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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' EXPEDITED
MOTION TO DEPOSE
JESSICA ANDERSON
OUT OF TIME**

Judge David Nuffer
Magistrate Judge Evelyn J. Furse

This Court allowed the United States to take certain fact discovery after the original deadline, June 2, 2017.¹ The United States now respectfully requests permission to depose Jessica Anderson. The most relevant factors are whether the United States “was diligent in obtaining discovery,” “the likelihood that discovery will lead to relevant evidence,” “whether the request is opposed,” and “prejudice to the non-moving party.”²

The Court is familiar with the motions regarding discovery of *Todd* Anderson and communications between him and certain defendants regarding “the Anderson letter.”³ Only on June 23, 2017 (more than a year after discovery began and more than three weeks *after* the fact discovery deadline) did Defendants finally admit attorney-client privilege was waived.

Before June 28, 2017, all indications were that Todd Anderson wrote the Anderson letter and was the primary point of contact regarding the letter.⁴ But on June 28, Neldon Johnson

¹ ECF Docs. 178, 197.

² *Water Servs. v. Zoeller Co.*, No. 2:12-CV-723 TS, 2013 WL 5964457, at *8 (D. Utah Nov. 7, 2013) (Stewart, J.). The other factors are “whether trial is imminent” and “the foreseeability of the need for additional discovery in light of the time allowed for discovery by the Court.” Trial is set for April 2018, and therefore is not imminent. ECF Doc. 205 ¶ 7(f). Similarly, there is ample time until the dispositive motion deadline. *Id.* ¶ 5(b). *Braun v. Medtronic Sofamor Danek, Inc.*, No. 2:10-CV-1283, 2013 WL 30155, at *10 (D. Utah Jan. 2, 2013) (Pead, M.J.), *objection sustained on other grounds*, No. 2:10-CV-1283, 2013 WL 1842290 (D. Utah May 1, 2013) (Shelby, J.). Jessica Anderson is the only remaining person from whom the United States would seek discovery on this topic.

³ ECF Docs. 124, 126, 127, 129, 132, 138, 144, 150, 154, 161, 163, 175, 176, 178 at 3, 197 ¶ 2, 200, 206.

⁴ Pl. Ex. 480 at 1 (“My client, *Todd Anderson*, provided you with an advisory letter *Todd Anderson’s letter* was not, and is not, a complete advisory letter and was only in the ‘rough draft’ stage and was intended to solicit additional information from you during the regular course of representation. Further, *Todd Anderson* did not, and does not, give you permission to use his incomplete letter in any other manner other than for its intended purpose – to solicit additional information to aid *him* in *his* legal analysis.” (emphasis added)); Pl. Ex. 578, letter from Todd Anderson to IRS Revenue Agent Kevin Matteson, June 11, 2013 (“*I* did not have enough information to provide a specific, legal opinion about tax consequences to any specific circumstances. *My* representation of Mr. Johnson and/or RaPower-3 was ended before more details could be provided to *me*. . . . It was never *my* intent that the draft be used for any purpose other than ongoing discussion as to the client’s contemplated business.” (emphasis added)), ECF Doc. 150 at 3 (“Defendants explicitly do not waive the privilege to any conversations they had with *Todd Anderson*”); Pl. Ex. 23 at 5 (Anderson letter sent to Johnson by Todd Anderson).

testified that the author was Jessica Anderson, Todd Anderson's wife.⁵ Her testimony will be highly relevant to the issue of whether Johnson knew, or had reason to know, that his statements about tax benefits he associated with his solar energy scheme were false or fraudulent as to material matters, such as whether the depreciation deduction for solar lenses could offset active income like W-2 wages.⁶

Johnson testified that he met with Jessica Anderson "several times . . . over a period of several months" before he received the Anderson letter.⁷ Johnson "gave her all the contracts" at issue, "gave her everything. She even came out and saw the lenses and everything."⁸ According to Johnson, he and Jessica Anderson "discussed all the tax laws and how . . . she felt about them, what the ramifications were," and how "she felt like they could be applied."⁹ Johnson testified that Jessica Anderson told him that the Anderson letter "was a finished product, that [he] could use it."¹⁰ Johnson testified that, in his mind, the Anderson letter "validated [his] beliefs" that customers who bought his solar lenses could claim depreciation and tax credits.¹¹

⁵ Pl. Ex. 579, Excerpts from Deposition of Neldon Johnson 248:13-257:5, June 28, 2017. "She's the tax attorney." *Id.* 248:13-19.

⁶ 26 U.S.C. § 6700(a)(2)(A); *e.g.* ECF Doc. 95 at 4-13.

⁷ Johnson Dep. 252:2-255:5

⁸ Johnson Dep. 253:24-254:4; *see also* Pl. Ex. 580, Excerpts from Deposition of Todd Anderson 160:5- 164:12, Aug. 4, 2017 (discussing Pl. Exs. 574 and 575); *but see* Todd Anderson Dep. 90:12-19.

⁹ Johnson Dep. 254:5-22.

¹⁰ Johnson Dep. 255:9-14; *but see* Anderson Dep. 149:18-152:21, 155:5-158:6.

¹¹ Pl. Ex. 581, Excerpts from Deposition of International Automated Systems, Inc., 130:2-11, June 29, 2017.

But according to Todd Anderson, no later than June 2011, Jessica Anderson simply could not give Johnson the opinions he wanted with the facts he presented.¹² Johnson “became upset because essentially he could not convince Jessica of his view of these tax principles as applied to circumstances.”¹³ Todd Anderson testified that he believed Jessica Anderson wrote the following to Johnson in June 2011:¹⁴

It has always been my belief that your customers who purchase the solar equipment and then turn over the operation of the power generating to a third party are not active participants, such that the income from the business would not be active income. I have been unable to find any way around it I understand you believe that there is a way to draft the contract between the equipment owner and the third party manager in such a way that the income and/or losses will be active. I do not believe that is something I can accomplish for you. . . .¹⁵

Defendants¹⁶ oppose this motion but they cannot articulate any prejudice that they did not cause.¹⁷ Defendants’ waiver of attorney-client privilege with respect to the Anderson letter was effective (at the very latest) on January 21, 2016, when they claimed reliance on advice of

¹² Todd Anderson Dep. 127:23-143:23. Todd Anderson knew of conversations and communications between Johnson and Jessica Anderson because he had overheard parts of them, or talked to Jessica Anderson about her work with Johnson. *E.g.*, Todd Anderson Dep. 118:16-120:21, 127:23-129:23; 183:3-28. For general context on the chronology of events relating to the Anderson letter and other communications between both Todd and Jessica Anderson and Neldon Johnson, see Todd Anderson Dep. 55:1-56:5, 61:6-13, 63:15-71:16, 75:2-82:4, 85:2-143:19; 149:2-164:12; 175:16-178:24. *See also* Pl. Exs. 23, 570-72, 574-76 referenced in this testimony and attached to this motion.

¹³ Todd Anderson Dep. 130:15-25.

¹⁴ Todd Anderson Dep. 136:6-143:3.

¹⁵ Pl. Ex. 582, email from Jessica Anderson to Todd Anderson, June 7, 2011; Todd Anderson Dep. 136:6-143:23.

¹⁶ Counsel for Jessica Anderson also opposes this motion to the extent Defendants oppose the motion, but does not raise any separate objection.

¹⁷ *C.f. Wilcox v. Career Step*, No. 2:08-CV-00998-CW-DBP, 2012 WL 5997199, at *3 (D. Utah Nov. 30, 2012) (Pead, M.J.) (recognizing that a party which has “complied with all discovery obligations” (which these Defendants have not) would suffer some prejudice by extending the discovery deadline, and minimizing that prejudice by allowing only specific, limited fact discovery after the original deadline).

counsel as an affirmative defense.¹⁸ After that date, Defendants should have allowed Todd Anderson to respond promptly and completely to the United States' discovery requests about the Anderson letter. They chose not to.¹⁹ Had the United States received discovery regarding the Anderson letter timely,²⁰ Jessica Anderson would have been timely deposed.

In light of these "compelling, good reasons required by the need to promote justice,"²¹ this Court should grant the United States' motion and order that Jessica Anderson be deposed in Provo, Utah, at a time and date set by the United States upon reasonable consultation with all necessary counsel.

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 emailing counsel for RaPower-3, LLC, International Automated Systems, Inc., LTB1, LLC, and Neldon Johnson on August 7, 2017, requesting their consent to depose Jessica Anderson. Counsel responded on August 8, 2017, and opposed the request. Counsel for the United States responded on August 14, 2017, with specific dates and times to meet and confer to avoid court intervention. Counsel for these Defendants did not respond. Counsel for Jessica Anderson met and conferred

¹⁸ See ECF Docs. 200 and 206 ¶ 1.

¹⁹ E.g., ECF Doc. 124-2, email from Justin Heideman to Stuart Shultz, Jan. 30, 2017 ("My client is not interested in waiving any of the Attorney/Client privilege and anticipates that your client will maintain that in the strictest fashion.").

²⁰ For example, Todd Anderson's subpoena duces tecum response was due on or before August 15, 2016 (*see* Pl. Ex. 571); Anderson's first deposition date was February 17, 2017 (ECF Doc. 124-1); Anderson's second deposition date was April 17, 2017 (ECF Doc. 161 ¶ 2); and Neldon Johnson's first deposition date was May 23, 2017 (ECF Doc. 178 at 2).

²¹ *Lane v. Page*, 273 F.R.D. 665, 667 (D.N.M. 2011).

with counsel for the United States on August 18, 2017, and stated that his opposition to the motion is based solely on Defendants' opposition; he does not oppose this motion for any other reason.

Dated: August 21, 2017

Respectfully submitted,

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**ATTORNEYS FOR THE
UNITED STATES**

CERTIFICATE OF SERVICE

I hereby certify that on August 21, 2017, the foregoing document and its exhibits were 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