Moran, Christopher R. (TAX)

From: Moran, Christopher R. (TAX)
Sent: Thursday, December 01, 2016 3:53 PM
To: 'Tate Bennett'; 'Donald Reay'; 'Justin Heideman'
Cc: Healy Gallagher, Erin (TAX); Hines, Erin R. (TAX); 'Travis Sorenson'; Christian Austin
Subject: USA v. RaPower3, et al.: Letter regarding Todd Anderson's subpoena response
Attachments: 2016 12 01 Letter to Tate Bennett & Opposing Counsel.pdf; 2016 12 01 Attachment to Bennett Letter- Freeborn supplemental response to US first set of interroga.PDF; 2016 12 01 Attachment to Bennett letter- Shepard supplemental response to US first set of interrogat.PDF; Exhibit 1 to Letter to Tate Bennett & Opposing Counsel.PDF; EX00023.pdf; Exhibit 49.pdf

Dear Counsel:

Please see the attached letter concerning Todd Anderson’s response to the United States’ subpoena in the subject case.

Thank you,

Chris Moran

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Tax Division
U.S. Department of Justice
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Please reply to: Civil Trial Section, Central Region
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CDC:RSC:CRMoran
DJ 5-77-4466
CMN 2014101376

December 1, 2016

VIA EMAIL

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Re: *United States v. RaPower-3, LLC, et al.*
Case No. 2:15-cv-00828-DN-BCW

Dear Counsel:

As you are aware, the United States issued a subpoena for documents to Todd Anderson of the Anderson Law Center in Delta, Utah. The subpoena seeks documents related to a letter addressed to "Potential RaPower-3 Customer" and purportedly written by Mr. Anderson, which appears on the RaPower-3's website[1] (the "Anderson letter"). The Anderson letter is dated August 8, 2012 and addresses "four possible ways to reduce tax liability" from purchasing "RaPower-3 energy equipment."

[1] See http://www.rapower3.com/tax-benefits, ("Click here to see our tax attorney letter for from Anderson Law Center, P.C." (*sic.*)), last accessed December 1, 2016; Pl. Ex. 23 (copy attached to this letter).

The United States understands that the "RaPower-3 energy equipment" referenced in the Anderson letter are the solar lenses that are at issue in this case. (*See* ECF Doc. 2 ¶¶ 17-34.) The parties agree that discovery is needed on statements made by Defendants regarding their solar lenses and any related federal tax deductions, credits or benefits they promote. *See* 26 U.S.C. § 6700(a)(2)(A); (ECF Doc. 2 ¶¶ 157-198; ECF Doc. 35 ¶ 2(a)). Discovery is also needed on what Defendants knew, or had reason to know, about the truthfulness or falsity of the statements they made about the federal tax consequences of participating in their solar energy scheme. (ECF Doc. 2 ¶¶ 76 & 77.) Defendants claim that they relied on the advice of attorneys, including Mr. Anderson, to support their statements. (ECF Doc. 22, Sixth Defense, ECF Doc. 23, Sixth Defense; *See also* Gregory Shepard and Roger Freeborn responses to United States' Interrogatory No. 16 (copy attached to this letter). A party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1).

Accordingly, the United States seeks to discover information related to the circumstances under which this letter was written and information that was conveyed between Mr. Anderson and the Defendants in this case. No Defendant filed a motion to quash the subpoena. As discussed below, Mr. Anderson produced some documents and withheld others because they "are or may be privileged." The purpose of this letter is to explain why the United States disagrees with Mr. Anderson's characterization: (1) invoices and related financial information are not protected; (2) any privilege that may have attached has been waived, and (3) the attorney work-product doctrine does not apply because the documents were not prepared in anticipation of litigation, and even if it did apply, the protection has been waived. We invite Mr. Anderson and the other parties to further discuss this matter in hopes of resolving the matter by December 16, 2016, without Court involvement.

I. TODD ANDERSON'S PRODUCTION

a. The documents Mr. Anderson produced demonstrate that he was involved in preparing the Anderson letter and that it is being used in an unauthorized manner.

On August 15, 2016, the United States received Mr. Anderson's response to the United States' subpoena through his attorney, Mr. Tate Bennett. (Exhibit 1 to this letter.) Mr. Anderson produced 5 responsive documents (Exhibits A – E, to Anderson production). Mr. Anderson's production included two documents, one of which Mr. Anderson describes as a document he downloaded from the RaPower-3 website on October 11, 2013 (Exhibit D to Anderson production), and a "draft letter [that] was never signed or delivered to any person as being a final draft with the contents being endorsed by the Anderson Law Center" (Exhibit E to Anderson production). Exhibits D and E to the Anderson production appear nearly identical to the Anderson letter that is the basis for the United States' subpoena to Mr. Anderson. Mr. Anderson's production also included correspondence between Mr. Anderson and the IRS (Exhibits A & B to the Anderson production) and a "cease and desist letter," dated June 30, 2013, to Neldon Johnson and RaPower-3, sent on Mr. Anderson's behalf (Exhibit C to the Anderson production).

In Mr. Anderson's June 11, 2013 letter to the IRS (Exhibit B to the Anderson production), Mr. Anderson describes the Anderson letter as "a working draft regarding generic tax descriptions of tax regulations." Mr. Anderson noted that he "did not have enough information to provide a specific, legal opinion about tax consequences," and that his representation of Neldon Johnson and/or RaPower-3 ended before he learned adequate information to render a legal opinion. Mr. Anderson claims he never signed the Anderson letter and that it was only meant to elicit information from RaPower-3 and its principals.

In the "cease and desist letter," (Exhibit C to the Anderson production) Mr. Anderson's attorney, Mr. Tate Bennett, advised Neldon Johnson and RaPower-3 that the Anderson letter was a "rough draft" intended only to solicit information from RaPower-3 to aid Mr. Anderson's legal analysis. Mr. Bennett observed that the Anderson letter was being used in an unauthorized manner, *i.e.*, being displayed to third parties, which was contrary to the letter's intended purpose. The "cease and desist letter" demanded that Neldon Johnson and RaPower-3 "immediately cease the use and distribution of the advisory letter," among other demands. The Anderson letter remains on RaPower-3's website to the present day.

The documents Mr. Anderson produced demonstrate that he was, at some point, retained by RaPower-3 and/or Neldon Johnson to give advice on possible tax ramifications of the RaPower-3 solar lens program and that, in Mr. Anderson's opinion, the Anderson letter on RaPower-3's website is being used for purposes it was not intended.

b. Mr. Anderson withheld responsive documents because they "are or may be privileged."

As discussed above, it is clear that at some point RaPower-3 and/or Neldon Johnson engaged Mr. Anderson to give advice on possible tax ramifications of the RaPower-3's solar lens program. A copy of the Anderson letter appears on the RaPower-3 website and contains statements about the federal tax implications of the solar lenses at issue in this case. The exact nature of Mr. Anderson's engagement is unclear, however, in Mr. Anderson's opinion, the Anderson letter on RaPower-3's website is being used for purposes it was not intended.

Mr. Anderson withheld 28 documents because he believes the documents "are or may be privileged" by the attorney-client privilege and/or attorney work product doctrine.

The withheld documents fall into four categories:

1) invoices from the Anderson Law Center to Neldon and Glenda Johnson for legal fees and costs and a communication regarding a returned check (ALC Reference numbers 371, 389, 424, 372, 463, 499, 470 and A);

2) correspondence between Anderson Law Center attorneys and Neldon Johnson (ALC Reference B, N, O, P, Q, R, T & U);

3) documents provided to the Anderson Law Center by Neldon Johnson (ALC Reference C, D, E, F, G, H, I, J , K & L); and

4) attorney notes (ALC Reference M & S).

We disagree with Mr. Anderson's assertions. For the reasons discussed below, each category of documents is either not protected by the privilege or doctrine asserted, or the Defendants have waived any protection that may have applied.

II. THE ASSERTED PROTECTIONS DO NOT APPLY, AND EVEN IF THEY DID APPLY, THEY HAVE BEEN WAIVED.

By enumerating the 28 withheld documents in a privilege log, Mr. Anderson implies that the documents are responsive to the United States' subpoena (*i.e.*, that the documents concern the Anderson letter), but he contends he cannot produce the documents because the attorney-client or attorney work-product doctrine may apply. We disagree for the following reasons: (a) no privilege attaches to invoices; (b) Defendants have publicized the Anderson letter and the legal advice it contains, thereby waiving any attorney-client privilege; (c) all defendants have raised "advice of counsel" as an affirmative defense to the United States' claims against them in this lawsuit, thus opening the door to discovery about the Anderson letter; and d) the attorney work product doctrine does not attach to the Anderson letter because the letter was not prepared in anticipation of litigation, and even if it were prepared in anticipation of litigation, the attorney work-product doctrine has been waived.

a. No privilege attaches to invoices from the Anderson Law Center to Neldon and Glenda Johnson for legal fees and costs (ALC Reference numbers 371, 389, 424, 372, 463, 499, 470, and A).

Mr. Anderson is withholding invoices and a letter regarding non-payment of fees because he believes that they are privileged documents (Category 1.) They are not. Information regarding a fee arrangement is not part of the professional consultation between an attorney and the client and therefore the information is not privileged. *In re Grand Jury Subpoenas*, 906 F.2d 1485, 1492 (10th Cir. 1990); *Wing v. Fulbright & Jaworski LLP*, 2010 WL 1566801, at *2 (D. Utah 2010) (disclosing accounting and disposition of money paid from a client to an attorney does not violate the attorney-client privilege or the work-product doctrine). Because the invoices are not covered by any privilege, all documents in Category 1 should be produced.

b. To the extent attorney-client privilege may have attached to the documents in Categories 2-4, Defendants have waived it.

i. Defendants waived the attorney-client privilege by publicly disclosing the Anderson letter on their website, and have therefore waived any attorney-client privilege related to it.

The attorney-client privilege potentially protects correspondence between Mr. Anderson and his clients, Neldon Johnson and RaPower-3, and documents they provided to Mr. Anderson (Categories 2 & 3). In order to be covered by the attorney-client privilege, a communication between an attorney and client must relate to legal advice or strategy sought by the client. *United States v. Johnston*, 146 F.3d 785, 794 (10th Cir. 1998). That communication, however, must be kept confidential to maintain the privilege. "[C]onfidentiality is the key to maintaining

the attorney-client privilege, a party waives the privilege when he voluntarily discloses to a third party material or information that he later claims is protected." *In re Grand Jury Proceedings*, 616 F.3d 1172, 1184 (10th Cir. 2010). The "confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived." *In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1185 (10th Cir. 2006) (*citing United States v. Ryans*, 903 F.2d 731, 741 (10th Cir.1990)).

We assume, for purposes of this letter, without conceding, that the communications and documents exchanged between Neldon Johnson, RaPower-3 and Mr. Anderson related to facts conveyed in confidence to secure legal advice and/or legal advice that would reveal such facts and therefore are subject to the attorney-client privilege. But neither Neldon Johnson nor RaPower-3 keep the Anderson letter confidential.

The Anderson letter is publically available on RaPower-3's website and is used to assist RaPower-3's customers in claiming depreciation and tax credits on their federal income tax returns. RaPower-3's website informs its customers that they "relied on [Mr. Anderson], who offered [his] research and opinions, to become involved with RaPower-3."[2] RaPower-3 makes no effort to keep information it received from Mr. Anderson confidential. Rather, the opposite is true. RaPower-3 publicizes the Anderson letter and uses the letter to induce customers to purchase lenses and claim tax benefits. Defendant Greg Shepard tells RaPower-3 customers to use the Anderson letter when their tax returns are examined by the IRS. *See* Pl. Ex. 49 from the deposition of Frank Lunn (copy attached to this letter). Any attorney-client privilege that may have applied to the Anderson letter has been waived by Neldon Johnson and RaPower-3.

Because the Defendants waived the attorney-client privilege with respect to the Anderson letter, the remaining question becomes to what extent they have waived the attorney-client privilege for related documents, or in other words, the scope of the subject matter waiver. A client's voluntary disclosure of documents otherwise protected by the attorney-client privilege breaches the confidentiality of the attorney-client relationship and effects a waiver of the privilege not only as to the disclosed documents, but also as to *all documents relating to the subject matter of the disclosed documents*. *United States v. Graham*, 2003 WL 23198792, at *5 (D. Colo. Dec. 2, 2003) (emphasis added) (*citing In re Sealed Case*, 676 F.2d 793, 809, 818 (D.C.Cir.1982). Fed. R. Evid. 502(a) codifies the scope of a privilege waiver. Rule 502(a) provides that disclosure of a privileged communication to a federal office or agency waives the attorney-client privilege with respect to undisclosed communications only if three conditions are met. (1) the waiver must be intentional; (2) the disclosed and undisclosed information and communications concern the same subject matter; and (3) the communications ought in fairness be considered together. Based on the information available to the United States, by waiving the attorney-client privilege with respect to the Anderson letter, the privilege has also been waived with respect to the documents in Categories 2 and 3.

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[2] *See* http://www.RaPower-3.com/#!bonus-depreciation, last visited September 8, 2016.

First, Rule 502(a) includes circumstances where privileged communications or information are disclosed in a federal proceeding or to a "federal office or agency." When a document is made publically available, it is, by default, made available to the entire world, including federal agencies. Thus, by posting the Anderson letter to the RaPower-3 website, RaPower-3 and Neldon Johnson intentionally waived attorney-client privilege with respect to the Anderson letter.[3] *See also* Utah R. Evid. 510(a) (privilege is waived when a privilege holder "voluntarily discloses or consents to the disclosure of any significant part of the matter or communication").

Second, correspondence between Mr. Anderson and his clients, Neldon Johnson and RaPower-3 and documents provided to Mr. Anderson (Categories 2 and 3) relate to the same subject matter as the Anderson letter: whether or not RaPower-3's customers are eligible for certain tax incentives from the purchase of the solar lenses. For example, the title of the withheld documents suggests that they relate to the Anderson letter. These titles include "Executive Summary" (ALC Ref. C), "The Economic Substance Doctrine in the Current Tax Shelter Environment," (ALC Ref. E), "What is the Purpose of a Federal Tax Credit for Renewable Energy," (ALC Ref. F), "RaPower3 Equipment Purchase Agreement," (ALC Ref. G), "Solar Purchase Referral Fee Contract," (ALC Ref. H), "PaPower3 Operation and Maintenance Agreement," (*sic.*) (ALC Refs. I, J, K & L), "Letter Re: Response to Tax Questions Posed" (ALC Ref. N), "Letter Re. Tax and Legal Information regarding RaPower-3 Equipment Purchase," (ALC Ref. O), "Employment Agreement Employment of Neldon P. Johnson by Rapwer-3" (sic.) (ALC Refs. P, Q & R), "Letter re. Response to Questions Posed to RaPower-3, LLC" (ALC Refs. T & U).[4]

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[3] The United States recognizes that a voluntary disclosure is generally only a waiver of the of the communication or information disclosed and that subject matter waiver is reserved for "those unusual situations in which fairness requires a further disclosure of related, protected information, in order to prevent a selective and misleading presentation of evidence to the disadvantage of the adversary." Fed. R. Evid. 502, Advisory Committee Notes, rev. 11/28/2007. As discussed below, this is not a usual situation. Not only are RaPower-3 and Neldon Johnson using the Anderson letter in a manner that is inconsistent with the asserted privilege, but they are also defending against the United States' claims in this case by claiming reliance on the very advice that Mr. Anderson provided.

[4] The only documents with descriptions that do not reflect a clear relationship with the Anderson letter are: "Letter re. Return Check No. 395 (ALC Ref. A), "Email sent from Jessica Anderson to Todd F. Anderson" which is substantially similar to an email that was sent to Neldon Johnson on June 11 2011 (ALC Ref. B), "Patronage Dividends: A Primer" (ALC Ref. D). We request that Mr. Anderson clarify whether these documents relate, in any way, to the Anderson letter or if they involve some other unrelated matter for which the attorney-client privilege applies. If these documents are unrelated to the Anderson letter and are protected by the attorney-client privilege, we will accept Mr. Anderson's representation and withdraw our request for these documents.

Third, the disclosed and undisclosed documents ought, in fairness, be considered together. Mr. Anderson has disavowed the Anderson letter and asked Neldon Johnson and RaPower-3 to stop using it. Notwithstanding Mr. Anderson's request, the letter remains on the RaPower-3 website. The tax advice purportedly contained in the Anderson letter goes directly to the heart of the United States' claims in this case: that the defendants are using the Anderson letter, among many other statements, as part of their solar energy scheme to defraud the United States' Treasury. The letter itself, and any communications related to the letter, also go directly to the question of whether Defendants knew, or had reason to know that their statements to current and potential customers of their scheme were false or fraudulent as to a "material matter" under the internal revenue laws. *See* 26 U.S.C. § 6700(a)(2)(A); *United States v. Hartshorn*, 751 F.3d 1194, 1198 (10th Cir. 2014); (ECF Doc. 2 ¶¶ 157-198). The United States should be permitted to learn the circumstances surrounding RaPower-3's engagement of Mr. Anderson, what information Neldon Johnson and RaPower-3 gave Mr. Anderson, and any advice Mr. Anderson gave that does not appear in the Anderson letter.

Tenth Circuit precedent suggests that a broad waiver of the attorney-client privilege applies in these circumstances. In *United States v. Bernard*, 877 F.2d 1463 (10th Cir. 1989), a bank fraud case, the defendant was accused of making illegal nominee loans. When one borrower asked him if the loans were legal, Bernard told the borrower that he had consulted an attorney. When the Government called the attorney as a witness, the attorney denied ever discussing the loans with Bernard. *Bernard*, 877 F.2d at 1465. The Tenth Circuit held that Bernard had waived the privilege by "voluntarily disclosing the confidential communication" to the borrower. The Tenth Circuit reasoned:

> Mr. Bernard, having revealed the purported conversation between himself and his counsel in an effort to induce Mr. 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.

Id. Here, RaPower-3 and Neldon Johnson revealed their communications with Mr. Anderson in an effort to induce customers to buy solar lenses. Using the attorney-client privilege to prevent discovery of the documents withheld, in this context, is not consistent with the privilege's purpose.

Based on the privilege log Mr. Anderson provided, most of the withheld documents relate to legal advice that Neldon Johnson and RaPower-3 sought from Mr. Anderson relating to the parties' claims and defenses in this case (*i.e.*, the propriety of the tax deductions and credits related to solar lenses the Defendants sell).[5] By disclosing the Anderson letter to the public and

[5] If our understanding is incorrect, and any defendant sought advice from Mr. Anderson on a matter unrelated to the claims and defenses in this case, we will consider withdrawing our request for documents related to such a matter. To be clear: the United States does not seek any (continued...)

advising their customers to use the letter in their IRS examinations, RaPower-3 and Neldon Johnson have waived any attorney-client privilege they may have had with respect to the documents Mr. Anderson has withheld. The documents should be produced.

ii. All Defendants raised reliance on advice of counsel as an affirmative defense to the United States' claims, squarely putting such advice at issue in this case and waiving any attorney-client privilege with respect to such advice.

Even if the Defendants did not waive the attorney-client privilege by disclosing the Anderson letter on their website, they waived the privilege by placing the communication at issue in this case. All Defendants raised reliance on the advice of counsel as an affirmative defense in their answer. *See* Doc. No. 22, Sixth Defense; Doc. No. 23, Sixth Defense. Greg Shepard and Roger Freeborn specifically identified the Anderson letter as tax advice they received related to the solar lenses RaPower-3 sells. *See* Shepard and Freeborn response to United States' Interrogatory No. 16. By raising the advice-of-counsel defense, the Defendants have waived the attorney-client privilege regarding what advice they received, and the United States is permitted to call these attorneys as witnesses to challenge the defenses. *United States v. Evanson*, 584 F.3d 904, 914 (10th Cir. 2009). *See also New Phoenix Sunrise Corp. v. Comm'r*, 408 F. Appx. 908, 919 (6th Cir. 2010) (finding waiver of the attorney-client privilege with respect to a tax opinion letter and "disclosed and undisclosed communications or information concern[ing] the same subject matter" that "ought in fairness ... be considered" with the tax opinion." (citing Fed.R.Evid. 502(a)) when a litigant relied on a tax opinion letter in its claims and defenses in the case.)

For all of these reasons, the documents in Categories 2-4 should be produced.

c. The attorney work-product doctrine does not apply to the Anderson letter, and even if it did, it has been waived.

At its core, the work-product doctrine shelters the mental processes of the attorney, providing a protected area within which he can analyze and prepare his client's case. *United States v. Nobles*, 422 U.S. 225, 238 (1975). Thus, the work-product doctrine potentially implicates Mr. Anderson's notes (Category 4, ALC Ref. M & S). To the extent that Mr. Anderson's notes reflect communications with RaPower-3 or Neldon Johnson, they are non-privileged for the reasons described above in section II.c.

(… continued)

documents related to legal advice that Mr. Anderson gave on any matter not relevant to the issues in this case and Mr. Anderson's letter, Pl. Ex. 23, which appears on the RaPower-3 website.

The attorney work-product doctrine is inapposite to the Anderson letter. The attorney work-product doctrine only prevents disclosure of information that was prepared by the attorney in anticipation of litigation or for trial. *In re Grand Jury Proceedings*, 616 F.3d, at 1184. There is no indication that Mr. Anderson's legal analysis was drafted in anticipation of litigation or trial. Rather, according to Mr. Anderson, RaPower-3 and its principals sought Mr. Anderson's legal advice to induce the public to purchase their lenses. Mr. Anderson considered the letter a "rough draft" and an attempt to solicit information from the Defendants from RaPower-3. *See* Ex. C to the Anderson Production, "Cease and Desist Letter;" Exh. B to the Anderson letter, June 11, 2013 letter to Internal Revenue Service. Furthermore, Mr. Anderson wrote the letter in 2012, over three years before this litigation was filed. Mr. Anderson does not identify any other litigation that was ongoing or anticipated at the time he wrote the letter.

Even if the attorney work-product doctrine did apply to the withheld documents, which it does not, the Defendants waived its protections by publishing Mr. Anderson's letter on the RaPower-3 website to induce customers to purchase solar lenses and by relying on the letter for their claims and defenses in this case. "[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. *Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 704 (10th Cir. 1998). The documents in Category 4 should be produced.

III. CONCLUSION

As stated in the beginning of this letter, the United States is including all relevant counsel in this letter in the interest of a complete resolution to this issue without resorting to filing a motion with the Court. However, as discussed above, case law from the Tenth Circuit makes it abundantly clear that the vast majority of documents Mr. Anderson has withheld – if not all of them – are neither privileged nor protected by the attorney work-product doctrine. In hopes of resolving this matter, we suggest that all Defendants provide written notice to Mr. Anderson that they waive any attorney-client privilege or attorney work-product protection and expressly direct him to produce the subpoenaed documents. If Defendants choose not provide such notice, we request that they identify why they believe the United States' position is incorrect, by explaining why any specific withheld document is privileged or protected, or why the authorities cited above are inapposite.

We are, of course, willing to discuss these issues with all interested parties in a conference call. If, however, these matters are not resolved and all appropriate documents are not produced to the United States by December 16, 2016, we will file an appropriate motion with the Court. Please contact us once you have had a chance to review this letter and discuss how you would like to proceed.

Sincerely yours,

/s/ Christopher R. Moran

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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, *et al.* Defendants.	**RESPONSE TO SUBPOENA TO PRODUCE DOCUMENTS AND CLAIM OF PRIVLEGE** Case No. :15-cv-00828-DN-BCW

Todd Anderson, and the law firm and attorneys of Anderson Law Center, P.C., by and through the undersigned counsel, hereby respond to the subpoena issued by Erin R. Hines, and served on or about August 12, 2016, as follows:

Pursuant to Fed. R. Civ. P. 45(E)(2)(A), Respondent claims that some of the documents are or may be privileged (attorney/client privilege or attorney work product), as more fully set forth below.

DOCUMENTS PROVIDED

Respondent believes the following documents are either not privileged, or that privilege has been waived by the client publishing the documents to its website.

Document Description	Document Date	Marked as Attachment	Notes
Fax from IRS	2013 Feb 26	A	Three page fax to Todd Anderson from Department of Treasury, Internal Revenue Service. Fax includes presumably a screen shot from the Rapower3 website of a substantially similar but modified version of the draft letter "Re: Potential Tax Advantages." Notable

Exhibit
1

			differences between the screenshot and the actual ALC draft letter are that the letterhead is removed, and the proposed signatory is "Law Center, P.C.," excluding Anderson.
Letter to IRS	2013 Jun 11	B	Response Letter from Todd Anderson to IRS agent
Cease and Desist Letter	2013 Jun 30	C	Letter from ALC's attorney, Tate Bennett, to Neldon Johnson and Rapower 3
File including document "Re Potential tax advantages"	2012 Aug 08	D	Document downloaded by ALC from Rapower3 Website on **2013 Oct 11**, but the date on the document is 8/8/12.
Draft Letter "Re: Potential tax advantages"		E	Draft letter prepared by ALC. The document, as provided, is dated July 27, 2016. The document as stored with ALC is in Microsoft Word format, is fully modifiable, and includes an automatically updating date field. The draft letter was never signed or delivered to any person as being a final draft with the contents being endorsed by Anderson Law Center, P.C. or its attorneys ("ALC"). The digital Word version can be provided upon further request.

DOCUMENTS NOT PROVIDED

Pursuant to Fed. R. Civ. P. 45(E)(2)(A), responder claims that the following documents are or may be privileged (attorney/client privilege or attorney work product), and expressly makes such claim. Responder provides the following summary, which is intended to describe the nature of the withheld documents, communications or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim. All or part of the following can and will be provided upon order of the Court.

Document Description	Document Date	ALC Reference	Notes
Invoice 371 to Neldon and Glenda Johnson: for legal fees and costs		371	
Invoice 389 to Neldon and Glenda Johnson: for legal fees and costs		389	
Invoice 424 to Neldon and Glenda Johnson: for legal fees and costs		424	

Invoice 372 to Neldon and Glenda Johnson: for legal fees and costs		372	
Invoice 463 to Neldon and Glenda Johnson: for legal fees and costs		463	
Invoice 499 to Neldon and Glenda Johnson: for legal fees and costs		499	
Invoice 470 to Rapower-3: for legal fees and cost		470	
Letter Re: Return Check No. 395 (Microsoft Word, modifiable file)	2011 Jan 15 (approx.)	A	Unsigned, but believed to have been signed and mailed on or about January 15, 2011.
Scan of Email sent from Jessica Anderson to Todd F. Anderson	2011 Jun 11	B	Email is addressed to Neldon Johnson but the email was sent from Jessica L. Anderson to Todd F. Anderson. The body of the email is believed to be identical or substantially similar to an email that was sent to Neldon Johnson on or about June 11, 2011.
Document Entitled "Executive Summary"	undated	C	Author is unknown. Document provided to ALC by client.
Document Entitled "Patronage Dividends: A Primer."	2010 Oct 14	D	Document provided to ALC by client. File includes email from Greg Shepard to Neldon Johnson and Glenda Johnson dated 2010 Oct 14.
Document entitled "Donald L Korb Chief Counsel for the Internal Revenue Service Reparks at the 2005 University of Southern California Tax Institute The Economic Substance Doctrine in the Current Tax Shelter Environment, Los Angeles, California on January 25, 2005.		E	Document provided to ALC by client.
Document entitled "What is the Purpose of a Federal Tax Credit for Renewable Energy"		F	Document provided to ALC by client.
Document entitled "Rapower3 Equipment Purchase Agreement"		G	Document provided to ALC by client.
Document entitled "Solar Purchase Referral Fee Contract"		H	Document provided to ALC by client.

Document entitled "PaPower3 Operation and Maintenance Agreement" (Microsoft Word, modifiable file)		I	Document provided to ALC by client.
Pages from document entitled "PaPower3 Operation and Maintenance Agreement" – including Microsoft Word attorney comments.		J	Document provided to ALC by client, with attorney comments added.
PDF (scanned) version of document entitled "PaPower3 Operation and Maintenance Agreement" – pages appear out of order		K	Document provided to ALC by client.
PDF (scanned) version of document entitled "PaPower3 Operation and Maintenance Agreement"		L	Document provided to ALC by client.
Attorney notes from client meeting (Microsoft Word, modifiable file)	2010 Oct 14	M	Document believed to be created by Jessica Anderson after meeting with Neldon Johnson on or about 2010 Oct 14.
Letter Re: Response to Tax Questions Posed (Microsoft Word, modifiable file)	2010 Oct 21	N	Document created and subsequently modified by Jessica Anderson, with the final revisions on or about 2010 Oct 21. The file is believed to be identical to a letter that was sent to Neldon Johnson, via email, as referenced in the document.
Letter Re: Tax and Legal information regarding RaPower-3 Equipment Purchase (Microsoft Word, modifiable file)	2010 Oct 14	O	General Tax Disclaimer Document created by Jessica Anderson and believed to be sent to Neldon Johnson.
Document entitled "Employment Agreement Employment of Neldon P. Johnson by Rapwer-3, LLC" (Microsoft Word, modifiable file)	2010 Oct 04	P	Document created by Todd Anderson on behalf of Neldon Johnson. Word Version.
Document entitled "Employment Agreement Employment of Neldon P. Johnson by Rapwer-3, LLC" (PDF	2010 Oct 04	Q	Document created by Todd Anderon on behalf of Neldon Johnson and believed to be delivered to Neldon Johnson. PDF Version with attorney comments.

Version with attorney note/comment)			
Document entitled "Employment Agreement Employment of Neldon P. Johnson by Rapwer-3, LLC" (PDF Version without attorney note/comment)	2010 Oct 04	R	Document created by Todd Anderon on behalf of Neldon Johnson and believed to be delivered to Neldon Johnson. PDF Version no comment or notes
Attorney notes	2010 Oct 06	S	Document created by Todd Anderson regarding questions purported by client to come from Mantyla McReynolds, LLC.
Letter Re: Response to Questions Posed to RaPower-3, LLC. (Microsoft Word, modifiable file)	2010 Oct 06	T	Document created by Todd Anderson regarding questions purported by client to come from Mantyle McReynolds, LLC.
Letter Re: Response to Questions Posed to RaPower-3, LLC. (PDF Version)	2010 Oct 06	U	Document created by Todd Anderson regarding questions purported by client to come from Mantyle McReynolds, LLC.

Dated this 15th day of August, 2016.

Respectfully provided,

By: _____

Tate W. Bennett, Esq.
Attorney for Todd Anderson

EXHIBT "A"

RAPOWER-3

RENEWABLE ENERGY SYSTEMS

Technology | News | Tax Benefits | Your Benefits | Purchase/Join

OUR RAPE: Ra is the ancient Egyptian sun God and this is a refers to the three ways our RAPOWER-3 can earn income from the power of the sun.

Greg Shepardt, Chief Director of Operations

TAX ATTORNEY OPINION LETTER

[redacted], 2010

Re: Potential tax advantages

Dear Potential RaPower-3 Customer,

To help you, as a taxpayer, understand the possible tax saving benefits of purchasing energy equipment (such as RaPower-3), we have assembled the following information so that you can consult with your own tax professional about the potential tax advantages of investing the energy market by owning RaPower-3 energy equipment.

With the purchase of Rapower-3 Energy Equipment, there are four possible ways to reduce tax liability:

- energy credits;
- depreciation;
- § 179 costs;
- deduction and expenses.

Depending on your situation, all four approaches may apply to you. Below is a discussion regarding each possible benefit for you to review with your own tax professional and determine the applicability to your own unique financial situation.

I. Energy credit -- Internal Revenue Code §§ 45 & 48

Through tax code, the Federal Government has implemented several programs to incentivize renewable energy projects. One such programs is found in IRC § 45 in conjunction with IRC § 48. Simply stated the sections provide for a credit of 30% the basis (essentially the purchase price) of energy equipment that is placed in service during the taxable year. For energy equipment that has not been placed in service, such as equipment still being manufactured, a taxpayer can elect to take a portion of the credit if the equipment is a Qualified Progress Expenditure Property ("QPEP"). QPEP is property being constructed by or for the taxpayer and which (a) has a normal construction period of two years or more, and (b) it is reasonable to believe that the property will qualify for the energy credit (from IRC § 48) once it is placed in service.

An owner of QPEP may claim the 30% credit on: (a) the amount paid towards the purchase (during the tax year) to another person for the construction of QPEP, or (b) an amount attributable to the portion of the QPEP that is completed (during the tax year); whichever is less.

Detailed language of this Energy Credit can be found in the United States Code, Title 26, §§ 45 through 48. Other considerations may apply, so be sure to talk to your tax professional about how you can personally qualify for this energy tax credit.

II. Depreciation

Depreciation is an annual income tax deduction that could allow an owner of energy equipment to recover the purchase cost. The tax code acknowledges that hard assets such as energy equipment wear out and lose value over time. Thus, depreciation is an allowance that accrues over time for the wear and tear, deterioration, or obsolescence of the property. You can depreciate most types of tangible property, such as buildings, machinery, vehicles, and equipment.

To be depreciable, the property must meet all of the following requirements: it must be property you own; it must be used in your business or income-producing activity, it must have a determinable useful life, and it must be expected to last more than one year after being placed in service.

A taxpayer can start claiming depreciation of an asset as soon as his or her property is placed in service. Property is placed in service when it is ready and available for a specific use, whether in a business activity, an income-producing activity, a tax-exempt activity, or a personal activity. This does not mean you have to be using the property, just that it is ready and available for its specific use.

If the equipment is ready and available for ANY income producing activity, including leasing it out for tax-renting purposes, the owner may start claiming depreciation of the asset.

III. Section 179 Expenses

A qualifying taxpayer may treat the costs (such as maintenance, upkeep, and repair) of his or her energy property as an expense beginning the year the property is placed in service. This is in addition to claiming the depreciation of the property as discussed above.

In 2010, the Federal Government through the Small Business Jobs Act (SBJA) increased the cap of Section 179 expenses so that certain business can claim up to $500,000 beginning in the 2010 and 2011 tax years. To qualify for the section 179 deduction, your property must have been acquired for use in your trade or business. Property you acquire only for the production of income, such as investment property, rental property (if renting property is not your trade or business), and property that produces royalties, does not qualify.

IV. Deductions and Losses

So long as a taxpayer materially participates in a business activity, the taxpayer may deduct the losses from such activity against investment income. Moreover, even if the taxpayer does not materially participate, any losses may be deducted if the taxpayer has passive income from other sources to offset the passive losses.

For a taxpayer to materially participate in a business activity, the payer must work on a regular, continuous and substantial basis in the activity. I.R.C. *§ 469 (h)(1)* lays out several tests to determine material participation and the taxpayer only has to meet one of the possible requirements. The tests are as follows:

a. The taxpayer does substantially all the work in the activity.

b. The taxpayer works more than 100 hours in the activity during the year and no one (including anyone who is not the taxpayer) works more than the taxpayer in the activity.

c. The taxpayer works 500 hours or more during the year in the activity.

d. Based on all of the facts and circumstances, the taxpayer participates in the activity on a regular, continuous, and substantial basis during each year. (This test only applies if the taxpayer works at least 100 hours in the activity, no one else works more hours than the taxpayer in the activity, and no one else receives compensation for managing the activity.)

Simply stated, if you do most of the work in the business using the RaPower-3 energy equipment, any losses associated with your business will be non-passive and can be deducted without limitation.

Generally any work you do in connection with your business will be considered participation. In a multi-level marketing structure, participation would include any activity to increase the productivity of other individuals engaged in sales such as recruiting, training, motivating and counseling such individuals. Other ways to participate in your business would include investing and counseling with the operators of the equipment, negotiating sale and distribution of energy, reviewing productivity and costs, among others.

V. Conclusion

Right now, the government is enacting programs geared to foster and encourage development of energy sources. RaPower-3's equipment could allow you to enter the energy market and capitalize on these government incentives. This is only a brief overview of some of the possibilities that may be available to new owners of RaPower-3 energy equipment.

Although we have tried to ensure the information is accurate and useful, we are not acting as your attorney and the above is offered to you for informational purposes only. We recommend that you consult your own lawyer and tax professional for particularized assurance that the information applies to your situation.

Sincerely,

Law Center, P.C.

DISCLAIMER: Law Center, P.C. as an institution or its attorneys are not offering you advice on any personal income tax requirements or issues. The purpose of this communication for general information only and does not represent personal tax advice either expressed or implied. You are encouraged to seek professional tax advice for personal or corporate income tax questions and assistance.

EXHIBT "B"

ANDERSON
Law Center, P.C.

Anderson | Nielsen

"Your Advocates – Close to Home"

TODD F. ANDERSON
todd@deltaattorney.com

JESSICA L. ANDERSON
jessica@deltaattorney.com

JOSHUA J. NIELSEN
josh@nebolegal.com

AUBREE H. NIELSEN
aubree@nebolegal.com

June 11, 2013

Internal Revenue Service
Attn: Kevin Matteson
50 South 200 East
Mail Stop 4245
Salt Lake City, UT 84111

Re.: ***Draft Letter Used by Rapower-3 or Neldon Johnson***

Dear Mr. Matteson,

Per your request, I am writing regarding an unsigned document produced by my office that I am told is being used by Rapower-3 as an opinion letter to substantiate actions taken by Rapower-3 and possibly others. The document was a working draft regarding generic descriptions of tax regulations. I say it was a working document because I did not have enough information to provide a specific, legal opinion about tax consequences to any set specific circumstances. My representation of Mr. Johnson and/or Rapower-3 was ended before more details could be provided to me.

This document amounted to notes in letter format, and was never signed by me, was never provided with any intent to be specific advice or opinion to Rapower-3, any specific person, or regarding any specific set of circumstances or facts. It was never my intent that the draft be used for any purpose other than ongoing discussion as to the client's contemplated business.

Sincerely,
Anderson Law Center, P.C.

Todd F. Anderson

EXHIBT "C"

Tate W. Bennett, Esq.
Attorney at Law
PO Box 272
Fillmore, Utah 84631
801-503-2795
tatebennettlawfirm@gmail.com

Cease and Desist Letter

Neldon Johnson
4035 W 4000 S
Delta, Utah 84624

RAPOWER-3, LLC
c/o Neldon P. Johnson – Registered Agent
326 North Hwy. 6
Salem, Utah 84653

Re: Unauthorized Use of Proprietary Information

Mr. Johnson

I have been retained by Todd Anderson and the Anderson Law Center to potentially initiate litigation regarding your unauthorized use of proprietary information in the form of an advisory letter.

My client, Todd Anderson, provided you with an advisory letter in order to further discussions and solicit information in his capacity as legal advisor. 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 manner other than for its intended purpose – to solicit additional information to aid him in his legal analysis.

It has come to my attention that the letter has been and/or is currently being displayed by you and/or your company, RAPOWER-3 LLC, in a manner which was not authorized by Mr. Anderson, nor The Anderson Law Center.

Although the information which has been and/or is currently being displayed by you and/or your company RAPOWER-3 LLC, does not bear the letter-head of the Anderson Law

Center, nor does it contain Mr. Anderson's name or signature, it is identical or substantially similar to Mr. Anderson's advisory letter previously provide to you and/or your company.

Permission was neither asked nor granted to reproduce or alter Mr. Anderson's advisory letter, nor was permission granted to display the advisory letter to 3rd parties. As such, your displaying of Mr. Anderson's letter constitutes an infringement of his rights. We are therefore entitled by law to an injunction against your continued infringement, as well as damages from you for the loss we have suffered as a result of your infringing conduct.

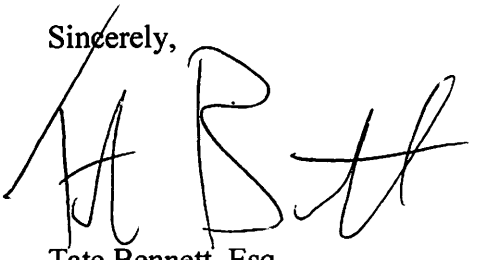
We demand that you immediately:

- Remove all infringing content and notify us in writing that you have done so;
- Immediately cease the use and distribution of the advisory letter;
- Deliver-up for destruction all unused or undistributed copies of Mr. Anderson's letter;
- Pledge in writing to desist from using any of Mr. Anderson's advisory letter in the future.

We request that you respond to this demand on or before the close of business on July 10, 2013.

This cease and desist letter is written without prejudice to our rights, all of which are hereby expressly reserved.

Sincerely,



Tate Bennett, Esq.

EXHIBT "D"

ANDERSON
LAW CENTER, P.C.

www.deltaattorney.com
andersonlawcenter@deltaattorney.com

P.O. Box 183
54 South 300 East
Delta, UT 84624

P: 435.864.4357
F: 435.864.4358

August 8, 2012

Re.: *Potential tax advantages.*

Dear Potential RaPower-3 Customer,

To help you, as a taxpayer, understand the possible tax saving benefits of purchasing energy equipment through RaPower-3, we have assembled the following information so that you can consult with your own tax professional about the potential tax advantages of entering the energy market by owning RaPower-3 energy equipment.

With the purchase of Rapower-3 Energy Equipment, there are four possible ways to reduce tax liability:

- energy credits;
- depreciation;
- § 179 costs,
- deductions and expenses.

Depending on your situation, all four approaches may apply to you. Below is a discussion regarding each possible benefit for you to review with your own tax professional and determine the applicability to your own unique financial situation.

I. Energy credit – Internal Revenue Code §§ 45 & 48

Through tax code, the Federal Government has implemented several programs to incentivize renewable energy projects. One such program is found in IRC § 45 in conjunction with IRC § 48. Simply stated the sections provide for a credit of 30% the basis (essentially the purchase price) of energy equipment that is placed in service during the taxable year. For energy equipment that has not been placed in service, such as equipment still being manufactured, a taxpayer can elect to take a portion of the credit if the equipment is a Qualified Progress Expenditure Property ("QPEP"). QPEP is property being constructed by or for the taxpayer and which (a) has a normal

construction period of two years or more, and (b) it is reasonable to believe that the property will qualify for the energy credit (from IRC § 48) once it is placed in service.

An owner of QPEP may claim the 30% credit on: (a) the amount paid towards the purchase (during the tax year) to another person for the construction of QPEP, or (b) an amount attributable to the portion of the QPEP that is completed (during the tax year); whichever is less.

Detailed language of this Energy Credit can be found in the United States Code, Title 26, §§ 45 through 48. Other considerations may apply, so be sure to talk to your tax professional about how you can personally qualify for this energy tax credit.

II. Depreciation

Depreciation is an annual income tax deduction that could allow an owner of energy equipment to recover the purchase cost. The tax code acknowledges that hard assets such as energy equipment wear out and lose value over time. Thus, depreciations is an allowance that accrues over time for the wear and tear, deterioration, or obsolescence of the property. You can depreciate most types of tangible property, such as buildings, machinery, vehicles, and equipment.

To be depreciable, the property must meet all of the following requirements: it must be property you own; it must be used in your business or income-producing activity; it must have a determinable useful life; and it must be expected to last more than one year after being placed in service.

A taxpayer can start claiming depreciation of an asset as soon as his or her property is placed in service. Property is placed in service when it is ready and available for a specific use, whether in a business activity, an income-producing activity, a tax-exempt activity, or a personal activity. This does not mean you have to be using the property, just that it is ready and available for its specific use.

If the equipment is ready and available for ANY income producing activity, including leasing it out for advertising purposes, the owner may start claiming depreciation of the asset.

III. Section 179 Expenses

A qualifying taxpayer may treat the costs (such as maintenance, upkeep, and repairs) of his or her energy property as an expense beginning the year the property is placed in service. This is in addition to claiming the depreciation of the property as discussed above.

In 2010, the Federal Government through the Small Business Jobs Act (SBJA) increased the cap of Section 179 expenses so that certain business can claim up to $500,000 beginning in the 2010 and 2011 tax years. To qualify for the section 179 deduction, your property must have been acquired for use in your trade or business. Property you acquire only for the production of income, such as investment property, rental property (if renting property is not your trade or business), and property that produces royalties, does not qualify.

IV. Deductions and Losses

So long as a taxpayer materially participates in a business activity, the taxpayer may deduct the losses from such activity against investment income. Moreover, even if the taxpayer does not materially participate, any losses may be deducted if the taxpayer has passive income from other sources to offset the passive losses.

For a taxpayer to materially participate in a business activity, the payer must work on a regular, continuous and substantial basis in the activity. *I.R.C. § 469 (h)(1)* lays out several tests to determine material participation and the taxpayer only has to meet one of the possible requirements. The tests are as follows:

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Stated simply, if you do most of the work in the business using the RaPower-3 energy equipment, any losses associated with your business will be non-passive and can be deducted without limitation.

Generally any work you do in connection with your business will be considered participation. In a multi-level marketing structure, participation would include any activity to increase the productivity of other individuals engaged in sales such as recruiting, training, motivating and counseling such individuals. Other ways to participate in your business would include meeting and counseling with the operator of the equipment, negotiating sale and distribution of energy, reviewing productivity and costs, among others.

V. Conclusion

Right now, the government is enacting programs geared to foster and encourage development of energy sources. RaPower-3's equipment could allow you to enter the energy market and capitalize on those government incentives. This is only a brief overview of some of the possibilities that may be available to new owners of RaPower-3 energy equipment.

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Sincerely,

Anderson Law Center, P.C.

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Tax Information

From: **Todd Anderson** (todd@deltaattorney.com)
Sent: Mon 11/15/10 3:41 PM
To: neldon@iaus.com; glendaejohnson@hotmail.com

2 attachments
Operation & Maintenance Agreement.docx (125.6 KB) , Taxpayer Info.docx (59.6 KB)

Todd Anderson
Attorney and Counselor at Law

ANDERSON
LAW CENTER, P.C.

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F: 435 864 4358
todd@deltaattorney.com

435-864-HELP (4357)

11/15/10
Sent mailed
to me

EXHIBT "E"

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54 South 300 East
Delta, UT 84624

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F: 435.864.4358

July 27, 2016

Re.: *Potential tax advantages.*

Dear Potential RaPower-3 Customer,

To help you, as a taxpayer, understand the possible tax saving benefits of purchasing energy equipment through RaPower-3, we have assembled the following information so that you can consult with your own tax professional about the potential tax advantages of entering the energy market by owning RaPower-3 energy equipment.

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b. The taxpayer works more than 100 hours in the activity during the year and no one else works more than the taxpayer.

c. The taxpayer works 500 hours or more during the year in the activity.

d. Based on all of the facts and circumstances, the taxpayer participates in the activity on a regular, continuous, and substantial basis during such year. This test only applies if the taxpayer works at least 100 hours in the activity, no one else works more hours than the taxpayer in the activity, and no one else receives compensation for managing the activity.

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V. Conclusion

Right now, the government is enacting programs geared to foster and encourage development of energy sources. RaPower-3's equipment could allow you to enter the energy market and capitalize on those government incentives. This is only a brief overview of some of the possibilities that may be available to new owners of RaPower-3 energy equipment.

Although we have tried to ensure our information is accurate and useful, we are not acting as your attorney and the above is offered to you for informational purposes only. We recommend that you consult your own lawyer and tax professional for particularized assurance that the information applies to your situation.

Sincerely,

Anderson Law Center, P.C.

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DONALD S. REAY (11948)
43 WEST 9000 SOUTH, SUITE B
SANDY, UTAH 84070
TELEPHONE: (801) 999-8529
FAX: (801) 206-0211
DONALD@REAYLAW.COM
Attorney for Defendants
R. Gregory Shepard and Roger Freeborn

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1,LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	**FREEBORN'S FIRST SUPPLEMENTAL RESPONSE TO UNITED STATES' FIRST INTERROGATORIES TO ROGER FREEBORN** Civil No. 2:15-cv-00828 DN **Judge David Nuffer** **Magistrate Judge Brooke C. Wells**

Defendant Roger Freeborn hereby supplements his responses to the United States' First Interrogatories to Roger Freeborn by adding the below supplemental answers in red to the numbered paragraphs of the requests as follows:

PRELIMINARY STATEMENT

1. Defendant's investigation into all facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, Defendant's right to rely on other facts or documents at trial.

16. **REQUEST:** Identify all attorneys or other tax advisors you consulted or from whom you received tax advice regarding any Lens, System or Component, including the dates consulted, the dates any advice was received, and the form of the advice (*i.e.*, oral, email, memoranda, opinion letters, other written correspondence, etc.).

OBJECTION: Defendant reiterates and restates each Objection from above, and adds that this Interrogatory requests information subject to privilege, including attorney work product. Defendant requests the protective order matter be settled prior to allowing the Plaintiff any such access or information. Defendant reserves the right to supplement this (and every other) Response. Without waiving any privilege, Defendant responds as follows:

RESPONSE: Relied upon the letters from Anderson Law Center dated August 8, 2012, from Kirton McConkie dated October 31, 2012, and from Hansen, Barnett & Maxwell on August 15, 2005.

VERIFICATION

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that I have read the foregoing Responses, which are based on a diligent and reasonable effort by me to obtain information currently available. I reserve the right to make changes in or additions to any of these answers if it appears at any time that errors or omissions have been made or if more accurate or complete information becomes available. Subject to these limitations, these Responses are true to the best of my present knowledge, information, and belief.

Executed this 17th day of May 2016.

/s/ Roger Freeborn
Roger Freeborn, signed electronically by Donald Reay with permission.

DONALD S. REAY (11948)
43 WEST 9000 SOUTH, SUITE B
SANDY, UTAH 84070
TELEPHONE: (801) 999-8529
FAX: (801) 206-0211
DONALD@REAYLAW.COM
Attorney for Defendants
R. Gregory Shepard and Roger Freeborn

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH

UNITED STATES OF AMERICA, Plaintiff, v. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1,LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	**SHEPARD'S FIRST SUPPLEMENTAL RESPONSE TO UNITED STATES' FIRST INTERROGATORIES TO R. GREGORY SHEPARD** Civil No. 2:15-cv-00828 DN **Judge David Nuffer** **Magistrate Judge Brooke C. Wells**

Defendant R. Gregory Shepard hereby Supplements his response to the United States' First Interrogatories to R. Gregory Shepard by adding the below supplemental answers in red to the numbered paragraphs of the requests as follows:

PRELIMINARY STATEMENT

1. Defendant's investigation into all facts and circumstances relating to this action is ongoing. These responses and objections are made without prejudice to, and are not a waiver of, Defendant's right to rely on other facts or documents at trial.

16. **REQUEST:** Identify all attorneys or other tax advisors you consulted or from whom you received tax advice regarding any Lens, System or Component, including the dates consulted, the dates any advice was received, and the form of the advice (*i.e.*, oral, email, memoranda, opinion letters, other written correspondence, etc.).

OBJECTION: Defendant reiterates and restates each Objection from above, and adds that this Interrogatory requests information subject to privilege, including attorney work product.

Defendant requests the protective order matter be settled prior to allowing the Plaintiff any such access or information. Defendant reserves the right to supplement this (and every other) Response. Without waiving any privilege, Defendant responds as follows:

RESPONSE: None unless that would include Rick Jameson as my tax preparer.

SUPPLEMENT: Kenneth W. Birrell at Kirton McConkie via memorandum on October 31, 2012. Anderson Law Center, via memorandum on November 15, 2010. Hansen, Barnett & Maxwell via memorandum dated August 15, 2005.

VERIFICATION

Pursuant to 28 U.S.C. §1746, I declare under penalty of perjury that I have read the foregoing Responses and supplemental responses, which are based on a diligent and reasonable effort by me to obtain information currently available. I reserve the right to make changes in or additions to any of these answers if it appears at any time that errors or omissions have been made or if more accurate or complete information becomes available. Subject to these limitations, these Responses are true to the best of my present knowledge, information, and belief.

Executed this 17th day of June 2016.

/s/ R. Gregory Shepard
R. Gregory Shepard signed electronically
with permission by Donald S. Reay

ANDERSON
LAW CENTER, P.C.

www.deltaattorney.com
andersonlawcenter@deltaattorney.com

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August 8, 2012

Re.: *Potential tax advantages.*

Dear Potential RaPower-3 Customer,

To help you, as a taxpayer, understand the possible tax saving benefits of purchasing energy equipment through RaPower-3, we have assembled the following information so that you can consult with your own tax professional about the potential tax advantages of entering the energy market by owning RaPower-3 energy equipment.

With the purchase of Rapower-3 Energy Equipment, there are four possible ways to reduce tax liability:

- energy credits;
- depreciation;
- § 179 costs,
- deductions and expenses.

Depending on your situation, all four approaches may apply to you. Below is a discussion regarding each possible benefit for you to review with your own tax professional and determine the applicability to your own unique financial situation.

I. Energy credit -- Internal Revenue Code §§ 45 & 48

Through tax code, the Federal Government has implemented several programs to incentivize renewable energy projects. One such program is found in IRC § 45 in conjunction with IRC § 48. Simply stated the sections provide for a credit of 30% the basis (essentially the purchase price) of energy equipment that is placed in service during the taxable year. For energy equipment that has not been placed in service, such as equipment still being manufactured, a taxpayer can elect to take a portion of the credit if the equipment is a Qualified Progress Expenditure Property ("QPEP"). QPEP is property being constructed by or for the taxpayer and which (a) has a normal

Plaintiff Exhibit
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construction period of two years or more, and (b) it is reasonable to believe that the property will qualify for the energy credit (from IRC § 48) once it is placed in service.

An owner of QPEP may claim the 30% credit on: (a) the amount paid towards the purchase (during the tax year) to another person for the construction of QPEP, or (b) an amount attributable to the portion of the QPEP that is completed (during the tax year); whichever is less.

Detailed language of this Energy Credit can be found in the United States Code, Title 26, §§ 45 through 48. Other considerations may apply, so be sure to talk to your tax professional about how you can personally qualify for this energy tax credit.

II. Depreciation

Depreciation is an annual income tax deduction that could allow an owner of energy equipment to recover the purchase cost. The tax code acknowledges that hard assets such as energy equipment wear out and lose value over time. Thus, depreciations is an allowance that accrues over time for the wear and tear, deterioration, or obsolescence of the property. You can depreciate most types of tangible property, such as buildings, machinery, vehicles, and equipment.

To be depreciable, the property must meet all of the following requirements: it must be property you own; it must be used in your business or income-producing activity; it must have a determinable useful life; and it must be expected to last more than one year after being placed in service.

A taxpayer can start claiming depreciation of an asset as soon as his or her property is placed in service. Property is placed in service when it is ready and available for a specific use, whether in a business activity, an income-producing activity, a tax-exempt activity, or a personal activity. This does not mean you have to be using the property, just that it is ready and available for its specific use.

If the equipment is ready and available for ANY income producing activity, including leasing it out for advertising purposes, the owner may start claiming depreciation of the asset.

III. Section 179 Expenses

A qualifying taxpayer may treat the costs (such as maintenance, upkeep, and repairs) of his or her energy property as an expense beginning the year the property is placed in service. This is in addition to claiming the depreciation of the property as discussed above.

In 2010, the Federal Government through the Small Business Jobs Act (SBJA) increased the cap of Section 179 expenses so that certain business can claim up to $500,000 beginning in the 2010 and 2011 tax years. To qualify for the section 179 deduction, your property must have been acquired for use in your trade or business. Property you acquire only for the production of income, such as investment property, rental property (if renting property is not your trade or business), and property that produces royalties, does not qualify.

IV. Deductions and Losses

So long as a taxpayer materially participates in a business activity, the taxpayer may deduct the losses from such activity against investment income. Moreover, even if the taxpayer does not materially participate, any losses may be deducted if the taxpayer has passive income from other sources to offset the passive losses.

For a taxpayer to materially participate in a business activity, the payer must work on a regular, continuous and substantial basis in the activity. *I.R.C. § 469 (h)(1)* lays out several tests to determine material participation and the taxpayer only has to meet one of the possible requirements. The tests are as follows:

a. The taxpayer does substantially all the work in the activity.

b. The taxpayer works more than 100 hours in the activity during the year and no one else works more than the taxpayer.

c. The taxpayer works 500 hours or more during the year in the activity.

d. Based on all of the facts and circumstances, the taxpayer participates in the activity on a regular, continuous, and substantial basis during such year. This test only applies if the taxpayer works at least 100 hours in the activity, no one else works more hours than the taxpayer in the activity, and no one else receives compensation for managing the activity.

Stated simply, if you do most of the work in the business using the RaPower-3 energy equipment, any losses associated with your business will be non-passive and can be deducted without limitation.

Generally any work you do in connection with your business will be considered participation. In a multi-level marketing structure, participation would include any activity to increase the productivity of other individuals engaged in sales such as recruiting, training, motivating and counseling such individuals. Other ways to participate in your business would include meeting and counseling with the operator of the equipment, negotiating sale and distribution of energy, reviewing productivity and costs, among others.

V. Conclusion

Right now, the government is enacting programs geared to foster and encourage development of energy sources. RaPower-3's equipment could allow you to enter the energy market and capitalize on those government incentives. This is only a brief overview of some of the possibilities that may be available to new owners of RaPower-3 energy equipment.

Although we have tried to ensure our information is accurate and useful, we are not acting as your attorney and the above is offered to you for informational purposes only. We recommend that you consult your own lawyer and tax professional for particularized assurance that the information applies to your situation.

Sincerely,

Anderson Law Center, P.C.

DISCLAIMER: Anderson Law Center, P.C. as an institution or its attorneys are not offering you advice on any personal income tax requirements or issues. The purpose of this communication for general information only and does not represent personal tax advice either expresses or implied. You are encouraged to seek professional tax advice for personal or corporate income tax questions and assistance.

Tax Information

From: **Todd Anderson** (todd@deltaattorney.com)
Sent: Mon 11/15/10 3:41 PM
To: neldon@ias.com; glendaejohnson@hotmail.com

2 attachments
Operation & Maintenance Agreement.docx (125.6 KB) , Taxpayer Info.docx (59.6 KB)

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11/15/10
E. mailed
to me

Frank Lunn

From: Greg Shepard <greg@rapower3.com>
Sent: Thursday, November 07, 2013 7:24 PM
Subject: Ra3 Vital Tax Info

In analyzing an Auditor's Proposed Report, I'm sharing my following thoughts:

DISALLOW DEPRECIATION ON SOLAR BUSINESS

A. Taxpayer is unable to establish time spent on business.

My Response: There a number of criteria for establishing hours spent on a business as outlined on the irs.gov website. You only have to meet one of the criterion. Most RaPower3 Team Members qualify under guideline #2. Almost all of our RaPower3 Team Members work by themselves in their solar energy business. They have no employees and therefore, they do all or most of the work involving their solar energy business. So there are no hourly requirements.

B. Taxpayer is unable to establish the ability to generate income form the solar panels (lenses) purchased.

My Response: First, when you start a business, you are not required to generate income right away. especially with innovative technology. It is standard to give the taxpayer some time to generate income. Rental and Bonus income should start in 2014.

Second, (From the Anderson Tax Attorney Opinion Letter) A taxpayer can start claiming depreciation of an asset as soon as his or her property is placed in service. Property is placed in service when it is ready and available for a specific use, whether in a business activity, an income-producing activity, a tax-exempt activity, or a personal activity. This does not mean you have to be using the property, just that it is ready and available for its specific use.

If the equipment is ready and available for ANY income producing activity, including leasing it out for advertising purposes, the owner may start claiming depreciation of the asset. **THIS MEANS YOUR BONUS REFERRAL CONTRACT.**

Agent Misconception: She says, "The taxpayer purchases solar panels (lenses) and then immediately leases them back to the seller." **The following is what really happens:**

A. IAS (International Automated Systems) gives RaPower3 the right to sell its lenses.

B. RaPower3 sells the solar lenses to its clients, most of which pay taxes. The taxpayer signs an Equipment Purchase Agreement with RaPower3 LLC, a Nevada Limited Liablity Company with principal offices in Delta, Utah.

C. The taxpayer also signs an Operation and Maintenance Agreement with LTB, LLC, a Nevada Limited

Liability with principal offices in Las Vegas, Nevada. The taxpayer agrees to rent his/her lenses to LTB, LLC for $150 per year per solar lens. The taxpayer also makes certain demands on LTB, LLC in order to reasonably insure a smooth operation and protection for the lenses.

Another Agent Misconception: She says, "The panels (lenses) at some point after an initial 5-year period will earn some rental income. **Here's what's written in the Agreement:**

A. The rental income begins right away. $150 a year per lens for the **first** five years. Then $68 per lens per year per lens for the next 30 years.

B. The initial down payment is $1,050 per lens. The total rental payback is $2,790 per lens. That's **some** rental income!

Final Incorrect Assertion: She states, "The panels are leased back to the company (Incorrect-see above), and therefore, according to the lease agreement and rental income (sic) would be an investment asset (We say purchase not investment) and reportable on Schedule E as a **passive activity** with **no material participation**. This means, to this auditor, the depreciation cannot be allowed.

Our position: This auditor seems to be unaware that the taxpayer's solar energy business has a multi-level marketing structure to it. Millions of Americans are involved in network or multi-level marketing and are allowed depreciation benefits. You can't single this taxpayer out. Again, I cite the **Anderson Tax Attorney Opinion** letter:

"Stated simply, if you do most of the work in the business using the RaPower-3 energy equipment, any losses associated with your business will be non-passive and can be deducted without limitation.

Generally any work you do in connection with your business will be considered participation. In a multi-level marketing structure, participation would include any activity to increase the productivity of other individuals engaged in sales such as recruiting, training, motivating and counseling such individuals. Other ways to participate in your business would include meeting and counseling with the operator of the equipment, negotiating sale and distribution of energy, reviewing productivity and costs, among others.

Right now, the government is enacting programs geared to foster and encourage development of energy sources. RaPower-3's equipment could allow you to enter the energy market and capitalize on those government incentives."

More subsantiation form the Kirton-McConkie Tax Attorney Opinion Letter:

A. At-Risk Limitations

Code Section 465(a) provides that the losses (in this case, depreciation deductions in excess of the Rental Payments) of certain taxpayers from certain activities are only allowed to the extent of the aggregate amount with respect to which the taxpayer is at risk with respect to such activity. The taxpayers subject to Code Section 465(a) include a subchapter C corporation that meets the ownership requirements of Code Section 542(a)(2), which are summarized above.

For purposes of Section 465(a), a taxpayer is considered to be at risk for an activity in amount equal to the sum of the amount of money or property contributed to the activity and certain amounts borrowed with respect to the activity. Code Section 465(b)(1). Taxpayers are considered to be at risk for borrowed amounts only if the

taxpayer is personally liable for the repayment of such amounts or has pledged property (other than property used in such activity) as security for such borrowed amounts; provided that a taxpayer will not be considered to be at risk with respect to borrowed amounts to the extent such amounts are borrowed from a person who has an interest in the activity (other than as a creditor) or from a person who is related to such a person. Code Section 465(b)(2) and (b).

Whether an obligation constitutes debt for tax purposes ultimately depends upon whether there was "a genuine intention to create a debt, with a reasonable expectation of repayment, and did that intention comport with the economic reality of creating a debtor-creditor relationship." *Jensen* v. *Commissioner*, 208 F.2d 226 (10th Cir. 2000) (citing *Dixie Dairies Corp.* v. *Commissioner*, 74 T.C. 476, 494 (1980)). Courts consider a variety of factors in making this determination, including (i) whether the promise to repay was evidenced by a written agreement, (ii) interest was charged, (iii) a fixed maturity date and/or a fixed schedule for repayments was set forth in the instrument or by agreement, (iv) security or other collateral was given to ensure repayment, (v) repayments were made, (vi) the borrower was not insolvent at the time of the advance and (vii) the parties otherwise acted consistently with such transfer being a loan. *See e.g.*, *Fisher* v. *United States*, 54 T.C. 905 (1970) and *Miller* v. *Commissioner*, T.C. Memo 1982-

629. Of course, not every factor is relevant in every situation, and the weight assigned to each factor varies from situation to situation. As noted by the Supreme Court, "[t]here is no one characteristic ... which can be said to be decisive in the determination of whether the obligations are ... debts" for tax purposes." *John Kelley Co.* v. *Commissioner*, 326 U.S. 521, 530 (1946).

It is our understanding that the parties genuinely intend to create a debt in the form of the Promissory Note and Buyer's obligation to make the Installment Payments and that the parties intend for the Installment Payments to be made. Similarly, the economic relationship between the Buyer and Seller appears to comport with the economic reality of creating a debtor-creditor relationship. For example, the Buyer and Seller have evidenced their intent for the Buyer to make the Installment Payments in both the Purchase Agreement and the Promissory Note; they have agreed that the Installment Payments will bear interest at the long-term applicable federal rate; they have agreed upon a fixed schedule for repayments; the Buyer's obligation to make the Installment Payments is secured by the Solar Lenses, which the Seller may repossess in the event the Buyer fails to make the Installment Payments when due; the Buyer will not be insolvent when it enters into the Purchase Agreement and is expected to have sufficient cash flow to make the Installment Payments; and the parties have acted consistently with treating the Installment

Payments as a loan. Therefore, the Installment Payments appear to be a bona fide debt for tax purposes.

As discussed in Section II.C.2.c above, the Buyer is personally liable for the Installment Payments and such amounts are not borrowed from a person who has an interest in the activity (other than as a creditor) in which the Solar Lenses will be used or from a person who is related to such a person. Therefore, the Buyer's amount at risk with respect to the Solar Lenses for purposes of Code Section 465 shall be an amount equal to the aggregate Purchase Price for the Solar Lenses.

A. Passive Activity Limitations

Code Section 469(a) provides that certain losses (in this case, depreciation deductions in excess of the Rental Payments) and credits associated with passive activities of certain taxpayers are only allowed to the extent of the taxpayer's income from passive activities. The taxpayers subject to Code Section 469 include closely-held subchapter C corporations. Code Section 469(a)(2). However, Code Section 469(e)(2) provides that a closely held subchapter C corporation that is not a personal service corporation can offset active income with passive

activity losses and credits. Code Section 269A(b)(I) defines a personal service corporation as a corporation the principal activity of which is the performance of personal services and such services are substantially performed by employee-owners. Code Section 269A(b)(3) provides that all related persons, within the meaning of Code Section 144(a)(3), are treated as a single entity. Code Section 144(a)(3) defines a related person as anyone described in Code Sections 267, 707(b) or 1563(a) (except that 80% is substituted for 50% everywhere is appears in Code Section 1563(a)).

So long as a Buyer's principal activity is something other than the performance of personal services, the Buyer will be able to use the credits and losses attributable to the Solar Lenses to offset active income from other sources.

Regards, GregGreg Shepard
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