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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 TODD ANDERSON TO PRODUCE DOCUMENTS Judge David Nuffer Magistrate Judge Brooke C. Wells
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The United States moves the Court for an order compelling Todd Anderson to produce 15 of the 21 documents he withheld in response to the United States' subpoena, specifically

“Invoice 470 to RaPower-3” and exhibits B-O.¹ The United States is mindful that the Court ordered that questions regarding withheld documents “should proceed with caution”² and has encouraged the parties to “use their best judgment and wisdom in motion practice.”³ In an effort to depose Anderson only once and limit further motion practice, thereby conserving the parties’ and judicial resources, and since there is only two and a half months left in discovery,⁴ the United States seeks production of these documents before Anderson’s rescheduled deposition on April 17, 2017.

The Court already ruled that privilege was waived with respect to Anderson’s advice (the “Anderson letter”) on defendants’ website.⁵ The Anderson letter discusses “possible tax saving benefits” of RaPower-3’s “energy equipment.”⁶ We allege that defendants made false statements about tax benefits that they knew, or should have known, were false.⁷

Voluntary disclosure of documents otherwise protected by privilege waives the privilege not only as to the disclosed documents, but also as to all documents relating to the subject matter of the disclosed documents.⁸ Fed. R. Evid. 502(a) codifies the principal. Defendants

¹ ECF Doc. 126-1, pp. 12-16.

² ECF Docs. 132, p. 4

³ ECF Doc. 135.

⁴ Discovery ends on June 2, 2017. ECF Doc. No. 37.

⁵ ECF Doc. 132 at 3.

⁶ ECF Doc. 126-1, pp. 26-29.

⁷ Compl. ¶¶ 1, 107, 108, 122, 162.

⁸ *United States v. Graham*, 2003 WL 23198792, at *5 (D. Colo. Dec. 2, 2003) (citing *In re Sealed Case*, 676 F.2d 793, 809, 818 (D.C.Cir.1982)).

intentionally made the Anderson letter available to the public. Documents E,F,G,H,I,J,K,L,N and O pertain to the subject matter, *i.e.*, solar energy equipment and tax benefits, as the Anderson letter.⁹ In fairness, these documents should be considered together because defendants are using Anderson's advice in a manner he did not authorize¹⁰ and the defendants rely on Anderson's advice in this case.¹¹ We should be permitted to learn all facts underpinning Anderson's advice.

Documents B,C,D, and M are inadequately described.¹² But "[i]t is not the Government's responsibility to sort out what is privileged from what is not; the burden of establishing a privilege is on the one who asserts it."¹³ We are aware of no facts to support the contention that documents B,C,D, and M are privileged and therefore request they be produced, or in the alternative, reviewed by the Court *in camera*.

Tenth Circuit precedent suggests that a broad waiver of the attorney-client privilege applies. In *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989), the defendant was accused of making illegal nominee loans. Bernard told borrowers that he consulted an attorney.¹⁴

⁹ ECF Doc. 126-1, pp. 12-16.

¹⁰ ECF Doc. 126-1, pp. 23-24, Anderson's "Cease and Desist Letter."

¹¹ ECF Docs. 22 & 26, Sixth Defense. See also, ECF Doc. No. 126-1, pp. 36-41, Freeborn and Shepard's responses to United States' Interrogatories.

¹² The log fails to describe the nature of the documents so that the privilege claim can be assessed. Fed. R. Civ. P. 45(e)(2)(A)(ii). Specifically, the log fails to state the subject matter of the email sent between Jessica and Todd Anderson (B); the topic of the "Executive Summary" (C) and the topic of the client meeting reflected in "Attorney Notes" (M). Documents (D) and (M) are dated 10/14/2010, which is approximately a month before Anderson emailed the Anderson letter to Neldon and Glenda Johnson, ECF Doc. 126-1, p. 30. Documents (N) and (O) relate to solar energy equipment and taxes and were also drafted in the October 2010 timeframe. ECF Doc. 126-1, p. 15.

¹³ *Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records*, 697 F.2d 277, 280 (10th Cir. 1983).

¹⁴ *Bernard*, 877 F.2d at 1465.

When called to testify, the attorney denied ever discussing the loans.¹⁵ Bernard waived the privilege by “voluntarily disclosing the confidential communication” to the borrower.¹⁶ “Courts need not allow the claim of attorney-client privilege when the party claiming the privilege is attempting to utilize the privilege in a manner that is not consistent with the privilege.”¹⁷ Here, defendants revealed their communications with Mr. Anderson in an effort to induce customers to buy solar lenses and rely on Anderson to defend this case. In this context, using the privilege to prevent discovery is inconsistent with the privilege’s purpose.

We also seek production of Anderson’s “Invoice 470 to RaPower-3.”¹⁸ Information regarding a fee arrangement is not part of the professional consultation with an attorney and is not privileged.¹⁹

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:

- a. On December 1, 2016, we sent a letter to Anderson’s attorney, Tate Bennett, and opposing counsel. The letter explained why we did not believe the withheld documents were privileged, requested the documents be produced, and offered to meet and confer on the matter;²⁰

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ ECF Doc. No. 126-1, p. 14, (“ALC Ref. No. 470.”)

¹⁹ *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir. 1990); *Wing v. Fulbright & Jaworski LLP*, 2010 WL 1566801, at *2 (D. Utah 2010).

²⁰ ECF Doc. 126-1, pp. 1-11.

- b. On March 2, 2017, we sent all relevant parties an email stating our position that any privilege with respect to the withheld documents had been waived and cited caselaw. We requested the documents be produced and invited the parties to meet and confer on the matter;
- c. On March 3rd and 6th we met and conferred via phone with Byron Martin, Anderson's attorney, and narrowed the scope of the documents that are now being requested; and
- d. We held a conference call with all relevant parties on March 7, 2017 at 2:00pm EST. Defendant's counsel stated his clients' position that the requested documents are privileged and would not consent to their disclosure.

WHEREFORE, the United States asks that the Court enter an Order compelling Anderson to produce the withheld documents: "Invoice 470 to RaPower-3" and exhibits B-O.

Dated: March 24, 2017

Respectfully submitted,

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**ATTORNEYS FOR THE
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CERTIFICATE OF SERVICE

I hereby certify that on March 24, 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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