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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,

v.

RAPOWER-3 LLC, INTERNATIONAL  
AUTOMATED SYSTEMS, INC., et al.,

Defendants.

ORDER DENYING MOTIONS TO QUASH

Case No. 2:15-cv-828 DN

District Judge David Nuffer

Magistrate Judge Brooke Wells

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Pending before the court are non-party Todd Anderson’s Motion to Quash Subpoena and Defendants RaPower-3 LLC, International Automated Systems LLC, LTB1 LLC, and Neldon Johnson’s (collectively Defendants) Motion to Quash Subpoena. These parties also requested expedited treatment as the deposition was scheduled for Friday February 17th. Plaintiff, however, agreed to postpone the deposition of Todd Anderson “until a date to be rescheduled upon order of this court.”<sup>1</sup> For the reasons set forth below the court will deny the Motions to Quash.

Plaintiff alleges Defendants made false statements about certain tax benefits that they “knew, or should have known, were false.”<sup>2</sup> In response to Plaintiff’s Complaint, Defendants assert that the claims “are barred to the extent that Defendants diligently and reasonably investigated the facts and relied upon the tax advice provided by Defendants’ attorneys.”<sup>3</sup> It is part of this advice that is at issue in the current motions.

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<sup>1</sup> Mem. in Op. p. 3, docket no. 129.

<sup>2</sup> Pla Op. p. 2, docket no. 126.

<sup>3</sup> Sixth Defense Answer, docket no. 22, docket no. 26.

In response to a document subpoena, Mr. Anderson produced 5 documents and withheld 21 that he claimed were subject to the attorney-client privilege and or the work product doctrine. Plaintiff seeks to now depose Mr. Anderson and expects him to testify about “1) The 5 documents, including the facts underpinning Anderson’s letter and his ‘cease and desist letter.’ 2) The nature of the 21 documents withheld.”<sup>4</sup>

Mr. Anderson argues the deposition subpoena should be quashed “on the grounds that the deposition questioning is precluded by Utah Statute, the attorney-client privilege, and the Utah Rules of Professional Conduct.”<sup>5</sup> Defendants join in Mr. Anderson’s motion and “do not consent to any disclosure of the privileged information, and insist that the privilege be maintain[ed] in its strictest fashion.”<sup>6</sup>

In response Plaintiff asserts any privilege has been waived by Defendants’ actions. Defendants assert reliance upon advice of counsel as a defense to Plaintiff’s claims. “Two Defendants identified Todd Anderson as the attorney they consulted.”<sup>7</sup> Information in a letter from Mr. Anderson to help customers “understand the possible tax saving benefits of purchasing energy equipment through RaPower-3” appears on Defendant RaPower-3’s website.<sup>8</sup> Defendant Shepard cited Mr. Anderson’s letter to RaPower-3 customers. In addition, Mr. Anderson also “sent [D]efendants Johnson and RaPower-3 a ‘cease and desist’ letter because his letter was used in an unauthorized manner [and] demanded that [D]efendants stop using it.”<sup>9</sup> Finally, any privilege with respect to the 5 documents is waived because they were already produced.

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<sup>4</sup> Pla Op. p. 3, docket no. 126 (internal citations omitted).

<sup>5</sup> Mtn. p. 1, docket no. 124.

<sup>6</sup> Def.’s mtn. p. 1-2, docket no. 127.

<sup>7</sup> Pla Op. p. 2.

<sup>8</sup> See <http://www.rapower3.com/tax-benefits> (last visited February 27, 2017).

<sup>9</sup> Pla. Op. p. 2.

The attorney client privilege protects “confidential communications by a client to an attorney made in order to obtain legal assistance” from the attorney in his capacity as a legal advisor.<sup>10</sup> The privilege is to be construed narrowly.<sup>11</sup> The burden of establishing a privilege is on the one who asserts it and it is “not the Government’s responsibility to sort out what is privileged from what is not[.]”<sup>12</sup> The undersigned finds Defendants and Mr. Anderson have failed to meet this burden. Further, the court finds based on the reasoning set forth by the Tenth Circuit in *In re Qwest Communications Intern. Inc.*,<sup>13</sup> any privilege relating to the 5 produced documents is waived.

Here, Mr. Anderson’s advice is posted on a public web site for anyone to see. Defendants cite to Mr. Anderson’s advice as a defense for Plaintiff’s claims and have pointed customers and potential customers toward it. As such the advice is not protected by any privilege. The Utah Rules of Professional Conduct provide that a “lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent.”<sup>14</sup> Here, the advice Plaintiff seeks to depose Mr. Anderson about is publicly available for all to see. So, the court finds the Utah Rules of Professional Conduct and Utah statute §78B-1-137(2) do not preclude the deposition. Defendants own actions have put the advice at issue here and any potential privilege as it relates to the advice has been waived.

In similar fashion the court cannot find a basis for Mr. Anderson’s cease and desist letter to fit within any privilege. Questions regarding this document are therefore appropriate.

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<sup>10</sup> *Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 1577, 48 L.Ed.2d 39 (1976).

<sup>11</sup> *See id.*; *Matters of Grand Jury Subpoena*, 697 F.2d at 278.

<sup>12</sup> *Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records*, 697 F.2d 277, 280, 12 Fed. R. Evid. Serv. 460 (10th Cir. 1983); *see, e.g., United States v. Hodgson*, 492 F.2d 1175, 1177 (10th Cir. 1974).

<sup>13</sup> *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1199–201, (10th Cir. 2006).

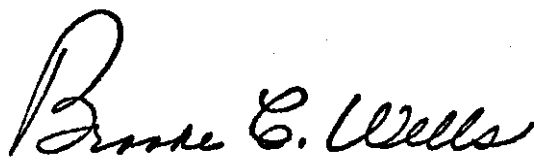
<sup>14</sup> Utah Rule of Professional Conduct 1.6(a).

“The nature of the 21 documents withheld”<sup>15</sup> presents a much closer call depending on the circumstances and questioning during the deposition. In the correspondence between the parties it appears a privilege log has been created that pertains to those documents.<sup>16</sup> As such, the Government should know the privilege asserted and a description of the nature of the withheld documents.<sup>17</sup> Perhaps the descriptions are inadequate under the Federal Rules, but if not, continued questioning into the nature of the withheld documents may run afoul of the asserted privileges. Thus any questioning about the 21 documents should proceed with caution. Based on the motions before the court, however, the court will not preclude Plaintiff’s questioning into the nature of the withheld documents.

#### ORDER

For the reasons set forth above the court finds the deposition questioning is not precluded by the attorney client privilege, Utah statute or the Utah Rules of Professional Conduct. Accordingly, the Motions to Quash are HEREBY DENIED.<sup>18</sup>

DATED this 28 February 2017.

A handwritten signature in black ink, reading "Brooke C. Wells". The signature is fluid and cursive, with the first name "Brooke" and last name "Wells" clearly legible.

Brooke C. Wells  
United States Magistrate Judge

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<sup>15</sup> Pla op. p. 3, docket no. 126.

<sup>16</sup> See January 27, 2017 email from Stuart Schultz, docket no. 124-2.

<sup>17</sup> See [Fed. R. Civ. P. 45\(d\)\(2\)\(A\)](#) (“A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial preparation material must: (i) expressly make the claim; and (ii) describe the nature of the withheld documents . . . in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.”).

<sup>18</sup> Docket no. 124, docket no. 127.