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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*.	**RESPONSE TO UNITED STATES' MOTION TO COMPEL DEPOSITION TESTIMONY OF CODY BUCK, KEN OVESON, AND DAVID MANTYLA** Case No. 2:15-CV-0828 DN Judge: Honorable David Nuffer Magistrate Judge Brooke Wells

Defendants RaPower-3, LLC; International Automated Systems, LLC; LTB1, LLC; and Neldon Johnson, ("Defendants") by and through their counsel of record, Justin D. Heideman and Christian D. Austin, of the law firm Heideman & Associates, hereby submit their response to Plaintiff's Motion to Compel Deposition Testimony of Cody Buck, Ken Oveson, and David Mantyla. As an initial matter, the Defendants dispute that the United States has made a good faith effort to confer or attempt to confer with the Defendants. Further, the legal issues raised in

Plaintiff's Motion to Compel Deposition Testimony of Cody Buck, et al., cannot be adequately addressed in only 500 words. As for the substance of the Plaintiff's Motion to Compel, the Defendants oppose it on the grounds described herein.

I. Background

1. Buck, Oveson and Mantyla are Certified Public Accountants.
2. On February 15-16, 2017, the United States conducted depositions of Buck, Oveson and Mantyla in which the United States asked these three individuals to divulge certain confidential information.[1]
3. A dispute arose on the record as to the scope of the privilege covering the answers to these questions, which precipitated Plaintiff's Motion to Compel.
4. During deposition, Plaintiff asserted that no privilege existed, and attempted to argue case law on the record in front of the witness.
5. Defendants assert that Plaintiff attempted to persuade the witness that no privilege existed.
6. After the Defendants invoked their privilege, and identified the grounds upon which they asserted the privilege, Plaintiff proceeded to ask questions which Plaintiff knew, or reasonably should have known, were covered by the scope of the asserted privilege.

[1] See, e.g., Deposition of Cody Buck ("Buck Tr."), 18:18-29:14, 30:5-10, 30:20-31:1, 32:25-33:9, 35:12-41:22;42:9-46-17; Deposition of Kenneth Wayne Oveson ("Oveson Tr."), 25:14-29:24, 30:14-31:10, 34:4-35:9, 43:25-69:1; Deposition of David Mantyla ("Mantyla Tr."), 26:20-48:11.

7. Despite this Court's admonitions regarding relentless questioning after a privilege has been asserted,[2] Plaintiff was determined to keep the Witnesses in deposition for multiple hours, for no apparent purpose other than to repeatedly ask those questions for which a privilege had already been asserted.

II. Argument

Plaintiff now asks this Court for a blanket order allowing Plaintiff to ask any and all questions they see fit. It would be improper for this Court to grant such a broad motion. The Court should deny Plaintiff's motion because Defendants RaPower-3, IAS, Inc., LTB1, LLC, and Johnson have asserted a "tax advice" privilege granted to them under 26 U.S.C. §7525, and no Defendant in this matter has waived this privilege.

1. The Information Sought by Plaintiffs is Covered by the Tax Advice Privilege.

The Plaintiff seeks privileged information from the witnesses. The Internal Revenue Code provides a framework which makes certain communications privileged if made between federally authorized tax practitioners and taxpayers. The statute reads:

> "With respect to tax advice, the same common law protections of confidentiality which apply 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."
>
> 26 U.S.C. §7525(a)(1).

[2] See, e.g., Dock.132, p.3 ("Perhaps the descriptions are inadequate under the Federal Rules, but if not, continued questioning into the nature of the withheld documents may run afoul of the asserted privileges. Thus any questioning… should proceed with caution".)

The Tenth Circuit has articulated the law of attorney-client privilege as follows: "The attorney-client privilege protects 'confidential communications by a client to an attorney made in order to obtain legal assistance from the attorney in his capacity as a legal advisor.'" *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir.) (Quotations omitted); *See also Fisher v. United States*, 425 U.S. 391, 403, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976). In Utah, the rule of attorney client privilege is also governed by Utah Rules of Professional Conduct 1.6, the relevant portions of which state:

> "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, [or] the disclosure is impliedly authorized in order to carry out the representation[.]"

In interpreting §7525, courts in other jurisdictions have applied their local rules governing attorney-client privilege, supplanting the role of the attorney with that of the federally authorized tax practitioner. *See, e.g. United States v. Arthur Andersen, L.L.P.*, 273 F.Supp.2d 955, 957-58 (N. D. Ill. 2003).

2. Each Deposed Witness is a Federally Authorized Tax Practitioner.

As a threshold matter, each of the three witnesses at issue is a Certified Public Accountant (CPA), and is therefore a federally authorized tax practitioner.

"Federally authorized tax practitioner" means "any individual who is authorized under Federal law to practice before the Internal Revenue Service if such practice is subject to Federal regulation" under 31 U.S.C. §330, which is an act giving the Treasury authority to publish rules governing practice before it. *See* §7525(a)(3); 31 U.S.C. §330. Notably, the IRS itself has established rules allowing CPAs to practice before it. 31 C.F.R. §10.3(b). Section 10.3(b) states: "**Who may practice. …** *(b) Certified public*

accountants. Any certified public accountant… may practice before the Internal Revenue Service,"[3] and even appreciates, verbatim, **the same rights as an attorney** to practice before the IRS.[4]

For this reason, the witnesses' clients have the right to assert an evidentiary privilege covering any information relating to their representation by their CPAs, and in particular with respect to any communications "made in order to obtain [tax assistance] from the [federally authorized tax practitioner] in his capacity as a [tax] advisor." *See* 616 F.3d at 1182; 26 U.S.C. §7525.

In Plaintiff's motion, Plaintiff cites *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999). Unfortunately, Plaintiff misinterprets the case to argue that no such privilege applies. The United States erroneously asserts that the privilege "does not apply to non-lawyer practitioners doing non-legal work." In reality, *Frederick* is unhelpful to the Plaintiff's argument. That court did not apply §7525, because (1) in *Frederick*, communications were made with an actual attorney; and (2) even if the communications were made to a tax advisor, the communications were made **before the statute was made effective**. *United States v. Frederick*, 182 F.3d 496, 502 (7th Cir. 1999).

The current case is distinguishable from *Frederick*. In *Frederick*, the taxpayer hired an attorney to perform ministerial tax preparation work, in the hopes that it would "throw[] the cloak of privilege" over otherwise non-privileged activities. *See Id.* The dispositive factor in *Frederick* was the character of the work itself, and not the title of the person performing the work. By contrast, in this case, the Defendants hired Federally Authorized Tax Practitioners to perform **non-ministerial** activities. To wit, the witnesses were hired to render professional opinions on tax implications.

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[3] 31 C.F.R. §10.3(b) (emphasis in original).

[4] *Compare Id.* at §10.3(a).

Further, the Court notes that the privilege applies to "a nonlawyer who is nevertheless authorized to practice before the Internal Revenue Service." *Id.* In the instant case, this Court should determine that the tax advice privilege applies to CPAs, and that because Buck, Oveson, and Mantyla are CPAs, the privilege applies to communications between Defendants and Buck, Oveson, and Mantyla.

3. The Information Sought by the Plaintiff Arose Out of Defendants Seeking Privileged, Non-Ministerial Tax Advice.

The second basis the United States offers for their motion is that the kinds of services performed by the CPA witnesses are "non-legal." In fact, the opposite is true. The information Plaintiffs seek is legal in nature and as such, is confidential.

The *Frederick* court implicitly accepted that issues of statutory interpretation and case law may apply throughout the course of an audit, when it clarified that "If… the taxpayer is accompanied to the audit by a lawyer who is there to deal with issues of statutory interpretation or case law that the revenue agent may have raised in connection with his examination of the taxpayer's return… the lawyer is doing lawyer's work and the attorney-client privilege may attach." *See* 189 F.3d at 502.The effect of §7525 would be to create a privilege under the same circumstances, except where the lawyer is replaced by a tax professional. The Seventh Circuit has also explained that even though accounting advice is not privileged regardless of who gives it, a claim under §7525 may be successful if "the advice given was… legal advice." *Valero Energy Corp. v. United States*, 569, F.3d 626, 630 (7th Cir. 2009).

The more instructive case here is *United States v. Arthur Andersen, L.L.P.*, 273 F.Supp.2d, 955 (N. D. Ill. 2003). *Arthur Andersen* involved anonymous intervenors in a lawsuit between the United States and a tax firm. The United States requested the identities of all people involved in an allegedly abusive tax shelter, and the intervenors successfully asserted that their identities were privileged under

§7525. 273 F.Supp.2d, at 960. The Court applied a six-pronged inquiry, asking (1) whether the purpose of the firm's representation was to provide tax advice; (2) whether the clients waived the privilege; (3) whether the documents at issue were communicated or generated for the purpose of preparing the client's tax returns; (4) did the communications occur after the effective date of the privilege; and two other questions particular to the identity of the intervenor, and which are not applicable here. It was "abundantly clear" from the court's review that the role of the tax firm was to provide tax advice to the intervenors with respect to their particular transactions. *Id.* at 959.

The Seventh Circuit focuses on whether the work being done is legal work in some fashion, including whether the work "implicates issues of statutory interpretation or case law". *See* 189 F.3d at 502; 569 F.3d at 630. The documents in *Frederick* and *Valero* contained information generally gathered to facilitate a tax return, and the documents in *BDO* contained a "no warranty" provision explicitly disclaiming them as legal advice. By contrast, here Defendants sought professional opinions from their accountants on the application of tax codes, and regulations, to *prospective* transactions. Buck, Oveson, and Mantyla were hired to research, and analyze, potential tax implications. They performed "purely auditing services" as opposed to ministerial tax preparation work. "The audit services is [sic] *establishing opinions* on financial statements." Buck Tr. at 12:4-5 (emphasis added). All of these things fall squarely within the realm of rendering tax advice, and they more closely resemble privileged legal work than non-privileged ministerial work at issue in *Frederick* and *Valero*. Applying all relevant considerations including the *Andersen* factors, the purpose of the Mantyla McReynolds' representation was to provide tax advice; said tax advice was unrelated to tax preparation; and Defendants have never waived their privilege. Of note is the fact that all such communications occurred **after** the enactment of the statute.

This Court should apply Utah's robust attorney-client privilege doctrine, and decide that the CPA

witnesses in this case were engaged in the activity of rendering tax advice that would be privileged if it had come from an attorney.

4. The Communications Were Made in Confidence and Defendants Did Not Waive Privilege.

The Defendants had an expectation of confidence in their communications with the witnesses. Under Utah Law, any "information relating to the representation of a client" is confidential, unless it is necessary to disclose that information through the scope of representation.

The attorney-client privilege exists "to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). "The… privilege rests on the need for the advocate and counsel to know all that relates to the client's reasons for seeking representation if the professional mission is to be carried out." *Id.* "The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 390. In enacting §7525, Congress sought to extend these same policies to the discussion of taxes with a tax professional.

The tax opinions, and all research done by Mantyla McReynolds, were never intended to be disclosed to any third party. The discussions were investigatory in nature, and undertaken to determine whether the Defendants could engage in solar lens transactions.

Further, there has been no waiver, either express or implied, over the confidential information Plaintiff seeks to discover in the depositions of Buck, Oveson and Mantyla. As for documents specifically intended for disclosure, such as any documents filed with the SEC or the IRS, these documents speak for themselves. All conversations that were legal in nature and which surround the creation of those

documents are still confidential, even if the information on the documents themselves is not.

5. The Exception to the Privilege Does Not Apply.

Finally, Plaintiff seeks to invoke a statutory exception to the §7525 privilege. The statutory exception reads:

"The privilege under subsection (a) shall not apply to any **written** communication which is…" between a tax professional and in connection with the promotion of a tax shelter. 26 U.S.C. §7525(b) (emphasis added). The Plaintiff's reliance on this exception is erroneous, because it applies only to written communications. By contrast, the Plaintiff repeated asked the witnesses to verbally comment on the substance of documents, and the Plaintiff is currently seeking an order compelling the witnesses to answer these questions, rather than providing documents.

In summary, the witnesses are federally authorized tax practitioners. Defendants engaged the witnesses to render tax advice. Defendants had an expectation of confidentiality pursuant to the Utah and tenth circuit rules of attorney-client privilege as applied to tax practitioners. Defendants did not waive the privilege, and no exception applies that would allow the plaintiff to compel deposition testimony. For all of the offered reasons, Plaintiff's Motion to Compel should be denied.

SIGNED and DATED this 3rd day of April, 2017.

HEIDEMAN & ASSOCIATES

/s/ Justin D. Heideman
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Attorney for RAPower-3, LLC, International Automated Systems, Inc., LTB1, and Neldon Johnson

CERTIFICATE OF SERVICE

On this 3rd day of April, 2017, I hereby certify a true and correct copy of the forgoing **RESPONSE TO UNITED STATES' MOTION TO COMPEL DEPOSITION TESTIMONY OF CODY BUCK, KEN OVESON, AND DAVID MANTYLA** was served on the following:

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