</sup> Even if the privilege was not waived by publishing the Anderson letter, and relying on it in this case, at a minimum, the attorney-client privilege was waived with respect to the 5 produced documents. *See In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1201 (10th Cir. 2006).

<sup>11</sup> If the deposition goes forward, the United States may learn all the facts it needs, obviating the need for a motion to compel production of the 21 withheld documents. If a motion to compel is necessary, the deposition will assist in narrowing the issues.

<sup>12</sup> *Seneca Ins. Co. v. W. Claims, Inc.*, 774 F.3d 1272, 1277 (10th Cir. 2014).

Dated: February 7, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on February 7, 2017, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to the following:

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