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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  <b>UNITED STATES' RENEWED MOTION TO COMPEL TODD ANDERSON TO PRODUCE DOCUMENTS</b>  Judge David Nuffer Magistrate Judge Evelyn J. Furse
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Pursuant to this Court's order denying without prejudice the United States' motion to compel Todd Anderson to produce certain documents, the United States renews that motion in

part.<sup>1</sup> Specifically, the United States seeks documents that were previously identified as exhibits G through O in Mr. Anderson’s initial response to the United States’ subpoena for the production of documents.<sup>2</sup> On the “Defendants’ Supplemental Privilege Log,”<sup>3</sup> those documents are identified in rows 24 through 32 (Bates numbers Anderson 162 through Anderson 222). Further, because the Supplemental Privilege Log states that certain additional documents are not privileged, or are only partially privileged, the United States moves to compel production of those documents.<sup>4</sup>

Defendants have waived any attorney-client privilege or other protection from disclosure in litigation with respect to these documents. A client’s voluntary disclosure of documents otherwise protected by the attorney-client privilege – especially to induce another person to believe that the client’s actions or statements are lawful – breaches the confidentiality of the attorney-client relationship.<sup>5</sup> Such disclosure waives privilege not only as to the disclosed

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<sup>1</sup> ECF Doc. 161 ¶ 3.

<sup>2</sup> ECF Doc. 138; Pl. Ex. 353 at 12-16.

<sup>3</sup> ECF Doc. 161 ¶ 1; Pl. Ex. 454, “Defendants’ Supplemental Privilege Log.”

<sup>4</sup> Pl. Ex. 454 at 9-10, rows 21 through 23 (Bates numbers Anderson 135 through Anderson 161), and at 17-18, rows 36 through 38 (Bates numbers Anderson 232 through Anderson 241). The Supplemental Privilege Log itself identifies all but one of these documents as either not privileged or as partially privileged. In Row 23, however, Defendants assert that a communication from the National Association of Tax Professionals (“NATP”) to Neldon Johnson is privileged. *Id.* at row 23. During the parties’ phone conference to meet and confer on this issue on May 9, 2017, counsel for Defendants did not articulate any privilege that shields communication between a person and the NATP. Counsel for Defendants stated that he would produce 1) documents identified on the log as either not privileged or partially privileged (with redactions, if partially privileged), and 2) would explain the assertion of privilege with respect to the NATP communication or produce it by Friday, May 12. To date, counsel for Defendants has not produced documents or information, or requested an extension of time to do so.

<sup>5</sup> *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989) (“Mr. Bernard willingly sacrificed his attorney-client confidentiality and privilege by voluntarily disclosing the confidential communication to Mr. Treat. Any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege. Mr. Bernard did this in an effort to convince Mr. Treat that the proposed nominee loan was lawful and proper. Mr. Bernard, having revealed the purported conversation between himself and his counsel in an effort to induce Mr.

(continued...)

documents, but also as to documents and information related to the subject matter of the disclosed documents.<sup>6</sup>

Here, RaPower-3 posts the Anderson letter to convince customers that the statements Defendants make in support of the solar energy scheme are true.<sup>7</sup> The letter, which purports 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 Gregory Shepard tells RaPower-3 customers to use the Anderson letter in IRS audits.<sup>9</sup> Yet Todd Anderson had already instructed Defendants to cease and desist using the letter.<sup>10</sup> The documents in rows 24 through 32 on the Supplemental Privilege Log are on the same topics addressed in the letter, were dated within the range of time relevant to both the publicly available Anderson letter and the cease and desist letter, and/or were obtained by RaPower-3 in furtherance of the scheme at issue here.<sup>11</sup>

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(...continued)

Treat to engage in a nominee loan, cannot later claim the protection of the attorney-client privilege. 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.”) (citation omitted); *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998). (“Voluntary disclosure of attorney client communications expressly waives the privilege. The waiver covers any information directly related to that which was actually disclosed.”) (citations omitted).

<sup>6</sup> *Bernard*, 877 F.2d at 1465; *Workman*, 138 F.3d at 1263.

<sup>7</sup> Pl. Ex. 1 at 3-4, 6.

<sup>8</sup> ECF Doc. 132 at 2; Pl. Ex. 23.

<sup>9</sup> Pl. Ex. 283 at 2-3.

<sup>10</sup> Pl. Ex. 353 at 23-24.

<sup>11</sup> *Compare*, e.g., Pl. Ex. 23 at 5 (the Anderson letter plus an email indicating that Anderson sent it to Neldon and Glenda Johnson with an operation and maintenance agreement on November 15, 2010) *with* Pl. Ex. 454 at rows 24 through 32. Further, the documents at rows 30 through 32 are dated in mid- to late October 2010, soon before Anderson sent the letter, which further supports those documents’ connection to the letter itself. *Compare* Pl. Ex.

(continued...)

Further, International Automated Systems, Inc., and RaPower-3, LLC, are expressly relying on the Anderson letter to support their Sixth Affirmative Defense, as are other Defendants.<sup>12</sup> “The attorney-client privilege cannot be used as both a sword and a shield.”<sup>13</sup> By raising an advice-of-counsel defense, a client waives attorney-client privilege regarding what advice he received from that attorney.<sup>14</sup> This waiver permits the opposing party to call the attorney as a witness to challenge the client’s version of events.<sup>15</sup>

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454 at rows 30 through 32 with Pl. Ex. 353 at 13 (noting that the date on the Anderson letter automatically updates) and *id.* at 15, rows M, N, and O (identifying the dates on the documents in Pl. Ex. 454 rows 30 through 32).

<sup>12</sup> *E.g.* ECF Doc. 162 at 2-3; Pl. Ex. 449, IAS’s Supplemental Responses to United States’ First Interrogatories, No. 18, May 3, 2017; Pl. Ex. 450, RaPower-3’s Supplemental Responses to United States’ First Interrogatories, No. 22, May 3, 2017. *See also* Excerpts from Pl. Ex. 411, Shepard’s First Supplemental Response to United States’ First Interrogatories to R. Gregory Shepard, No. 16, May 17, 2016; Excerpts from Pl. Ex. 412, Freeborn’s First Supplemental Response to United States’ First Interrogatories to Roger Freeborn, No. 16, May 17, 2016. *But see* Pl. Ex. 451, Neldon Johnson’s Supplemental Responses to United States’ First Interrogatories, No. 18 (Neldon Johnson “has not personally met with any attorneys in his individual capacity. Any attorneys he has met or spoke with was done in his capacity as an officer or official for IAUS or a manager of another of the Defendant companies.”), May 3, 2017; Pl. Ex. 452, LTB1’s Supplemental Responses to United States’ First Interrogatories, No. 18 (LTB1, LLC, “did not consult with any attorneys or tax advisors regarding any Lens, System, or Component.”), May 3, 2017.

<sup>13</sup> *Sedillos v. Bd. of Educ. of Sch. Dist. No. 1 in City & Cty. of Denver*, 313 F. Supp. 2d 1091, 1093 (D. Colo. 2004) (“A defendant may not “on the one hand claim as a defense that he relied on the advice of his counsel, . . . waiving the attorney-client privilege to support that defense, while at the same time invoking the attorney-client privilege to prevent the plaintiffs from exploring fully the substance and circumstances of that advice.”) (citations omitted); *accord Phillip M. Adams & Assocs., L.L.C. v. Winbond*, No. 1:05-CV-64 TS, 2010 WL 2991065, at \*4 (D. Utah July 27, 2010) (“[A] litigant cannot use the work product doctrine as both a sword and shield by selectively using the privileged documents to prove a point but then invoking the privilege to prevent an opponent from challenging the assertion. Thus, work product protection may be waived by the conduct of a party.”) (quotation and footnote omitted) (Stewart, J.); *see also Salem Fin., Inc. v. United States*, 102 Fed. Cl. 793, 798 (2012) (citations omitted) (“[I]nsofar as the documents at issue contain KPMG’s advice concerning proposed changes in law and the unwinding of STARS, the Court finds that Plaintiff waived the privilege by relying on KPMG’s advice as a defense to IRS penalties. This Court has observed that because the tax practitioner privilege is ‘largely coterminous with the attorney-client privilege,’ waiver of the tax practitioner privilege occurs on the same terms as waiver of the attorney-client privilege. Thus, like attorney-client privilege, where a party waives the tax practitioner privilege as to a particular communication, it also waives the privilege as to all communications involving the same subject matter.”).

<sup>14</sup> *United States v. Evanson*, 584 F.3d 904, 914 (10th Cir. 2009).

<sup>15</sup> *Id.*

This Court has already concluded that Defendants waived privilege with respect to documents that Anderson has produced to the United States to date.<sup>16</sup> Defendants cannot meet their burden to show that they have *not* waived any remaining aspect of privilege regarding the documents the United States now moves to compel.<sup>17</sup>

For all of these reasons, the United States' renewed motion to compel Todd Anderson to produce certain documents should be granted for the documents identified in rows 24 through 32 (Bates numbers Anderson 162 through Anderson 222) of the Supplemental Privilege Log. In the alternative, Defendants should be ordered to produce these documents for *in camera* review so that this Court may decide whether they should be produced to the United States.

Because Defendants have admitted that no privilege attaches to all or part of the documents identified in rows 21 through 23 (Bates numbers Anderson 135 through Anderson 161), and in rows 36 through 38 (Bates numbers Anderson 232 through Anderson 241), they should be ordered to produce the documents, or the non-privileged portions of those documents, immediately and without any need for *in camera* review.

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<sup>16</sup> ECF Doc. 160 ¶ 1; ECF Doc. 132 at 3; *id.* (“Defendants['] own actions have put the advice at issue here and any potential privilege as it relates to the advice has been waived.”)

<sup>17</sup> *In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998); *Dataworks, LLC v. Commlog LLC*, No. 09-CV-00528-PAB-BNB, 2011 WL 66111, at \*1 (D. Colo. Jan. 10, 2011) (“[T]he party asserting the privilege has the burden of proving its applicability and non-waiver.”) (quotation omitted).

**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 conferring by telephone with counsel for all Defendants and counsel for Mr. Anderson on May 9, 2017. The United States agreed not to move to compel invoices identified on the log. Counsel for RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC, and Neldon Johnson agreed to produce documents, and parts of documents, identified as “not privileged” by Friday, May 12, 2017. For the remaining documents identified as privileged and withheld, all counsel discussed the parties’ respective positions on whether Defendants had waived attorney-client privilege with respect to such documents. The parties could not reach agreement and this renewed motion follows.

Dated: May 18, 2017

Respectfully submitted,

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**ATTORNEYS FOR THE  
UNITED STATES**

**CERTIFICATE OF SERVICE**

I hereby certify that on May 18, 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 all counsel of record.

/s/ Erin Healy Gallagher

ERIN HEALY GALLAGHER

Trial Attorney