

JOHN W. HUBER, United States Attorney (#7226)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
185 South State Street, Suite 300
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>UNITED STATES' BRIEF IN OPPOSITION TO DEFENDANT'S OBJECTION TO THE SUBPOENA ISSUED TO TODD ANDERSON AND MOTION TO QUASH SUBPOENA</p> <p>Judge David Nuffer Magistrate Judge Brooke C. Wells</p>
---	---

The defendants ask the Court to quash a deposition subpoena issued 54 days ago because they insist that the attorney-client “privilege be maintain[ed] in its strictest fashion.”¹ But the defendants themselves have failed to maintain that privilege in *any* fashion with respect to the topics for discovery: by publishing Anderson’s advice to their website, by advising customers to use Anderson’s advice during tax audits, by raising the advice of counsel as a defense in this case, and because according to Anderson’s “cease and desist letter” the defendants are using Anderson’s advice in an unauthorized manner, and by allowing Anderson to produce 5 documents in response to the United States in this case, *defendants waived the privilege*.²

The burden of establishing a privilege is on the one who asserts it and “[i]t is not the Government's responsibility to sort out what is privileged from what is not.”³ The defendants do not meet their burden of demonstrating why Todd Anderson’s testimony is protected by the attorney-client privilege.⁴ The defendants’ motion does not even attempt to refute the arguments raised in the United States’ opposition to Anderson’s motion to quash⁵ and instead summarily insists that the privilege should be maintained without explaining why the privilege has not been waived. The defendants’ motion should be summarily denied.

¹ Doc. No. 127.

² Doc. No. 126. In this opposition, we incorporate by reference the arguments made in Doc. No. 126, the United States’ opposition to Anderson’s motion to quash the subpoena.

³ *Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records*, 697 F.2d 277, 280 (10th Cir. 1983)

⁴ *In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998).

⁵ Doc. No. 126; *see also* Doc. No. 126-1 (letter to, among others, counsel for the defendants containing the same arguments).

For a purported attempt to maintain the attorney-client privilege in its “strictest fashion,” the defendants’ motion is long overdue: it was filed 52 days after we notified them that we intended to seek Anderson’s deposition testimony⁶ and 75 days after we notified them of our position on both the waiver of privilege with respect to Anderson’s advice and the scope of that waiver⁷. The Anderson deposition is not subject to the automatic stay under DUCiv R 26-2. But in light of the defendants’ motion to quash asserting privilege; the witness’s stated intention not to answer any substantive questions without a Court order; the short time until the deposition itself; and this Court’s opinions in similar situations,⁸ counsel for the United States has informed all counsel in this matter that it will postpone the Anderson deposition from Friday, February 17 until a date to be rescheduled upon order of this Court.

//

//

//

//

//

//

//

//

⁶ Plaintiff’s Exhibit 378, December 23, 2016, Notice of Todd Anderson’s Deposition (attached).

⁷ Doc. No. 126-1.

⁸ *Salt Lake City Corp. v. ERM-W., Inc.*, 2014 WL 6386802, at *7 (D. Utah 2014) (noting that a witness was substantially justified in not appearing for a deposition because he had a pending motion to quash, citing Fed. R. Civ. P. 37(d)(2)).

Dated: February 16, 2017

Respectfully submitted,

/s/ Christopher R. Moran

CHRISTOPHER R. MORAN

New York Bar No. 5033832

Email: christopher.r.moran@usdoj.gov

Telephone: (202) 307-0834

ERIN HEALY GALLAGHER

DC Bar No. 985760

Email: erin.healygallagher@usdoj.gov

Telephone: (202) 353-2452

ERIN R. HINES

FL Bar No. 985670

Email: erin.r.hines@usdoj.gov

Telephone: (202) 514-6619

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 February 16, 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:

Justin D. Heideman
HEIDEMAN & ASSOCIATES
2696 North University Avenue, Suite 180
Provo, Utah 84604
jheideman@heidlaw.com
**ATTORNEY FOR RAPOWER-3, LLC,
INTERNATIONAL AUTOMATED SYSTEMS, INC.,
LTB1, LLC, and NELDON JOHNSON**

Donald S. Reay
REAY LAW, PLLC
donald@reaylaw.com
**ATTORNEY FOR R. GREGORY SHEPARD
AND ROGER FREEBORN**

Stuart H. Schultz
Byron G. Martin
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111
ATTORNEYS FOR TODD ANDERSON

/s/ Christopher R. Moran
CHRISTOPHER R. MORAN
Trial Attorney