

Byron G. Martin, #8824
STRONG & HANNI
102 South 200 East, Suite 800
Salt Lake City, UT 84111
Tel: (801) 532 -7080
Fax: (801) 596-1508
bmartin@strongandhanni.com
Attorneys for Non-Party Todd Anderson

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

<p>UNITED STATES OF AMERICA,</p> <p style="text-align: center;">Plaintiff, Counterclaim Defendant</p> <p>v.</p> <p>RAPOWER-3, LLC, et al.,</p> <p style="text-align: center;">Defendant.</p>	<p style="text-align: center;">TODD ANDERSON’S MEMORANDUM IN OPPOSITION TO UNITED STATES’ MOTION TO COMPEL TODD ANDERSON TO PRODUCE DOCUMENTS</p> <p style="text-align: center;">Case No.: 2:15-cv-00828-DN-BCW</p>
--	--

Todd Anderson requests that the Court deny the United States’ (“Plaintiff”) motion entirely.

The Plaintiff asserts that under Rule 502(a) of the Federal Rules of Evidence, privileged material not yet posted on the RaPower-3 (“RaPower”) website should be produced because the Anderson draft was posted. It is unclear whether Rule 502(a) applies since the Anderson draft letter was not given to a federal agency, nor did any undisclosed communications occur during a

federal proceeding, as stated in the rule. Further, the notes to the Rule explain that waiver “generally results in a waiver only of the communication or information disclosed,” which is just the Anderson draft letter.

Also, the posting of the Anderson draft on the RaPower website constitutes an “extra-judicial” disclosure, i.e., a disclosure not made during a judicial proceeding. Courts recognize that extra-judicial disclosure generally waives the privilege only as to that particular document.¹ Here, the Anderson draft letter was disclosed before any litigation, and is therefore “extra-judicial.”

The United States argues that RaPower has nonetheless placed the other documents “at issue” by raising the advice of counsel defense in its answer. However, the United States has not laid proper foundation for this argument. It is not clear that RaPower and Johnson are still pursuing a broad advice of counsel defense given recent objections [Doc. 127]. Also, the Answer is non-specific as to which attorneys were allegedly relied on (there were several attorneys), and as to what specific “tax advice” was relied upon. To lay foundation, the United States would need to first depose RaPower and owner Neldon Johnson to determine: (1) if they both still rely on the advice of counsel defense; (2) if they both identify Mr. Anderson as the attorney whose advice they will use as a defense in this case (or whether it is Kirton & McConkie and/or Hansen, Barnett & Maxwell); and (3) the precise scope of what advice was relied on that will be used as a

¹ See, e.g., Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1372 (Fed. Cir. 2012); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222–23 (4th Cir. 1976); Bus. Integration Servs., Inc. v. AT & T Corp., 251 F.R.D. 121, 123 (S.D.N.Y. 2008); Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. P'ship, 154 F.R.D. 202, 211-12 (N.D. Ind. 1993).

defense in this case.²

If foundation can be laid, Anderson believes that an in-camera review would still be necessary. Any production should be narrowly tailored,³ rather than the United States' blanket sweep of "21 documents." Invoices may not be relevant. Attorney notes may not be relevant, and may constitute inviolate mental impression work product.⁴ Only those few documents/communications that bear directly on an advice of counsel claim (if any) should even be considered.⁵

Ultimately, however, the attorney-client privilege belongs to RaPower and Neldon Johnson, and Anderson will therefore defer to their position. Anderson states his position herein because of the Court's earlier ruling and because of the instruction that the parties proceed with caution as to the remaining documents.

Regardless of waiver and privilege, so long as RaPower and Johnson do not consent (they have not), and so long as there is no court order to the contrary, Anderson is not at liberty to comply further with the document subpoena. See Utah Rules of Professional Conduct 1.6(a) and 1.9(c); Utah Code Ann. §78B-1-137(2).

² The United States cites Doc. No. 126-1, pp. 36-41 as supposed foundation, but the citation is to co-defendants Freeborn's and Shepard's position, not Anderson's former clients RaPower or Johnson. Further, the same citation references two other law firms besides Anderson.

³ Henry v. Quicken Loans, Inc., 263 F.R.D. 458, 466 (E.D. Mich. 2008) (" . . . implied waivers are to be construed narrowly . . .").

⁴ Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999).

⁵ The United States suggests that items B, C, M, and D in the log are vaguely described. However, Anderson should err on the side of caution in a log rather than divulge too much. Also, the United States did not raise this concern in the meet and confer phone call with counsel. On the contrary, the United States said that the log was clear as to all the documents in its March 2 email ("[b]ased on the document descriptions in Mr. Anderson's privilege log (See Doc. No. 126. Pp. 12-16), it seems clear to us . . .").

DATED this 29th day of March, 2017.

STRONG & HANNI

/s/ Byron G. Martin

Byron G. Martin
Attorneys for Todd Anderson

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of March, 2017 a true and correct copy of the foregoing **TODD ANDERSON'S MEMORANDUM IN OPPOSITION TO UNITED STATES' MOTION TO COMPEL TODD ANDERSON TO PRODUCE DOCUMENTS** was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to the following:

Erin Healy Gallagher
Christopher R. Moran
U.S. Dept. of Justice
Tax Division
Erin.healygallagher@usdoj.gov
Christopher.r.moran@usdoj.gov

Erin R. Hines
U.S. Dept. of Justice
Central Civil Trial Section
Erin.r.hines@usdoj.gov
Central.taxcivil@usdoj.gov

John K. Mangum
U.S. Attorney's Office
John.mangum@usdoj.gov

Donald S. Reay
Miller Reay & Associates
donald@reaylaw.com
donald@utahbankruptcy.pro

Samuel Alba
Richard A. Van Wagoner
James S. Judd
Snow, Christensen & Martineau
sa@scmlaw.com
ray@scmlaw.com
jsj@scmlaw.com

/s/ Melissa Aguilar

04233.00157