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

UNITED STATES OF AMERICA,

Plaintiff, Counterclaim Defendant

v.

RAPOWER-3, LLC, et al.,

Defendant.

**TODD ANDERSON’S
MEMORANDUM IN OPPOSITION
TO UNITED STATES’ RENEWED
MOTION TO COMPEL TODD
ANDERSON TO PRODUCE
DOCUMENTS**

Case No.: 2:15-cv-00828-DN
Judge David Nuffer
Magistrate Judge Evelyn J. Furse

Todd Anderson requests that the Court deny the United States’ (“Plaintiff”) renewed motion [Doc. 163] entirely.

Express Waiver. The Plaintiff asserts that privileged material not yet posted on the RaPower-3 (“RaPower”) website should be produced if it relates to the draft Anderson letter that was posted. However, as the notes to Rule 502(a) of the Federal Rules of Evidence explain,

waiver “generally results in a waiver only of the communication or information disclosed,” not to other documents. Courts recognize that extra-judicial disclosure generally waives the privilege only as to that particular document.¹ RaPower allegedly relied on nothing else from Anderson but the draft letter.² The Plaintiff already has the draft letter, which is as far as any express waiver extends. This is consistent with Judge Wells’ previous ruling on waiver.³

Implied Waiver. The Plaintiff argues that RaPower has nonetheless placed the other documents “at issue” by raising the advice of counsel defense in its answer. The Plaintiff’s argument fails for at least two reasons.

First, RaPower has recently filed a motion to strike certain issues from the case [Doc. 173], and counsel for RaPower has indicated that a related motion for summary judgment will soon follow. If granted, these motions will substantially narrow the issues and scope of discovery in the case, potentially rendering moot any alleged reliance on Anderson.

Second, the United States has not laid proper foundation for the advice of counsel waiver argument. All that can be shown from the exhibits attached by the United States is that RaPower

¹ See, e.g., Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP, 684 F.3d 1364, 1372 (Fed. Cir. 2012); Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222–23 (4th Cir. 1976); Bus. Integration Servs., Inc. v. AT & T Corp., 251 F.R.D. 121, 123 (S.D.N.Y. 2008); Hartford Fire Ins. Co. v. Pure Air on the Lake Ltd. P’ship, 154 F.R.D. 202, 211-12 (N.D. Ind. 1993).

² Pl. Ex. 450, attached to Plaintiff’s motion: “It is expressly affirmed that the sole advice upon which RaPower³ relied is stated in the opinion letters produced by Kirton & McConkie and The Todd Anderson Law Firm, which were posted for public view on the internet, and which Plaintiff’s [sic] already have in their possession.”

³ The ruling arguably confines the waiver to what has actually been posted: “Here, Mr. Anderson’s *advice* is posted on a public web site for anyone to see. . . . any potential privilege as it relates to the *advice* has been waived.” [Doc. 132, p. 3, emphasis added.]

allegedly relied on the Anderson draft letter in conducting certain business operations. But RaPower has not conceded that it is relying on the Anderson draft as an affirmative defense to the claims made by the United States in this litigation. Reliance in the first setting is not necessarily reliance in the litigation setting.

Narrow production. If foundation can be laid for an implied waiver of the privilege stemming from an advice of counsel defense, Anderson believes that any production should be narrowly tailored,⁴ rather than the Plaintiff's blanket sweep of documents.⁵ Invoices may not be relevant. Attorney notes may not be relevant, and may constitute inviolate mental impression work product.⁶ Only those few documents/communications that bear directly on an advice of counsel claim (if any) should even be considered. Judge Wells has already ruled that caution is warranted regarding the documents. [Doc. 132, p. 4.]⁷

Anderson duties. Ultimately, the attorney-client privilege belongs to RaPower, and Anderson will therefore defer to its position. And regardless of waiver and privilege, so long as RaPower does not consent (it has not),⁸ and so long as there is no court order to the contrary,

⁴ Henry v. Quicken Loans, Inc., 263 F.R.D. 458, 466 (E.D. Mich. 2008) (“ . . . implied waivers are to be construed narrowly . . .”).

⁵ Identified by the United States as rows 24 through 32 on RaPower's supplemental privilege log.

⁶ Nguyen v. Excel Corp., 197 F.3d 200 (5th Cir. 1999).

⁷ “[Q]uestioning into the nature of the withheld documents may run afoul of the asserted privileges. Thus any questioning about the 21 documents should proceed with caution.” [Doc. 132, p. 4.]

⁸ In a phone conference today with RaPower's new counsel Denver Snuffer, the

Anderson is not at liberty to comply further with the document subpoena. See Utah Rules of Professional Conduct 1.6(a) and 1.9(c);⁹ Fed. R. Civ. P. 501; *In re Grand Jury Proceedings*, 616 F.3d 1172, 1182 (10th Cir. 2010).

DATED this 30th day of May, 2017.

STRONG & HANNI

/s/ Byron G. Martin

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undersigned was advised to continue to maintain privilege and confidentiality of the requested documents.

⁹ Utah Rule of Professional Conduct 1.6(a) provides that “[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent”. Further, Rule 1.9(c) provides that “[a] lawyer who has formerly represented a client . . . shall not thereafter reveal information relating to the representation except as these Rules would permit or require with respect to a client.” With that said, “[a] lawyer may reveal information relating to the representation of a client . . . to comply with other law or a court order.” No consent has been given here, and no order requiring production of the documents has yet been entered.

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of May, 2017 a true and correct copy of the foregoing **TODD ANDERSON'S MEMORANDUM IN OPPOSITION TO UNITED STATES' RENEWED MOTION TO COMPEL TODD ANDERSON TO PRODUCE DOCUMENTS** was 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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