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IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828 DN UNITED STATES' MOTION TO COMPEL DEPOSITION TESTIMONY OF CODY BUCK, KEN OVESON, AND DAVID MANTYLA Judge David Nuffer Magistrate Judge Brooke C. Wells
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FILED UNDER COURT SEAL, PURSUANT TO COURT ORDER (ECF DOC. 135)

The United States seeks expedited treatment of this Motion in accordance with the
Court's Short Form Discovery Procedure. ECF Doc. 115.

The United States moves to compel the deposition testimony of Cody Buck, Ken Oveson, and David Mantyla, CPAs formerly employed by the accounting firm Mantyla McReynolds.¹ In their depositions, Buck, Oveson, and Mantyla declined to answer numerous questions, citing defendants' objections.² Defendants contend that we seek "tax advice" privileged under 26 U.S.C. § 7525.³

Buck provided International Automated Systems, Inc., with "pure[] auditing services."⁴ Oveson communicated with the defendants regarding tax implications of solar lenses,⁵ and voiced concern that the audit department (Cody Buck) said that the lenses were "not yet 'placed in service.'"⁶ Invoices demonstrate that someone with the initials "DDM" performed research regarding the solar lenses and tax implications at issue.⁷ Mantyla's initials are "DDM."⁸ None of these services are covered by the § 7525 privilege.

¹ Mantyla McReynolds no longer exists. It joined BDO USA in July 2016. Pl. Ex. 384, Deposition of Cody Buck ("Buck Tr.") 5:23-6:13.

² Pl. Ex. 384, Buck Tr., 18:18-21:23; Pl. Ex. 385, Deposition of Ken Oveson ("Oveson Tr.") 25:19-27:10; Pl. Ex. 386, Deposition of David Mantyla, ("Mantyla Dep.") 26:22- 28:12.

³ *Id.*

⁴ Pl. Ex. 384, Buck Tr. 18:13.

⁵ Pl. Exs. 372, 373, and 374. These communications are discoverable and not protected by any privilege. In fact, Mantyla McReynolds produced documents reflecting those communications in response to a subpoena from the United States.

⁶ Pl. Ex. 372, Email dated 8/24/2009 from Oveson to Greg Shepard.

⁷ Pl. Ex. 376 (MM004391-MM004392); Pl. Ex. 377 (MM004395, MM004408). The invoices are addressed to an entity known as "Bigger, Faster, Stronger" (BFS). Discovery in this case has demonstrated that defendant Greg Shepard was employed by BFS. It appears that BFS was billed for preparation of its employees' tax returns. Mr. Robert Rowbotham, Chief Executive Officer BFS executed a "waiver of tax privilege" permitting David Mantyla to give testimony related to Mantyla's representation of BFS. See Pl. Ex. 381. However, defendant Greg Shepard has not signed such a waiver.

Section 7525 extends the attorney-client privilege to communications with “a federally authorized tax practitioner,” *i.e.*, a non-lawyer authorized to practice before the IRS, “to the extent that “the communication would be considered a privileged communication if it were between a taxpayer and an attorney.”⁹ Section 7525 does not cover non-lawyer practitioners when they are doing non-legal work.¹⁰ The party asserting privilege bears the burden of proof, a “high hurdle.”¹¹

Defendants fall short. Buck provided “purely auditing services.”¹² Independent auditors like Buck assume a “public responsibility transcending any employment relationship with the client”¹³ and their work is non-privileged. Auditing services are non-legal and therefore not covered by § 7525.¹⁴ Shepard retained Oveson to advise customers on claiming tax credits and deductions on their tax returns in a conference call.¹⁵ Mantyla researched tax issues pertaining to solar energy in efforts to prepare Shepard’s tax return.¹⁶ Tax return preparation is an accounting, not legal, service¹⁷ and when communications concern return preparation *and* litigation, they are

(...continued)

⁸ Pl. Ex. 386, Mantyla Dep. 38:18-21.

⁹ 26 U.S.C. § 7525; *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999) (Posner, J.).

¹⁰ *Id.*

¹¹ *Valero Energy Corp.*, 569 F.3d at 630.

¹² Pl. Ex. 384, Buck Tr. 18:13.

¹³ *United States v. Arthur Young & Co.*, 465 U.S. 805, 817 (1984).

¹⁴ § 7525(a)(1); *Frederick*, 182 F.3d, at 502.

¹⁵ Pl. Exs. 136 (Olsen_P&E-01339, August 21, 2009 email from Greg Shepard), 372, 373 and 374.

¹⁶ Pl. Exs. 376 and 377.

¹⁷ *In re Grand Jury Proceedings*, 220 F.3d 568, 570 (7th Cir. 2000).

unprotected.¹⁸ We should be permitted to learn about these witnesses' services and communications with defendants related to the tax implications of their solar lenses. Such facts are highly probative of defendants' scienter when they made or furnished statements about the allowability of tax benefits related to the sale of solar lenses to customers.¹⁹

Even if the communications were "considered privileged,"²⁰ any privilege was waived.²¹ Defendants' communications do not demonstrate confidentiality, rather the opposite: Buck reviewed information that was to be filed with the SEC,²² Oveson was to opine on tax benefits for a multitude of customers,²³ and Mantyla gathered information to report it on Shepard's tax return.²⁴ These activities are non-confidential in nature, thereby vitiating the privilege.²⁵

Finally, even if the communications were encompassed by § 7525, the privilege does not apply to communications regarding a "tax shelter,"²⁶ which is broadly defined, encompassing any plan or arrangement whose significant purpose is to avoid or evade federal taxes.²⁷

¹⁸ *Valero Energy Corp. v. United States*, 569 F.3d 626, 630 (7th Cir. 2009).

¹⁹ 26 U.S.C. § 6700(a)(2)(A).

²⁰ § 7525(a)(1).

²¹ See *In re Grand Jury Proceedings*, 616 F.3d 1172, 1184 (10th Cir. 2010) ("confidentiality is the key to maintaining the attorney-client privilege, a party waives the privilege when he voluntarily discloses to a third party material or information that he later claims is protected").

²² Buck Tr. 12:4-24. 51:17-23.

²³ Pl. Exs. 372, 373, and 374.

²⁴ Pl. Ex. 376 (MM004391-MM004392); Pl. Ex. 377 (MM004395, MM004408).

²⁵ *United States v. BDO Seidman*, 337 F.3d 802, 812 (7th Cir. 2003); see also *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006).

²⁶ 26 U.S.C. § 7525(b).

²⁷ *Valero Energy Corp. v. United States*, 569 F.3d 626, 632 (7th Cir. 2009) (citing 26 U.S.C. § 6662(d)(2)(C)(ii)).

Avoiding federal taxes is a significant purpose of defendants' scheme.²⁸ Section 7525 is inapplicable to their communications.

This is another example of defendants obfuscating the truth by preventing discovery of the facts in this case.²⁹ Defendants' objections should be overruled and Buck, Oveson, and Mantyla ordered to answer all questions they declined to answer, plus reasonable follow-up questions.³⁰

CERTIFICATION IN ACCORDANCE WITH FED. R. CIV. P. 37(a)(1) & THE SHORT FORM DISCOVERY MOTION PROCEDURE (Doc. No. 115)

The United States made reasonable efforts to resolve this dispute, including:

- 1) During the deposition of Cody Buck, when defendants first raised the objection under 26 U.S.C. § 7525, the United States provided defendant's counsel with copies of *Valero Energy Corp. v. United States*, 569 F.3d 626 (7th Cir. 2009), and *United States v. BDO Seidman*, 337 F.3d 802 (7th Cir. 2003) which refute defendants' position.³¹
- 2) On March 1, 2017 at approximately 2:35pm (Eastern Standard Time), counsel for the United States discussed this matter with Justin Heideman and Christian Austin, counsel

²⁸ See Pl. Ex. 87 (email from Shepard, "Hope every one of you has the success as expected from our aPower3 Tax Benefit program"); Pl. Ex. 214 (email from Roger Freeborn "Enrolling into RAPower3 could reduce your federal income tax burden to ZERO!"); Pl. Ex. 221 (email from Freeborn stating "Because you are participating in this tax credit program, you will no longer be paying federal income tax"); Pl. Ex. 244 (email from Shepard, "EVERYONE MAKES MONEY WITH RAPOWER3 AS LONG AS THEY ARE A TAXPAYER"); Pl. Ex. 383 (statement from Neldon Johnson "There shall be no finance charges that apply to your lens purchases, also you will have no financial obligation to pay for the note on your lens purchases if the IRS does not accept your tax credits.").

²⁹ See e.g., Doc. No. 127 (Defendant's Motion to Quash the Deposition of Todd Anderson).

³⁰ Fed. R. Civ. P. 37(a)(3)(B)(i); DUCivR 37-1; ECF Doc. 115.

³¹ Pl. Ex. 384, Buck Tr. 21:19-25:18.

for all defendants except R. Gregory Shepard and Roger Freeborn, and were unable to reach an agreement.

- 3) On March 6, 2017, at 5:47pm (Eastern Standard Time) counsel for the United States sent opposing counsel an email providing caselaw to support the United States' position and inviting counsel for the defendants to withdraw their objections and offering time periods to meet and confer. Justin Heideman, counsel for defendants, responded and stated "[w]e will discuss your information and get back to you." No response was received.

Dated: March 22, 2017

Respectfully submitted,

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**ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on March 22, 2017, the foregoing document was conventionally filed under seal with the Clerk of the Court, in accordance with DUCivR 5-2(d) and ECF Doc. 135. Copies of this Motion to Compel Deposition Testimony are being mailed via Fedex to the following counsel of record:

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I further certify that I sent the foregoing document to counsel for Cody Buck, Ken Oveson, and David Mantyla via email (per agreement):

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