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

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	Civil No. 2:15-cv-00828 DN **UNITED STATES' RESPONSE TO ORDER GRANTING IN PART UNITED STATES' MOTION TO COMPEL DEPOSITION TESTIMONY OF KENNETH BIRRELL (ECF DOC. 160)** Judge David Nuffer Magistrate Judge Evelyn J. Furse

The United States alleges (among other things) that Defendants made statements about tax benefits that they knew, or had reason to know, were false or fraudulent.[1] Each Defendant has answered the United States' claims with affirmative defenses, including reliance on the advice of counsel.[2] Pursuant to this Court's order granting in part the United States' motion to compel deposition testimony of Kenneth Birrell, the United States respectfully submits the information that Defendants have provided regarding the scope of this affirmative defense.[3] The United States' motion to compel deposition testimony of Kenneth Birrell should be granted.[4] Defendants' objections should be overruled and Birrell should be compelled to appear and answer the questions posed by the United States in the transcript attached to its original motion, and reasonable follow-up questions.

International Automated Systems, Inc., and RaPower-3, LLC, are relying on the "Kirton McConkie memorandum"[5] and the "Anderson letter"[6]: each of these Defendants "consulted with Kirton McConkie and the Todd Anderson Law Firm. These were the only attorneys used for legal advice regarding solar energy. . . . It is expressly affirmed that the sole advice upon which [these Defendants] relied is stated in the opinion letters produced by Kirton & McConkie and

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[1] Compl. ¶¶ 1, 107, 108, 122, 162; 26 U.S.C. § 6700(a)(2)(A).

[2] Sixth Affirmative Defense in each of ECF Docs. 22, 23, 26.

[3] ECF Doc. 160 ¶¶ 3-7. The parties agreed that instead of depositions on the topic of the advice-of-counsel defense, Defendants would provide the information and documents required in paragraph 3 of the order in their interrogatory responses to be ordered served on May 3, 2017. *See* ECF Doc. 156.

[4] *But see* ECF Doc. 160 ¶ 2 (prohibiting "inquiry into communications between Mr. Birrell and Mr. Olson," Mr. Birrell's attorney).

[5] Pl. Ex. 370 at KM00276 through KM00288; *see also* ECF Doc. 140.

[6] Pl. Ex. 23; *see also* ECF Docs. 129, 132, 138.

The Todd Anderson Law Firm, which were posted for public view on the internet, and which Plaintiffs [*sic*] already have in their possession."[7]

It follows that IAS and RaPower-3 have waived attorney client privilege, and any other related protection, with respect to the memorandum, the letter, *and* the undisclosed facts and circumstances that relate to the memorandum and the letter. A client's voluntary disclosure of documents otherwise protected by the attorney-client privilege – especially to induce another person to believe that the client's actions or statements are lawful – breaches the confidentiality of the attorney-client relationship.[8] Such disclosure waives privilege not only as to the disclosed documents, but also as to documents and information related to the subject matter of the disclosed documents.[9] RaPower-3 posts the Kirton McConkie memorandum and the Anderson letter to convince customers that the statements Defendants make in support of the solar energy

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

[8] *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989) ("Mr. Bernard willingly sacrificed his attorney-client confidentiality and privilege by voluntarily disclosing the confidential communication to Mr. Treat. Any voluntary disclosure by the client is inconsistent with the attorney-client relationship and waives the privilege. Mr. Bernard did this in an effort to convince Mr. Treat that the proposed nominee loan was lawful and proper. Mr. Bernard, having revealed the purported conversation between himself and his counsel in an effort to induce Mr. Treat to engage in a nominee loan, cannot later claim the protection of the attorney-client privilege. Courts need not allow the claim of attorney-client privilege when the party claiming the privilege is attempting to utilize the privilege in a manner that is not consistent with the privilege.") (citation omitted); *United States v. Workman*, 138 F.3d 1261, 1263 (8th Cir. 1998). ("Voluntary disclosure of attorney client communications expressly waives the privilege. The waiver covers any information directly related to that which was actually disclosed.") (citations omitted).

[9] *Bernard*, 877 F.2d at 1465; *Workman*, 138 F.3d at 1263.

scheme are true.[10] Defendant Gregory Shepard tells RaPower-3 customers to use the Kirton McConkie memorandum and the Anderson letter in IRS audits.[11] Yet both Kirton McConkie and Todd Anderson instructed Defendants to cease and desist using the memorandum and the letter, respectively.[12]

Further, the Defendants who "consulted with Kirton McConkie and the Todd Anderson Law Firm" are relying on the Kirton McConkie memorandum and the Anderson letter to support their Sixth Affirmative Defense, as are other Defendants. "The attorney-client privilege cannot be used as both a sword and a shield."[13] By raising an advice-of-counsel defense, a client waives attorney-client privilege regarding what advice he received from that attorney.[14] This waiver permits the opposing party to call the attorney as a witness to challenge the client's version of events.[15]

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[10] Pl. Ex. 1 at 3-4, 6.

[11] Pl. Ex. 231 at 2; *see also* Pl. Ex. 283 at 2-3.

[12] Pl. Ex. 370, Pl. Ex. 353 (ECF Doc. 126-1) at 23-24.

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

[14] *United States v. Evanson*, 584 F.3d 904, 914 (10th Cir. 2009).

[15] *Id.*

This Court has already concluded that Defendants waived privilege with respect to all documents that Birrell and Anderson have produced to the United States to date.[16] Defendants cannot meet their burden to show that they have *not* waived any remaining aspect of privilege regarding their communications with Birrell and Anderson regarding the memorandum and the letter, respectively.[17]

For all of these reasons, the United States' motion to compel deposition testimony of Kenneth Birrell should be granted.[18]

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

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

[18] *But see* ECF Doc. 160 ¶ 2 (prohibiting "inquiry into communications between Mr. Birrell and Mr. Olson," Mr. Birrell's attorney).

Dated: May 5, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 5, 2017, the foregoing document and its supporting documents were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to the following:

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