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

UNITED STATES OF AMERICA, *Plaintiff*, vs. RAPOWER-3, LLC, *et al.*, *Defendants*.	**MEMORANDUM IN OPPOSITION TO UNITED STATES' MOTION FOR REASONABLE EXPENSES AND ATTORNEYS' FEES ASSOCIATED WITH MOTIONS TO COMPEL** Case No. 2:15-CV-0828 DN Judge: David Nuffer Magistrate Judge Evelyn J. Furse

COME NOW Justin D. Heideman and Christian D. Austin, of the law firm Heideman & Associates, and hereby submit their response to Plaintiff's *Motion for Reasonable Expenses and Attorneys' Fees Associated with Motions to Compel*.

STATEMENT OF FACTS

1. On May 18, 2016, Justin D. Heideman and the law firm Heideman & Associates substituted as counsel for Defendants International Automated Systems, Neldon Johnson, LTB1, and RaPower-3. See DOC 46.
2. On February 14, 2017, Kenneth Birrell, a member of the law firm of Kirton McKonkie, former counsel for Defendants and/or their predecessors in interest or related entities, was

deposed by the Plaintiff. Todd Anderson was also a former attorney for these entities. [See *Deposition of Kenneth Birrell* attached as Exhibit 1].

3. At Mr. Birrell's deposition, counsel Christian Austin, also of the firm Heideman & Associates was present for the Defendants; and Mr. Birrell was represented by attorney Christopher Hill of the law firm Kirton McConkie. [See Exhibit 1 at page 5.]

4. As Mr. Birrell was former counsel and had provided legal advice to Defendants, he potentially possessed information protected by the attorney-client privilege. Accordingly, in an effort to preserve the privilege, and seeking to avoid any appearance of waiver, counsel for Defendants objected to questions which could potentially implicate the privilege, leaving it to the discretion of the witness, and his counsel, whether an answer could be provided without waiving the privilege.

5. For example, when Plaintiff asked Mr. Birrell "[s]o what, Mr. Birrell, did you understand from Mr. Clements in your first contact with him? What did you talk about?" Mr. Hill raised a preliminary objection and stated the following:

> "I need to be sure – raise an objection preliminarily. Ordinarily the question you've asked would be protected by attorney-client privilege. We don't continue to represent the client. We understand that client has separate representation. And we have a duty as the attorneys for that client to maintain that privilege unless and until it has been waived or is not being asserted by that client. And we're not parties to the lawsuit, so we look to counsel for the – our former client to raise the issue of privilege that's going to be raised in this issue."

See Exhibit 1 at pp. 23:4-18.

6. In response, Mr. Austin, who at the time was counsel for the clients referred to by Mr. Hill, stated:

> "Yes, and to the extent that it's appropriate for us to raise it, we do. I don't

> think you're entitled to know about their attorney-client communications. I think that to the extent you're going to question him about an opinion letter, I think that the fact that an opinion letter was issued does not, in and of itself, waive the confidential communications that may or may not relate to the creation or production of the letter, since those are often produced by attorneys for various business purposes.

Id. at pp. 23:19-24:4.

7. Mr. Hill went on to state:

> "We don't take a position either way, whether the privilege is maintained or has been waived. We just need to make sure that the privilege is – is not being asserted in order to permit the testimony to go forward so that we don't –"

Id. at pp. 24:5-9.

8. Mr. Austin interjected and continued:

> "And it is being asserted, and every attorney has a duty to maintain the attorney-client privilege unless it has been waived. The privilege belongs to the client. And regardless of whether or not there's some affirmative representation, I would expect an attorney to understand that the privilege must be maintained unless there's an express waiver. And, for the record, I think you can certainly ask him about the – if you're going to ask him about statements made in an opinion letter, you can certainly ask him questions about those to the extent that they don't encroach upon the privilege, but beyond that I would certainly object."

Id. at pp. 24:10-23.

9. Thereafter, government counsel, rather than explore the basis for the witness' assertion of the privilege, or attempt to craft questions that did not implicate the privilege, simply attempted to compel counsel for Defendants to waive the privilege, or alternatively to have prior counsel violate that privilege.

10. For example, Ms. Healy-Gallagher responded to the foregoing statements by counsel by stating, "Well, Mr. Austin, I'm trying to understand the basis for the

assertion of the privilege." *Id*. at pp. 25:17-19.

11. Mr. Austin thereafter explained the basis of his objection:

> "the communications regarding the reasons, rationales, motivations, thought processes, advice, underpinning the issuance of an attorney opinion letter that may or may not be intended to be made public, as is often done for multiple business purposes, does not render all those communications non-confidential or waive the privilege. If I produce, for example, Miss Healy Gallagher, a contract that doesn't – and I provide it to another party to sign, that does not mean that I can now depose the attorney for the party that drafted the contract and ask them about everything that was discussed in the context of coming up with that proposed contract draft. The work product itself does not waive the privilege with regard to the production of the work product."

Id. at pp. 25:20-26:18.

12. Rather than continue with her questioning of the witness, Ms. Healy-Gallagher thereafter attempted to engage in legal argument of case law, in an effort to coerce counsel for Defendants to agree that the attorney-client privilege had been entirely waived:

> Ms. Healy Gallagher: "I am offering to Mr. Austin United States versus Bernard"
>
> Mr. Austin: "I object to your speech."
>
> Ms. Healy Gallagher: "877 F.2d 1463 from the Tenth Circuit. That's June 7, 1989."
>
> Mr. Austin: "I'm going to object to this entire speech on the record. I would refer you to the Federal Rules of Civil Procedure. Speeches on the record where you make – I don't want to look at it. Speeches on the record, where you make legal argument in an attempt to persuade a witness to breach the attorney-client privilege once an objection has been raised is beyond inappropriate. Please ask your questions to the witness and quit trying to brief a legal issue with me here and now on the record. Totally inappropriate.
>
> Ms. Healy Gallagher: "Let the record reflect Mr. Austin was offered a copy of this opinion, printed out for him to review, and he declined to accept that copy."
>
> Mr. Austin: "Let the record reflect that Miss Healy Gallagher is inappropriately attempting to grandstand in a deposition and waste everyone's time arguing points of law with another attorney in an effort to breach attorney-client privilege once it's

been raised." (emphasis added)

Ms. Healy-Gallagher: "Mr. Austin, it's our position that the defendants have placed the advice of their attorneys at issue in this case, and that waives the attorney-client privilege with response to – or with respect to the memorandum that Mr. Birrell wrote. And in doing that we rely on United States v. Evanson 584 F.3d 904, Tenth Circuit, 2009. I'm offering you a copy of that case now."

Mr. Austin: "Thank you."

Ms. Healy-Gallagher: "Do you have a response?"

Mr. Austin: "Yes, I disagree with your position."

Id. at pp. 33:10-34:10 and 36:6-18.

13. When Mr. Austin would not agree that the attorney-client privilege had been entirely waived, Ms. Healy-Gallagher then indicated that she would stop the deposition to contact Magistrate Judge Wells. While this call was pending, counsel for Defendants made it clear that they were only raising an objection to the extent the questioning called for the disclosure of privileged communications, and that it was up to the witness and his attorney to determine whether an answer could be provided that did not breach the privilege:

Mr. Austin: "We're still on the record. I want to state for the record, I haven't instructed the witness not to answer. This is not my client, and I haven't instructed him not to answer, nor has his counsel. So it's up to the witness to decide whether or not to answer. If the witness decides to answer, then you want to – not to answer, then you want to call Judge Wells? That might make sense, but go ahead and do what you're doing. Otherwise, I will just state for the record that my client objects on the basis of attorney-client privilege. And no – no judge can order my client not to raise the attorney-client privilege." (emphasis added)

Mr. Hill: "On the basis of the objection that has been raised by the former client of Mr. Birrell, as Mr. Birrell's counsel I have a duty to instruct Mr. Birrell not to answer the question that is pending." (emphasis added)

Ms. Healy-Gallagher: "Mr. Birrell, were you going to answer the questions pending?"

Mr. Birrell: "On the advice of counsel, no."

Id. at pp. 38:5-39:1.

14. Specifically, because Defendants did not waive their privilege, counsel for Mr. Birrell instructed Mr. Birrell not to answer the pending question.

15. The questioning continued as follows:

Ms. Healy-Gallagher: "Mr. Birrell, about how many actual conversations did you have with Mr. Clements?"

Mr. Austin: "Objection. Found – or, pardon me, privilege."

Mr. Hill: "Without taking a position as to the application of the attorney-client privilege in this instance or of any contended waiver thereof, the privilege has been asserted by the former client and on that basis I must instruct the witness not to answer the question regarding client communications until the privilege dispute has been resolved."

Ms. Healy-Gallagher: "Mr. Birrell, will you follow the advice of your attorney?"

Mr. Birrell: "I will."

Ms. Healy-Gallagher: "Mr. Birrell, did you get facts and information from Mr. Clements that helped inform your legal analysis for SOLCO?"

Mr. Austin: "Objection. Privilege."

Ms. Healy-Gallagher: "Off the record."

(Discussion off the record.)

Mr. Hill: "Without taking a position as to the application of the privilege, the former client has raised the attorney-client privilege, and on that basis I will instruct the witness not to answer the question."

Ms. Healy-Gallagher: "Mr. Austin, what's the basis for your objection?"

Mr. Austin: "The method and manner of communication between an attorney and

a client, the nature of the information exchanged and their communications, unless waived, is privileged, particularly under circumstances where it is already being argued and may be argued that any – the disclosure of any information that would otherwise be privileged acts as a comprehensive waiver of any and all information relating to a communication or to a provision of advice as it relates to one or more specific issues. Based on that, I think in order to preserve the privilege, it is incumbent upon the party raising the privilege to object to any attempt to breach the attorney-client relationship in communications between the attorney and the client, including, without limitation, the method, manner and basis upon which legal advice is rendered."

Ms. Healy-Gallagher: "Mr. Birrell, in drafting the memorandum did you rely on facts and information given to you by Mr. Clements?"

Mr. Austin: "Again, same objection. Again, the basis thereof being that once it begins – you begin an examination of the foundation for an attorney's provision of legal advice to a client, then it could be argued that the door has been opened with regard to the remainder of the foundation and basis for the provision of that advice and, accordingly, the question, as phrased, is calling for the disclosure of protected attorney-client information."

Mr. Hill: "The problem with this one is that it may or may not be calling for a disclosure. If the answer is no, then it opens a line of questioning that is not privileged or protected. However, if the answer is yes, then it falls within the disputed assertion of privilege without taking a position as to the scope of the privilege, its application or the argued waiver of that privilege. The privilege has been raised as to – with respect to the content of that – the provisional content of the answer to that question, and on the basis of the privilege being asserted, I have to instruct the witness not answer the question."

Ms. Healy-Gallagher: "Mr. Birrell?"

Mr. Birrell: "I will follow the advice of counsel."

Id. at pp. 39:13-43:18.

16. Again, immediately after the above exchange, Ms. Healy-Gallagher asked Mr. Birrell a question that was objected to on the basis of privilege, and again, when Ms. Healy-Gallagher asked Mr. Birrell if he would answer the question, Mr. Birrell responded: "I will follow the advice of counsel." *Id*. at pp. 43:19-44:6.

17. Thereafter, Mr. Birrell continued to follow the advice of counsel in responding to questioning by the Plaintiff, which advice included both instructions not to answer the question, and instruction that the question could be answered notwithstanding any objections. *Id*. at pp. 46:18-19.
18. However, despite the very clear indication by both counsel for Defendants, and counsel for Mr. Birrell, that questions relating to communications between Mr. Birrell and his former client would not be answered; and that Mr. Hill would instruct his client to not answer any such questions based on the attorney client privilege, the United States ceaselessly continued the deposition for several additional hours; repeatedly asking questions that Mr. Birrell instructed his client not to answer.
19. Plaintiff's conduct of insisting on conducting depositions, and engaging in hours of questioning, when it was clear that the questions would not be answered based on the attorney-client privilege, continued for three additional depositions over multiple days and consumed hours of witness and attorney time.
20. Cody Buck, Ken Oveson, and David Mantyla performed auditing, tax planning, and other tax-related work for Defendants.
21. On February 15, 2017, Cody Buck, a former accountant for Defendants, was deposed by the Plaintiff. [See *Deposition of Cody Buck* attached as Exhibit 2].
22. Mr. Buck was represented by counsel, Eric Benson, at the deposition. Mr. Christian D. Austin was also present, appearing on behalf of Defendants RaPower-3, International Automated Systems, LTB1, and Neldon Johnson.

23. During the deposition, the following conversation occurred between Mr. Austin, Plaintiff's counsel Mr. Moran, and Mr. Buck's counsel Eric Benson:

Mr. Austin: "I'm just going to make a statement on the record at this point. Information relating to accountant's advice given related to preparation of tax returns or any other tax advice and communications related thereto are protected by the evidentiary privilege in this case. And my client's do – expressly do not waive the privilege of confidentiality and, accordingly, will object to any questions that seek to breach that privilege, which is not the witness's to waive, but it's the client's."

Mr. Moran: "Mr. Austin, I don't understand what you are saying. I'm not familiar with an accounting privilege. What are you referring to?"

Mr. Austin: "The accountant, tax preparation professional who renders advice related to the preparation of a tax return. ***Any communications that the professional has with the taxpayer related to taxes is privileged to the same extent that the communication would be privileged if it were between an attorney and the taxpayer."*** (emphasis added).

…

Mr. Benson: "So I'll just – for the record, I have no objection so far to this line of questioning, to the extent that a question is asked that elicits any information that touches on attorney-client communications, which we have extensively reviewed based on the audit, and there were some communications that have been pulled because, in an abundance of caution, we determined there were privileged communications. Regarding the more narrow tax preparer privilege, that's, I think, a very, very narrow exception, but I will advise my client to not answer any questions if one of those recognized privileges is implicated. We'll just take on your questioning, Counsel, as far as my advice to my client."

Mr. Austin: "If you want me to quote you from the IRS Restructuring Reform Act of 1988, it states that 'With respect to tax advice, the same common law protections of confidentiality which apply to a communication between a taxpayer and an attorney shall also apply to a communication between a taxpayer and any federally-authorized tax practitioner, to the extent the communication would be considered a privileged communication if it were between a taxpayer and an attorney."

Mr. Moran: "Mr. Austin, you are referring to 26 USC 7525, which several courts have concluded does not cover preparation of tax returns. I'd cite you to Valero Energy Corporation v. United States, 569 F.3d 626."

Mr. Austin: "The authority you're citing – and this is why it's a good idea not to try to debate issues of law in the context of a deposition on the record. The authority you're citing refers to ministerial acts, not to tax advice. Preparation of a tax return, in and of itself, may in many circumstances, not render – or not – may not fall within the protections of provisions cited, but tax advice does. And were it not – were there not something covered by that, Counsel, then it would be surplusage to even include it in the statute. So if you want to have a debate with me about this, that's fine. I'll just put on the record that my clients do not waive the confidentiality of any communications made with the witness in this case as it relates to tax advice and/or opinions regarding the applicability of deductions and/or credits. That, in my view, falls within the protections of the statute and is not merely a ministerial act. And to the extent that the privilege is breached by the witness, then, of course, my clients have remedies available for that."

…

Mr. Moran: "I'm going back on the record. Do you have something you wanted to say?"

Mr. Benson: "Yeah. Do you want to ask a question or do you want – maybe – are we on the record?"

The Reporter: "Yes."

Mr. Benson: "So we've had some discussions about some potential privilege issues that may or may not exist, and it sounds like there could be potential litigation over these issues. So I would like to make a record that I will be instructing my client not to answer any questions that pertain to the representation and/or tax advice that was given to a former client, which is IAS, subject to the determination of these privilege issues at a later date by a federal judge."

Id. at pp. 19:16-20:11, 20:19-22:20, 26:8-23.

24. The questioning then continued after a break and again, the witness followed the legal advice given by his own individual counsel, Mr. Benson:

Mr. Moran: "Mr. Buck, before our break you mentioned a gentleman by the name of Bryan Sorenson?"

Mr. Benson: "Same objection that I just stated on the record."

Mr. Moran: "Are you instruction the witness not to answer?"

Mr. Benson: "Yes."

Mr. Moran: "Mr. Buck, your attorney has instructed you not to answer the question. Are you going to follow that advice?"

Mr. Buck: "Yes, I'll follow the advice of my counsel."
Id. at pp. 27:8-19.

25. As with the Birrell deposition, and despite Mr. Benson's previously stated objections, Plaintiff continued the deposition for over twenty-five (25) additional pages of transcript, and the witness repeatedly was instructed by his personal counsel Mr. Benson not to answer the Plaintiff's. Mr. Buck of his own free will chose to follow Mr. Benson's advice *Id*.

26. Thereafter, Plaintiff conducted two more depositions in which the same objections were raised.

27. On February 16, 2017, Ken Oveson was deposed by the Plaintiff. [See *Deposition of Ken Oveson* attached as Exhibit 3.]

28. Mr. Oveson was also represented by Eric Benson, and again Mr. Austin appeared on behalf of his Defendant clients. *Id*.

29. During the deposition, the following conversation occurred where counsel for the witness again was required to bring up the applicability of a privilege:

Mr. Moran: "Mr. Oveson, in your tax practice at Mantyla McReynolds, did you have occasion to become familiar with a gentleman by the name of R. Gregory Shepard?"

Mr. Oveson: "Yes."

Mr. Benson: "I'd object to any questioning that relates to former clients that were represented by Mantyla, McReynolds and Mr. Oveson. Yesterday there was discussion on the record about the applicability of a privilege. My understanding is that has been confined to 26 United States Code Section 7525. That is a disputed

issue among the parties. It's our understanding that former clients, including Mr. Shepard, International Automated Systems and any of the other defendants in this action which are former clients of Mantyla McReynolds, have not waived the privilege, therefore, without a waiver and until a determination as to the applicability of the privilege in that specific federal statute is determined, I would object to the line of questioning and advise my client not – or instruct my client not to answer any questions relating to the representation of former clients of Mantyla."

Mr. Moran: "And I will clean up one other thing for the record as far as appearance. Counsel for R. Gregory Shepard and Roger Freeborn, Mr. Donald Reay, is not in attendance at this deposition. And I would also note, Mr. Benson is referring to an objection that was made yesterday by Mr. Austin, who is counsel for several defendants but not including R. Gregory Shepard, who this question pertains to."

Mr. Austin: "And I'll just clarify for the record, we don't – I don't represent Mr. Shepard in his personal capacity, however, I do represent the – RaPower3 and IAUS, upon whose behalf everyone in this case is aware Mr. Shepard, from time to time, may have acted."

Mr. Benson: "If I could also add something for the record. We have gotten no waiver from any of these former clients, so we would treat them all in the same fashion."

Mr. Moran: "Mr. Oveson, your attorney has instructed you not to answer the question. I'm going to ask you, are you going to follow his advice?"

Mr. Oveson: "Yes."

Id. at pp. 25:14-27:10.

30. Thereafter the Government continued with the deposition for over twenty (20) additional pages of questions, many of which Mr. Benson objected to and instructed his client not to answer.

31. At one point, the following exchange occurs:

Mr. Moran: "Mr. Oveson, I'm handing you a copy of an exhibit that's already been marked previously with another deponent in this case. That is Plaintiff's Exhibit 136. Plaintiff's Exhibit 136 is labeled Olsen_P&E-1338, and it's a three page document that goes through Olsen_P&E-1430. Mr. Oveson, I direct your attention to the second page. There is an e-mail from Greg Shepard with a cc to ken@mmacpa.com. I believe you testified earlier that is your e-mail address. Is that

correct?"

Mr. Oveson: "Yes."

Mr. Moran: "Mr. Shepard says that he met with a CPA today by the name of Ken Oveson. Do you see that text?"

Mr. Benson: "I would object to any testimony relating to communications or potentially confidential communications between the former client in this case, Mr. Shepard, and anyone with my client at Mantyla McReynolds. This document purports to be an e-mail which looks to me like it does have communications not pertinent to my client's representation. This objection doesn't necessarily concern that. But as to the – I guess the start of the string e-mail, I would object to the admissibility of the document and I would instruct the witness not to offer any testimony describing the nature of those potentially confidential communications."

Id. at pp. 53:17-54:20.

32. The line of questioning by Plaintiff continued and again, after Mr. Benson's advice and instruction, the witness refused to answer many of the questions.

33. Thereafter, and possessing knowledge of the three prior depositions; and before resolving the issue of privilege, Plaintiff elected to depose David Mantyla.

34. On February 16, 2017, following the deposition of Mr. Oveson, David Mantyla was deposed by the Plaintiff. [See also *Deposition of David Mantyla* attached as Exhibit 4].

35. Mr. Mantyla was also represented by Eric Benson at his deposition; and again Mr. Austin appeared on behalf of his Defendant clients. *Id*.

36. During the deposition, the following exchange occurred:

Mr. Moran: "Mr. Mantyla, are you familiar with a gentleman by the name of R. Gregory Shepard?"

Mr. Benson: "At this point I'm going to make a record of the objection that has been made in other depositions that this is a pending issue, specifically Title 26, United States Code Section 7525, and whether or not that confidential – those confidentiality provisions apply to the facts at issue in this case. It's my understanding that that's an issue that is yet to be determined before this court and

until a determination is made, I'm going to instruct my client not to answer any questions regarding Mantyla's cope of their representation with any former clients, including the defendants named in this lawsuit. So I would instruct you not to answer that."

Mr. Mantyla: "So based on the advice of my counsel…"

Mr. Benson: "I decline to answer."

Mr. Mantyla: "I decline to answer."

37. Consistent with the Government's prior conduct, rather than terminate the deposition to obtain a ruling regarding the scope of the privilege, or further exploring the foundation for the witness's refusal to answer, counsel for the United States elected to argue that the privilege had been waived:

Mr. Moran: "And I'll note for the record that Mr. Benson's objection is based on an objection that counsel for Rapower3 and Neldon Johnson and International Automated Systems and LTB1, LLC, made with respect to the – I think he termed it an accounting privilege."

38. Counsel for Defendants responded by again, making it clear that the objection on the basis of privilege extended only to act as a preservation of the privilege to the extent it had not been legally waived:

Mr. Austin: "Well, I disagree with you to the extent you are characterizing the nature of my objection. My objection was simply to note that there are duties of confidentiality owed. It's not really an objection to the form of the question so much as it's an objection I'm putting on the record that my client has not waived privileges that exist."

Mr. Moran: "And I'm noting for the record that Mr. Austin does not represent R. Gregory Shepard."

Mr. Benson: "But we would stipulate for the record that none of these former clients have executed knowing and voluntarily waivers, and until that happens we will proceed in this fashion. Or if you have a court order ordering us to answer, we will follow that." (emphasis added)

Id. at pp. 26:20-28:12.

39. As with the previous three depositions, the questioning by the Plaintiff then continued for twenty additional pages, with the witness declining to answer many of the questions at the advice of his counsel, Mr. Benson. *Id*.

40. On March 23, 2017, Plaintiff filed their Motion to Compel Deposition Testimony of Cody Buck, Ken Oveson, and David Mantyla. See DOC 137.

41. On March 28, 2017, Plaintiff filed their Motion to Compel Deposition Testimony of Kenneth Birrell. See DOC 140.

42. On April 3, 2017 Defendants filed their Response to Plaintiff's Motion to Compel Deposition Testimony of Buck, Oveson, and Mantyla. See DOCS 147 and 148.

43. On April 4, 2017 Defendants filed their Response to Plaintiff's Motion to Compel Deposition Testimony of Kenneth Birrell. See DOCS 150 and 151.

44. On April 12, 2017, the Court held a hearing on the Motion to Compel. The Court did not agree with the United States' argument that the privilege had been "waived in its entirety," and instead ordered that "depositions be taken of defendants on the limited issue of assertion of right to counsel." See Minute Entry DOC 154.

45. In the Court's April 24, 2017 signed Order on Motion to Compel Deposition Testimony of Kenneth Birrell, the Court found that:

> "Mr. Birrell has not waived attorney-client privilege with respect to his communications with his own counsel, Ken Olson. Objections made during the deposition of Kenneth Birrell on February 14, 2017, by counsel for Mr. Birrell on the basis of attorney-client privilege regarding communications between Mr. Birrell and Mr. Olson, are sustained."

46. On July 21, 2017, the Court entered an Order on Plaintiff's Motion to Compel Buck,

Oveson, and Mantyla. See DOC 209.

47. In its ruling, the Court agreed with counsel for Defendants that the tax-advice privilege protects "communications between a taxpayer and a federally authorized tax practitioner when the attorney-client privilege would protect the same communications if made by a taxpayer to an attorney." *Id.*

48. The Court went on to rule, however, that under the circumstances Messrs. Buck, Oveson, and Mantyla could testify regarding tax advice rendered to Defendants without breaching the privilege because "it intended the disclosure of the information to outside parties." *Id.*

ARGUMENT

On or about February 14, 2017, the United States took the deposition of Kenneth Birrell, in this case. Mr. Birrell is former counsel for Defendants and/or their predecessors in interest or related entities; Todd Anderson was also a former attorney for these entities. Also deposed were Cody Buck on February 15, 2017; and Ken Oveson, and David Mantyla on February 16, 2017. Mr. Buck, Mr. Oveson, and Mr. Mantyla performed auditing, tax planning, and other tax-related work for these parties.

During Mr. Birrell's February 14, 2017 deposition, counsel for the United States repeatedly asked numerous questions that unambiguously sought disclosure of information presumptively protected by the attorney-client privilege. In response to the instruction of the ***witnesses' counsel*** not to answer, counsel for the United States explained that it was the United State's position that the unauthorized production of certain documents by the deponents operated as a blanket waiver of any and all attorney client privilege as to all subjects and all matters, including without limitation communications between Mr. Birrell as an attorney between his

clients. Based on this theory, counsel for the United States, repeatedly, posed questions such as those demonstrated in paragraphs 5-45 in the statement of facts, *supra*.

In compliance with their professional obligations to their clients, and in order to prevent any implied or actual waiver of the privilege, counsel for Defendants objected to such questions "**to the extent**" the answers would disclose information protected by the attorney-client privilege. The deposition transcript makes it plain that at no time did counsel for Defendants instruct Mr. Birrell, not to answer a question. Indeed, Mr. Birrell was represented by his own legal counsel. It was Mr. Hill, counsel for Mr. Birrell, who made the decision to instruct his client not to answer. Presumptively the deponents legal counsel issued that instruction because they determined the answer would disclose information protected by the attorney-client privilege. It was the duty and obligation of Mr. Birrell and his counsel, not Defendants' counsel, to determine whether a privilege applied and whether a question could be answered without breaching the privilege.

Likewise, during the depositions of Messrs. Buck, Overson, and Mantyla, counsel for Defendants raised an objection to the disclosure of communications that would be covered by the tax-preparer privilege, specifically identifying this as communications that "would be privileged if it were between an attorney and the taxpayer." This objection was limited by its terms to such protected communications, and only in response to questions that could potentially elicit such information. As with the deposition of Mr. Birrell, the decision as to whether an answer to the questions posed by Government counsel could be answered without running afoul of the privilege was left entirely within the discretion of the deponent and his counsel, and it was counsel for the deponents who instructed them to answer or not.

Of course, the context of the event does not conclude at this point. Specifically, and despite the apparent fact that that the deponents and/or their attorneys believed the information sought by the United States was protected by the attorney-client privilege, the United States refused to terminate the depositions, or to seek guidance from the Court regarding any alleged waiver of the privilege. Nor did the United States elect to seek a protective order (as is required by Fed. R. Civ. P. Rule 26(c)) based on any alleged impropriety on the part of Defendants' regarding the objections raised to the Government's questions "to the extent" they requested disclosure of information protected by the attorney-client privilege.

Instead, counsel for the United States insisted on continuing to question the deponents for hours, over the course of multiple days, and continued to seek information that the deponents and their attorneys had plainly determined were embraced by the attorney-client, or tax-preparer, privilege; which questions of course could not be answered without invading said privilege. As a consequence, the attorneys for Defendants, the attorneys for the witnesses, and the witnesses themselves were needlessly, and pointlessly, subjected to hours of time and expense in unproductive deposition questioning, resulting in harassment, and vexatious litigation tactics.

Following the depositions, the United States filed a discovery motion seeking to compel the deposition testimony of Mr. Birrell. Critical to this Court's analysis is the fact that, the motion did not seek to compel Defendants to waive the attorney-client privilege, or seek a ruling that the Defendants did not have the right to object to questions that invaded that privilege. Rather, the motion argued that based on the disclosure of certain documents, including a memorandum letter drafted by Mr. Birrell, Defendants had ***entirely*** waived the privilege in all of its particulars. Based on this legal theory, the United States argued that Mr. Birrell should be

compelled to answer any and all of the deposition questions, which they had previously refused to answer on the basis of their individual counsel's instruction regarding the attorney-client, or tax-preparer, privilege.

Likewise, the United States filed a motion to compel the deposition testimony of Messrs. Buck, Oveson, and Mantyla, arguing that the questions posed did not invade the relevant privilege because the pertinent communications would not be privileged if they had occurred between the Defendants and an attorney. Critically, counsel for Defendants had never objected to the disclosure of information that was not privileged, and the United States' motion did not contend that it was entitled to communications that would have been privileged if between an attorney and his client, which was the only disclosure Defendants objected to.

Far from granting the Birrell motion in its entirety, and contrary to the representations of the Government in the instant motion, this Court ruled, after a hearing which lasted over ***six (6)*** hours, that while the privilege had been waived as to the facially apparent information in the produced correspondence and other documents; the waiver was only as to those documents and the information contained therein. Notably, this position was never in doubt, as Defendants' counsel had never maintained that information intentionally produced to third parties would maintain privileged status.

Indeed, the Court expressly stated in its April 24, 2017 Order on Motion to Compel Deposition Testimony of Kenneth Birrell that

> "Mr. Birrell has not waived attorney-client privilege with respect to his communications with his own counsel, Ken Olson. Objections made during the deposition of Kenneth Birrell on February 14, 2017, by counsel for Mr. Birrell on the basis of attorney-client privilege regarding communications between Mr. Birrell and Mr. Olson, ***are sustained***. There shall be no further inquiry into communications between Mr. Birrell and Mr. Olson." (Emphasis added)

Likewise, in ruling on the motion to compel the deposition testimony of Messrs. Buck, Oveson, and Mantyla, the court agreed with *Defendants* that information communicated between a tax preparer and a client was privileged to the same extent that such communications would be privileged if between the client and an attorney. The Court granted the motion only because it determined that under the facts of this case, the information sought by the United States would not have been protected if between the Defendants and their attorney because it was the Court's decision that the parties intended for disclosure of the information to third parties. Defendants had not, at any time, objected to the disclosure of such information, as the objections of counsel were specifically limited to those that would have been privileged if between the client and an attorney. Further, in the Court's April 24, 2017 Order regarding the Motion to Compel Todd Anderson to Produce Documents, the Court denied the United States' Motion without prejudice.

Several months after these determinations by this Court, and following Heideman & Associates' attorney's withdrawal from the case – a withdrawal that occurred without any objection by the government - and at a point when Defendants were represented by new counsel, Defendants decided to stipulate to a blanket waiver of the attorney-client privilege as to the witnesses and information at issue. In short, Defendants determined based on the development of the case at a point well after the issue of privilege had been affirmed that it would be tactically important to agree to the production of information that *was in fact privileged*.

Of course, the United States now seeks to abuse the situation by asserting that they are the "prevailing party" on the previously filed motions to compel, and that Defendants and/or their former attorneys are somehow liable for the costs and attorney fees incurred by the United

States when conducting their vexatious depositions of Mr. Birrell, Mr. Anderson, Mr. Buck, Mr. Oveson, and Mr. Mantyla and thereafter seeking to compel them to testify. Such a warped sense of reality is difficult to comprehend. Plainly stated, when the motion was heard by the Court, and the position argued by Heideman & Associates – as well as the individual attorneys for the deponents – was presented, the Court affirmed the privilege, affirmed that a complete waiver had not occurred, and sustained many of the objections raised. The factual nexus of the Government's Motion to Compel was that Defendants' objections were not properly raised, and that the objections could not be sustained. A subsequent decision, made by entirely different counsel, at an entirely different time and place in the litigation process, to waive a right that this Court previously affirmed does not in *any conceivable way, form or fashion* change the Government's posture to that of victor on their motion to have the court overrule the objections raised. Indeed, the language from the Court's own ruling makes it plain that the objections were sustained, and that the Government position at the time and now, is simply wrong.

What should be disturbing to this Court however, is the fact that the United States cannot have an actual good-faith belief in the propriety of its extraordinary theory. Stated directly, neither the actions of Defendants, nor Defendants' prior legal counsel, were the subject of the United States' original motion to compel. That motion expressly sought an order compelling Mr. Birrell, Mr. Buck, Mr. Oveson, and Mr. Mantyla to testify; **not Defendants or their former counsel from Heideman & Associates**. Further, and perhaps most critically, the United States did not seek, and the Court did not order, the production of information actually covered by the attorney-client privilege. Rather, the Court held that there had been a *limited* waiver of the privilege as to certain previously disclosed documents – a position that Defendants and their

counsel agreed with. Further, this Court did not agree with the United States that the disclosure of the identified documents, by itself, operated as a blanket waiver of the privilege as to all documents and all subjects.

The Court likewise affirmed the existence of the tax professional privilege, and agreed, as stated in the objection of counsel for Defendants, that communications between a tax professional and its client were in fact privileged to the same extent as they would be if between the client and an attorney. The disclosure of such information was all that Defendants ever objected to, and only to preserve said privilege. In granting the United States' motion, the Court did not hold that the privilege was improperly asserted, but only that the questions posed could be answered without invading the privilege. Such a ruling does not render the objection itself invalid, improper, or in any respect sanctionable.

In sum, the Court ordered that Mr. Birrell, Mr. Buck, Mr. Oveson, and Mr. Mantyla answer questions regarding non-privileged information. This order does not now, and did not at the time, contradict any objections raised during the deposition of the witnesses by counsel for Defendants; which objection was that the Government's questions were inappropriate "***to the extent***" they sought information "protected by the attorney-client privilege." Indeed, the Court agreed with counsel's objections, and preserved the right of the deponents to maintain the privilege except where it had been intentionally waived by the knowing disclosure of a document or information to third parties. The later voluntary waiver of the privilege by Defendants, to the extent it has occurred, does not transform the United States into a "prevailing party" in relation to its discovery motion.

The converse framing of this statement helps to emphasize the point argued:

Specifically, the United States' motion presumably only ever sought information **not covered** by the attorney client privilege due to subject matter or waiver by disclosure. Surely, the United States has never contended that it had a right to invade the attorney client privilege in the absence of such waiver by disclosure. To do so would be preposterous. Defendants only objection was as to information that would violate the privilege, and this objection was deemed appropriate by the Court and sustained. Any subsequent waiver by Defendants gave the United States ***more*** information than the United States had previously sought, or was entitled to.

Based on the foregoing, the United States is not entitled to reimbursement of its costs or attorney fees at all; and *certainly not from Defendants or their former counsel*. The objections of counsel for Defendants during the depositions of Mr. Birrell, Mr. Buck, Mr. Oveson, and Mr. Mantyla, and Mr. Anderson were entirely proper, did not instruct, or preclude, the witness from answering; and were only made to the extent the requested information was in fact privileged. To the extent the United States believes the instruction not to answer any particular question, or the decision to heed that advice, was improper, the proper parties to any request for reimbursement of fees and expenses would be counsel for the deponents or the deponents themselves, not attorneys for Defendants, who were merely objecting in order to preserve any existing privilege, and avoid any argument that by failing to object, Defendants had somehow waived any existing privilege. Stated more directly, Defendants' counsel did exactly as good lawyering would dictate. They preserved their client's privilege by making proper objections; that this Court sustained. Arguably, to have done otherwise would be malpractice on the part of Defendants' counsel.

ATTORNEY FEES PURSUANT TO 28 U.S.C. § 1927

Pursuant to 28 U.S.C. § 1927, former counsel for Defendants hereby demand attorney's fees and costs associated with this response. Section 1927 provides the following: "[a]ny attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees. . ." Based upon the entirely groundless nature of the Government's Motion for Fees, it is apparent that the above federal code section should apply in the instant matter; and that Plaintiff should be ordered to personally pay the excess costs, expenses, and attorneys' fees incurred by their Motion. There can be no other reasonable conclusion to this request in light of the fact that Defendants counsel was never even a subject of the Government's motion to compel, was released from the case months ago without objection, and the Court's own ruling demonstrates that the objections made were appropriate and sustained. As asserted above, it is simply impossible to argue that a good faith basis exists to support the Government's position, because the Government's counsel was present, heard the objection, saw that Defendants' counsel did not instruct a witness not to answer, and did not even think it proper to include them in the Motion to Compel. Frankly, it is difficult to even fathom the thought process that would sustain a motion against former counsel in a circumstance such as this; at all. It is particularly troubling here, where the motion to compel was denied, and the parties being compelled are entirely different from those in this motion. Given these plain discrepancy of position, this Court should take a dim view of the conduct engaged; and the plainly vexatious nature of this action should be readily apparent.

CONCLUSION

Based on the foregoing, former counsel for Defendants, Heideman & Associates and Defendants' attorneys Justin Heideman and Christian Austin, respectfully request that the United States' motion be denied in its entirety, and that they be granted their costs and attorney fees incurred in responding to this vexation activity.

SIGNED and DATED this February 27, 2018.

HEIDEMAN & ASSOCIATES
/s/ Justin D. Heideman
JUSTIN D. HEIDEMAN
Former counsel for Defendants

CERTIFICATE OF SERVICE

On February 27, 2018, I hereby certify a true and correct copy of the forgoing **MEMORANDUM IN OPPOSITION** was served on the following:

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