

**IN THE SUPERIOR COURT OF CALIFORNIA**  
**IN AND FOR THE COUNTY OF SOLANO**  
**DEPARTMENT SEVEN**

**SOLAR SENSE DCS, I, LLC**

**Plaintiff**

**vs.**

**HAYS GROUP INC, ET.AL**

**Defendant**

**CASE NO: FCS 055800**

**RULING AND ORDER AFTER  
HEARING**

**KEYBANK NATIONAL ASSOCIATON**

**Plaintiff**

**vs.**

**JAMES C. HAYES, ET.AL**

**Defendant**

**Consolidated Case: FCS 059112)**

**RULING AND ORDER AFTER  
HEARING**

1 On November 20, 2024, the Court heard oral arguments on the following  
2 motions:

- 3 1. Solar Sense's motion to compel responses to discovery re: tax benefits  
received from Fund 0 investment.
- 4 2. Solar Sense's motion to compel production of documents.
- 5 3. Keybank's motion to compel production of Deloitte documents on privilege  
logs.

6 Counsel for all parties were present at the hearing. After the hearing, the  
7 parties submitted on their written motions and oral argument.

8 On November 26, 2024, Defendant Hays filed a surreply brief. On December  
9 2, 2024, Solar Sense filed an objection and request to strike the surreply brief. The  
10 Court strikes the surreply brief as the court did not authorize further briefing.

11 The Court makes the following findings and orders.

12 SOLAR SENSE DCS I, LLC ("SOLAR SENSE"), plaintiff in case FCS055800,  
13 alleges that Defendants HAYS GROUP, INC., JAMES C. HAYS ("HAYS"), and  
14 AARON BURR, LLC invested in an entity named Solar Eclipse Investment Fund, LLC  
15 ("Solar Eclipse" or "Fund 0"). Fund 0 was part of a Ponzi scheme perpetrated by  
16 Jeffrey Carpoﬀ. Carpoﬀ told investors his fund entities would manufacture mobile  
17 solar generators and lease them to companies such as T-Mobile to generate revenue.  
18 Investors would also claim substantial tax credits through their investments. However,  
19 Carpoﬀ's companies DC Solar Distribution and DC Solar Solutions manufactured and  
20 leased only a small portion of the generators promised, instead generating the  
21 appearance of high revenue by shuffling money between the companies while taking  
22 investor funds. SOLAR SENSE alleges that Defendants knew of and participated in  
23 the fraud no later than April 28, 2017, when they initially assisted Fund 0 in responding  
24 to an IRS audit of Fund 0. SOLAR SENSE alleges that Defendants defrauded it by  
25 selling it Fund 0's mobile solar generators in July 2017 on representations that there  
26 was a revenue generating lease of the generators to T-Mobile in effect when in fact  
27 the lease was not legitimate, being a product of Carpoﬀ's bribery of unauthorized T-  
28 Mobile personnel, and actual lease income from T-Mobile was a small fraction of what  
was represented. SOLAR SENSE's first amended complaint alleges violation of the  
Uniform Fraudulent Transfer Act (the "UFTA") and Voidable Transactions Act (the  
"VTA") five times, common law fraudulent transfer, aiding and abetting fraud,  
conspiracy to defraud, and unfair competition. SOLAR SENSE's voidable transfer  
claims concern distributions made by Solar Eclipse to Defendants.

26 KEYBANK NATIONAL ASSOCIATION ("KEYBANK"), plaintiff in consolidated  
27 case FCS059112, alleges that it loaned money to SOLAR SENSE to enable the  
28 purchase of the generators from Fund 0 and Defendants. KEYBANK alleges it was  
also defrauded in the course of that deal.

1 There are five interrelated motions before the court. SOLAR SENSE moves to  
2 compel Defendants to further respond to discovery requests concerning tax credits  
3 HAYS received due to his investment in Fund 0. SOLAR SENSE also moves to  
4 compel Defendants to further respond to requests for production seeking documents  
5 chronicling the course of HAYS's investment in Fund 0, the response to the IRS audit,  
6 and the sale of the generators to SOLAR SENSE. KEYBANK moves to compel  
7 Deloitte Tax, LLP, Defendants' accountants, to produce to it like documents  
8 concerning the history of the investment, audit, and sale.

9 Non-party Nixon Peabody LLP, counsel for Fund 0, moves to seal certain  
10 documents upon which SOLAR SENSE relies in making its motion to compel further  
11 responses to requests for production, as well as connected portions of the motion.  
12 Defendants move to seal certain documents upon which KEYBANK relies in its  
13 motion, as well as connected portions of the motion.

14 The motions before the court broadly concern similar documents and the  
15 parties make similar arguments for and against discovery of the targeted materials.  
16 Analysis will proceed by legal concepts, with application to the motions where  
17 appropriate and in the conclusion of the court's ruling.

18 The court finds that adequate efforts to meet and confer were made before the  
19 filing of the instant motions as the parties engaged in extensive, prolonged  
20 discussions concerning the requested discovery beforehand.

21 The court notes that on January 26, 2023 SOLAR SENSE filed a motion to  
22 compel production of documents pursuant to a subpoena served on Deloitte. That  
23 motion was denied as untimely on July 31, 2023. The denial of that motion has no  
24 bearing on the motions now before the court. SOLAR SENSE's motion to compel  
25 production of documents from Defendants concerns discovery requests served on a  
26 different entity from the earlier motion and KEYBANK's motion to compel documents  
27 from Deloitte is not made by the same party as the earlier motion. The motions  
28 concern different discovery rights and/or different parties. There is no attempt to  
impermissibly "reheat" a time-barred discovery dispute here.

## 22 **1. SOLAR SENSE: COMPEL FUND 0 TAX CREDITS**

24 SOLAR SENSE asserts that it needs discovery regarding Hays' tax credit  
25 information to address HAYS's fifth affirmative defense to its claims of fraudulent  
26 transfer targeting distributions he received from Fund 0 after investment. HAYS's fifth  
27 affirmative defense is that he took the distributions in good faith and for a reasonably  
28 equivalent value per Civil Code section 3439.08.

"Value" in this context refers to debt or property transferred in exchange for the  
distribution and does not include distributions that are made to respect a previously

1 purchased equity interest. (*Hayes v. Palm Seedlings Partners-A (In re Agric.*  
2 *Research & Tech. Grp. Inc.* (9<sup>th</sup> Cir. 1990) 916 F.2d 528; *Elite Personnel, Inc. v.*  
3 *Barclay (In re AFI Holding, Inc.)* (B.A.P. 9<sup>th</sup> Cir. Oct. 16, 2006) 2006 Bankr.LEXIS  
4 4793.) Offsetting a restitution claim can also count as "value" in this context. (*In re*  
5 *United Energy Corp.* (9<sup>th</sup> Cir. 1991) 944 F.3d 589, 595.) A defendant claiming taking  
6 in good faith and for reasonably equivalent value must demonstrate both good faith  
7 and a reasonably equivalent value per the text of the statute; good faith alone is  
8 insufficient. *Nautilus, Inc. v. Yang* (2017) 11 Cal.App.5th 33 does not hold to the  
9 contrary because that case states at page 41 that it was conceded to the court that  
10 reasonably equivalent value was not then at issue and that is the only reason that the  
11 court there assessed good faith alone.

12 SOLAR SENSE argues that HAYS's investment made him an equity owner,  
13 meaning that he cannot claim that the distributions were for the reasonably equivalent  
14 value of his investment. Therefore, it argues, his affirmative defense must concern tax  
15 credits he received for his investment and the offset they represent against any claim  
16 of his against Fund 0 for the collapse of the Ponzi scheme. HAYS has not committed  
17 to articulating his affirmative defense in any particular way and is not required to do so  
18 at this stage of litigation. Nonetheless, HAYS may choose to conduct his defense by  
19 asserting that his tax credits received do not equal his \$10.9 million investment in  
20 Fund 0, so that any investment amount not matched by tax credit value received is  
21 remaining reasonably equivalent value given to Fund 0 for the distributions. As such,  
22 SOLAR SENSE's discovery request is reasonably calculated to lead to the discovery  
23 of admissible evidence, specifically whether Hay's total tax credits are at least \$10.9  
24 million, the amount of HAY'S investment. The court expresses no opinion at this time  
25 on the strength or validity of any given argument HAYS may choose to make to  
26 support his affirmative defense.

27 **Revenue & Taxation Code Section 19542 Privilege.** Defendants claim  
28 "taxpayer privilege." Solar Sense disputes the existence of a "taxpayer privilege."  
Instead, Solar Sense argues that the privilege only applies to tax returns. Revenue  
and Taxation Code section 19542 provides that it is a misdemeanor for certain  
government administrative officers having access to tax returns to disclose the details  
of those tax returns. Though the statute is by its strict language directed only to those  
certain officers it contains an implied provision against forced disclosure in civil  
discovery proceedings so that the statutory purpose of encouraging truthful disclosure  
in returns may be advanced. (*Schnabel v. Superior Court* (1993) 5 Cal.4th 704, 719;  
*Webb v. Standard Oil Co.* (1957) 49 Cal.2d 509, 513 [discussing substantially identical  
former section 19282].) The privilege extends further than protecting literal tax return  
documents to also protect the information contained within a tax return. (*Sav-On*  
*Drugs, Inc. v. Superior Court* (1975) 15 Cal.3d 1, 7.)

The privilege has limited application here. The privilege against disclosure of  
tax returns cannot be taken so broadly as to protect any information related to the  
contents of tax returns. The purpose of encouraging truthful disclosure in tax returns



1 is not advanced by protecting all discussions of taxes. In this situation the privilege  
2 applies to protect any information that is directly printed on a tax return. It does not  
3 protect information surrounding the preparation of the return. To the extent that the  
4 targeted documents list information duplicated on a tax return, that information is  
5 privileged. Associated analysis, such as "Communication regarding Jim Hays  
6 personal taxes as it relates to investment in the Fund," is not.

7 Further, the court finds that HAYS waived the taxpayer privilege with regard to  
8 his tax credits claimed in 2011 as a result of investment in Fund 0 in that he produced  
9 to SOLAR SENSE an email stating the amount of tax credit claimed. (Declaration of  
10 Mary Kate Sullivan in Support of Motion to Compel Responses Re: Tax Benefits  
11 Received at ¶ 19; SOLAR SENSE's Compendium of Exhibits p. 496.)

## 12 **2. SOLAR SENSE: COMPEL PRODUCTION OF DOCUMENTS** 13 **(ATTACHMENTS A-E)**

### 14 **(ATTACHMENT A)**

15 Defendants claim "taxpayer privilege," with regard to four documents SOLAR  
16 SENSE wants to discover in its May 29, 2024 motion to compel production of  
17 documents, all included within SOLAR SENSE's Attachment A to its motion.  
18 Defendants state on their privilege log that two documents are "Analysis comparing  
19 tax credit reported on tax return with investment" and the other two are  
20 "Communication regarding Jim Hays personal taxes as it relates to investment in the  
21 Fund." Solar Sense again disputes the existence of a "taxpayer privilege." Solar  
22 Sense argues that the privilege only applies to tax returns.

23 As discussed above, the Revenue & Taxation Code Section 19542 privilege  
24 has limited application here. The privilege against disclosure of tax returns cannot be  
25 taken so broadly as to protect any information related to the contents of tax returns.  
26 Again, the privilege applies to protect any information that is directly printed on a tax  
27 return. It does not protect information surrounding the preparation of the return. To  
28 the extent that the targeted documents list information duplicated on a tax return, that  
information is privileged. Associated analysis, such as: "Analysis comparing tax credit  
reported on tax return with investment" and "Communication regarding Jim Hays  
personal taxes as it relates to investment in the Fund," is not.

### **(ATTACHMENTS B-E GENERALLY)**

**Attorney-Client Privilege.** The attorney-client privilege of Evidence Code  
section 954 confers on a client the privilege to refuse to disclose, and to prevent another  
from disclosing, a confidential communication between client and lawyer. A party  
claiming the attorney-client privilege bears the burden of producing preliminary facts  
necessary to support its exercise. (*Costco Wholesale Corp. v. Superior Court* (2009) 47

1 Cal.4th 725, 733.) The privilege attaches to any confidential legal advice given in the  
2 course of an attorney-client relationship and bars disclosure of a confidential  
3 communication even if the communication also contains unprivileged material. (*Id.* at pp.  
4 733-734.) In assessing whether a communication is confidential, the focus is upon the  
5 dominant purpose of the relationship between the client and attorney and not on the in-  
6 the-moment purpose of a given communication. (*Id.* at pp. 739-740.) A communication  
7 made in the course of an attorney-client relationship is normally presumed confidential,  
8 but when a third party is present in the communication, that presumption vanishes and  
9 the party asserting privilege takes on the burden of proving that the third party's  
10 presence was reasonably necessary to accomplish the client's purpose in consulting  
11 counsel and the communication must thus remain confidential. (*Behunin v. Superior*  
12 *Court* (2017) 9 Cal.App.5th 833, 844-845.)

13 A "communication" for purposes of the privilege is "information transmitted  
14 between a client and his lawyer...[that] includes a legal opinion formed and the advice  
15 given by the lawyer in the course of [the attorney-client] relationship." (Evid. Code, §  
16 952; *Zurich American Ins. Co. v. Superior Court* (2007) 155 Cal.App.4th 1485, 1495  
17 (*Zurich American*)). The attorney-client privilege is not waived for communications  
18 between non-lawyer corporate employees about the company's legal strategy when the  
19 communication contains a discussion of legal advice or strategy and the non-lawyers'  
20 communication of the legal advice or strategy was reasonably necessary for the  
21 transmission of the information or the accomplishment of the purpose for which the  
22 lawyer was consulted. (*Zurich American* at p. 1503.)

23 If a privilege log asserting the attorney-client privilege does not provide sufficient  
24 information to evaluate the merits of the claimed privilege, the Court may order the party  
25 claiming the privilege to provide a supplemental, more detailed privilege log. The Court  
26 lacks authority, however, to take the inadequate privilege log as a waiver of the attorney-  
27 client privilege. (*Catalina Island Yacht Club v. Superior Court* (2015) 242 Cal.App.4th  
28 1116, 1126.)

## 29 (ATTACHMENT B)

### 30 **Communications Between Non-Attorneys (SOLAR SENSE's Attachment B).**

31 The numerous documents of Attachment B to SOLAR SENSE's motion to compel  
32 Defendant's production of documents almost all state as their reason for privilege  
33 "Communication regarding [topic such as managing member's purchase option or AEDG  
34 sale]" with the appended phrase "for the purpose of obtaining or providing legal advice."  
35 The common feature of most of the documents marked on Attachment B is that they are  
36 communications between non-attorneys. The Court notes that Foley is also named as a  
37 sender or recipient to some of the communications.

38 Facially, the attorney client privilege does not apply to documents marked on  
39 Attachment B involving communications between non-attorneys made "for the purpose  
40 of obtaining or providing legal advice." Evidence Code section 952 defines a  
41 "communication" and states in pertinent part, that the communication must include "[...] a

1 legal opinion formed and the advice given by the lawyer in the course of that  
2 relationship." Communications between non-lawyers cannot obtain or provide legal  
3 advice. The privilege log reveals that while persons may have been talking about topics  
4 that touched upon legal issues, there is nothing to indicate communications discussing a  
5 lawyer's opinions or legal advice. An exception arises if HAYS seeks to claim that any  
6 communication involved a lawyer's opinion or advice and disclosure to a third party was  
7 reasonably necessary to accomplish the purpose for consulting a lawyer. (*Zurich*  
8 *American*, *supra*, 155 Cal.App.4th at p. 1503.)

9 Regarding communications where Foley was either a sender or recipient, HAYS  
10 presents evidence that he retained Foley & Lardner to provide legal advice and that  
11 Foley & Lardner provided legal advice concerning not just his initial investment in Solar  
12 Eclipse but the 2016 IRS audit and 2017 sale of the MSGs to Plaintiff. (Hays Dec. at ¶¶  
13 8-10.) He also declares that Foley & Lardner was permitted to work with Deloitte in order  
14 to provide legal advice on these subjects. (*Id.* at ¶ 11.) This establishes a *prima facie*  
15 case that the dominant purpose of HAYS retaining Foley & Lardner's services was the  
16 provision of legal advice and that disclosure of advice to Deloitte was reasonably  
17 necessary to further the purpose of the attorney-client relationship. Disclosure of  
18 privileged documents only to Deloitte personnel does not waive the attorney-client  
19 privilege.

20 The Court finds that any communication that includes anyone beyond Foley &  
21 Lardner, Defendant HAYS, and/or Deloitte is facially not privileged due to unnecessary  
22 disclosure to third parties and must be disclosed subject to the following exception. If  
23 DEFENDANT HAYS seeks to claim that any communication involved a lawyer's opinion  
24 or advice and disclosure to a third party was reasonably necessary to accomplish the  
25 purpose for consulting a lawyer, then Defendant Hays must amend his privilege log.  
26 Absent a proper amendment to the privilege log, the communications must be disclosed.

27 Two entries on Attachment B concern documents "recording legal advice:"  
28 DEFS021 and DEFS022, both on Attachment B's first page. Both seem to be emails  
from Mr. Joseph Housman to himself. Mr. Housman is a third party whose relationship  
to HAYS is not explained in competent evidence presented to the court. As he is a third  
party whose involvement is not shown to be reasonably necessary to effectuation of  
HAYS's relationship with his counsel, the disclosure of legal advice to Mr. Housman  
waives any applicable attorney-client privilege.

Other entries, such as DEFS175, DEFS177, DEFS178, DEFS179, DEFS181,  
include Foley as either a sender or recipient. (1) If the communication solely involves  
Foley, Hays, and/or Deloitte, the communication is privileged. (2) If Foley is a sender or  
recipient of the communication with third parties other than solely Hays or Deloitte, the  
communication is facially not privileged. If HAYS seeks to claim that any communication  
in item (2) involved a lawyer's opinion or advice and disclosure to a third party was  
reasonably necessary to accomplish the purpose for consulting a lawyer, Defendant  
Hays must then amend his privilege log. Absent a proper amendment to the privilege  
log, the communications must be disclosed.



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The Court notes that many documents on Attachment B claim the work product privilege in addition to the attorney-client privilege. SOLAR SENSE makes no argument against application of the work product privilege. Any document on Attachment B marked as "work product" is privileged, notwithstanding the above.

(ATTACHMENT C)

**Crime-Fraud Exception (SOLAR SENSE's Attachment C).** SOLAR SENSE asserts the crime-fraud exception with regard to the communications marked on its Attachment C, some of which are inarguably to or from HAYS's counsel and others of which are between non-lawyers. Evidence Code section 956 codifies the common law rule that the attorney-client privilege is lost where the client seeks legal assistance to plan or perpetuate a crime or fraud. The party seeking to apply the crime-fraud exception must make a prima facie showing that the services of the attorney were sought or obtained to enable or aid anyone in committing or planning to commit a crime or fraud. (*BP Alaska Exploration, Inc. v. Superior Court* (1988) 199 Cal.App.3d 1240, 1262.) This showing must be grounded in fact enabling a reasonable inference of crime or fraud rather than a mere assertion. (*Ibid.*) The proponent of the exception is required to prove (1) a false representation of a material fact, (2) knowledge of falsity, (3) intent to deceive, and (4) the statement recipient's right to rely. (*Id.* at p.1263) Also, the proponent need not show that the fraud plan predated the seeking or retention of legal counsel (*Id.* at pgs. 1267-1269, citing *In re Sealed Case* (1982) 676 F.2d 793, 815.) The proponent must, however, show a reasonable relationship between communications to be excepted from the privilege and the fraud to which they supposedly relate. (*Id.* at pgs. 1268-1269.)

It is the intent of the client that is the focus when determining the existence of a prima facie case for fraud in applying the crime-fraud exception, not the intent of the lawyer(s). (*State Farm Fire & Casualty Co. v. Superior Court* (1997) 54 Cal.App.4th 625, 645.)

SOLAR SENSE presses two different frauds as bases for applying the crime-fraud exception to the attorney-client privilege: first, a purported fraud on the IRS wherein Solar Eclipse represented that it had no documents related to DC Solar Distribution's third-party rentals when it in fact had a copy of the T-Mobile sublease and the March 2, 2017 email from Roach, and second, a purported fraud on SOLAR SENSE wherein Defendants sold it the generators on false representations that the T-Mobile sublease was legitimate and everything it appeared to be.

**(Allegations Regarding IRS Fraud)**

Regarding the allegations of fraud perpetrated on the IRS, that the misrepresentation here was not made to SOLAR SENSE or KEYBANK is immaterial.



1 The crime-fraud exception applies where counsel is utilized to help "anyone" commit a  
2 fraud. Defendants' counsel at Foley was involved in drafting Fund 0's response to the  
3 IRS's SO-7 request. (Sullivan Dec. at ¶¶ 8, 14; Exhibits in Support at pp. 878-887.) Solar  
4 Sense has made a sufficient prima facie showing that the response contained a  
5 misrepresentation where it told the IRS that Fund 0 had no documentation regarding  
6 Solar Distribution's generator leases when in fact Fund 0 had a copy of the T-Mobile  
7 sublease and the March 2, 2017 Roach email, which contained attachments with  
8 information about lease revenue. (*Id.* at ¶¶ 6, 8; Exhibits in Support at pp. 215-233,  
9 863.) The email provides sufficient evidence to draw a reasonable inference of  
10 knowledge of falsity and intent to deceive.

11 The crime fraud exception also requires that the communication bear a  
12 reasonable relationship to the fraud. In HAYS' declaration, HAYS states that he hired  
13 Foley and Lardner to assist him with his investment in the Fund, that Foley was hired to  
14 provide legal advice to him in his capacity as an investor, that Foley provided legal  
15 advice regarding his initial investment, the IRS audit, and the sale of the Fund's assets.  
16 (Declaration of James C. Hays in Support of Opposition to Motion to Compel  
17 Defendants' Further Responses ("Hays Dec.") at ¶¶ 8-10.) Where Foley was hired for  
18 these purposes, the Court finds that communications involving Foley, as it relates to  
19 these topics, bear a reasonable relationship to the IRS and generator sale frauds.

20 The IRS made its SO-7 request on May 10, 2017. Until the IRS specifically  
21 requested information about third-party rentals it is logical to assume that Defendants did  
22 not generate any communications designed to create a fraudulent response to that  
23 question. Defendants gave their reply to the request with the prima facie false statement  
24 in it on June 13, 2017. All documents on Attachment C concerning the IRS but dated  
25 before May 10, 2017 are not subject to the crime-fraud exception as relates to the IRS  
26 fraud because they cannot be reasonably related to fraudulently answering a question  
27 that was not yet posed. Likewise, all documents concerning the IRS but dated after  
28 June 13, 2017 are not reasonably related to committing the now-past fraud. Thus,  
communications concerning the IRS and generated between May 10, 2017 and June 13,  
2017 are subject to the crime-fraud exception and appear to be reasonably related to the  
prima facie fraud on the IRS. These communications are not privileged due to  
application of the crime-fraud exception.

22 Lastly, the Court finds that the IRS had a right to rely on the statements.

#### 24 **(Allegations Regarding Generator Sale Fraud)**

25 Regarding the allegations of fraud in selling generators to SOLAR SENSE,  
26 SOLAR SENSE has made a sufficient prima facie showing of misrepresentation and  
27 knowledge of falsity. SOLAR SENSE provides evidence that Defendants, as well as  
28 Solar Eclipse, knew the T-Mobile leases did not exist in the ways and extents  
represented to SOLAR SENSE and KEYBANK in the MSG sale.

1 The Asset Purchase Agreement represented to SOLAR SENSE that there was a  
2 valid and genuine T-Mobile lease for Fund 0's generators under which T-Mobile paid  
3 \$1,100 per generator per month. (Declaration of Mary Kate Sullivan in Support of Motion  
4 (Sullivan Dec.) at ¶ 34; Exhibits in Support at pp. 407-467.) The asset purchase  
5 agreement between SOLAR SENSE and Fund 0 states at background paragraph C  
6 that Fund 0's mobile solar generators were subject to a valid and genuine lease to T-  
7 Mobile and at paragraph 6(e)(ii) represents that said lease "is in existence and in full  
8 force and effect without modification" as of the date of the agreement. (Exhibits in  
9 Support of KEYBANK's Motion to Compel, Exhibit 9.) The agreement represents at  
10 paragraph 6(e)(iii) that T-Mobile is in actual possession of the generators and at  
11 6(e)(vii) that each generator is rented out for \$1,100 per month, with T-Mobile having  
12 fully paid all rent. (*Ibid.*)

9 Defendants represented the contents of the Asset Purchase Agreement to be true  
10 in that HAYS reviewed, consented, and agreed to the sale. (*Id.* at ¶¶ 2, 8; Exhibits in  
11 Support at pp. 85-88, 856, 863-866, 868-873, 888-892, 897-898, 901-908.) Defendants'  
12 counsel at Foley & Lardner was involved in negotiating this consent. (*Ibid.*) The T-  
13 Mobile lease was in fact fraudulent. (Exhibits in Support at pp. 22-24.)

13 SOLAR SENSE provides evidence establishing a prima facie case that  
14 Defendants knew the T-Mobile lease was fraudulent where Defendants obtained an  
15 email from accountant Ronald Roach on March 2, 2017 showing that T-Mobile was not  
16 providing lease income as it should have been under a genuine lease and that Carpo's  
17 companies were transferring large sums to each other. This aligned with what the IRS  
18 identified as an issue in its examination report sent to Defendants on January 30, 2017.  
19 (*Id.* at ¶ 6; Exhibits in Support at pp. 215-233 [email from Roach], 669-670 [IRS  
20 examination].) As stated in the IRS examination "The Service thus believes that while  
21 the lease itself validly conveys the property to the lessee, the lease payments  
22 themselves are overstated and ultimately are merely part of a circular flow of funds that  
23 begin and end with DC Solar Solutions." (IRS examination pages 669-670.)

20 Though the Roach email does not contain data precisely specific to Fund 0, but  
21 rather the overall picture of the Carpo's solar energy investment fund network, sufficient  
22 evidence exists to find that Fund 0 was included in the whole and that T-Mobile was not  
23 providing the lease revenue it would have under a genuine agreement. The lease  
24 purported to rent out 1,000 generators to T-Mobile for \$1,100 a month apiece. (*Id.* at ¶  
25 8, Exhibits in Support at pp. 407-467.) The size of the discrepancy between the  
26 \$1,100,000 a month T-Mobile was supposed to be paying for all of Solar Distribution's  
27 generators and the roughly \$27,000 a month Roach's email reveals was paid in 2016 is  
28 significant. Roach revealed that by comparison in 2016 \$61 million was "generated" on  
the "re-rent" agreement between Carpo's companies. SOLAR SENSE presents  
sufficient evidence to make a prima facie case of misrepresentation and knowledge of  
falsity.

Where HAYS' advisors are listed as recipients on the Roach email, the Court  
finds sufficient evidence to support a prima facie showing of HAYS' intent to deceive in

1 selling the generators. Plaintiff had a right to rely on the misrepresentations because it  
2 had no reason to suspect falsity.

3 All documents concerning the AEDG sale appear to be reasonably related to the  
4 prima facie fraud on SOLAR SENSE and are not privileged, due to application of the  
5 crime-fraud exception as relates to the fraud on SOLAR SENSE.

6 **(Documents Regarding "The Managing Member's Purchase Option")**

7 The court notes that there are documents on Attachment C where Defendants'  
8 privilege log states the contents are "Communication regarding the managing member's  
9 purchase option for the purpose of obtaining or providing legal advice." SOLAR SENSE  
10 does not advance an argument for discovering these documents. The documents  
11 concerning "the managing member's purchase option" are not subject to the crime-fraud  
12 exception to the attorney-client privilege.

13 **(ATTACHMENT D)**

14 **Waiver of Privilege (SOLAR SENSE's Attachment D).** The common feature of  
15 documents on SOLAR SENSE's Attachment D is that they involve Deloitte Tax, LLP  
16 personnel, retained to offer tax-related services to Defendants. SOLAR SENSE  
17 contends that Deloitte's engagement letter with Defendants contains a waiver as follows:  
18 "The Client [Defendants] acknowledges that none of its other advisors have imposed or  
19 will impose any conditions of confidentiality with respect to the tax treatment or tax  
20 structure associated with the tax services or transactions described in the Contract."  
21 (Sullivan Dec. at ¶ 11; Exhibits in Support at p. 563.) The Court finds that there is no  
22 express or implied waiver of the attorney-client privilege in the quoted language.

23 **(ATTACHMENT E)**

24 **Disclosure to Third Persons (SOLAR SENSE's Attachment E).** The  
25 documents on SOLAR SENSE's Attachment E contain communications between Foley,  
26 Deloitte, Nixon Peabody, and/or other of Fund 0's advisors. SOLAR SENSE contends  
27 that disclosure to these third parties waives the attorney-client privilege.

28 HAYS presents evidence that he retained Foley & Lardner to provide legal advice  
and that Foley & Lardner provided legal advice concerning not just his initial investment  
in Solar Eclipse but the 2016 IRS audit and 2017 sale of the MSGs to Plaintiff. (Hays  
Dec. at ¶¶ 8-10.) He also declares that Foley & Lardner was permitted to work with  
Deloitte in order to provide legal advice on these subjects. (*Id.* at ¶ 11.) This establishes  
a prima facie case that the dominant purpose of HAYS retaining Foley & Lardner's  
services was the provision of legal advice and that disclosure of advice to Deloitte was  
reasonably necessary to further the purpose of the attorney-client relationship.

1 Disclosure of privileged documents only to Deloitte personnel did not waive the attorney-  
2 client privilege.

3 However, HAYS does not present evidence that Nixon Peabody or anyone else  
4 was reasonably and necessarily involved to effectuate the attorney-client relationship.  
5 Any redactions of communications shared with entities other than Deloitte may be  
6 improper as disclosure to those other third parties potentially waive the attorney-client  
7 privilege.

8 The Court finds that any communication that includes anyone beyond Foley &  
9 Lardner, HAYS, and/or Deloitte is facially not privileged due to unnecessary disclosure to  
10 third parties and must be disclosed subject to the following exception. If HAYS seeks to  
11 claim that any communication involved a lawyer's opinion or advice and disclosure to a  
12 third party was reasonably necessary to accomplish the purpose for consulting a lawyer,  
13 then HAYS must amend his privilege log. Absent a proper amendment to the privilege  
14 log, the communications must be disclosed.

### 15 3. KEYBANK'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS FROM 16 DELOITTE

17 **KEYBANK's Motion to Compel.** KEYBANK's motion to compel Deloitte to  
18 produce documents is similar to the arguments of SOLAR SENSE. Much of the above  
19 reasoning equally applies here.

#### 20 (DELOITTE'S 2021 PRIVILEGE LOG)

21 Deloitte's December 2021 privilege log provides insufficient factual detail to permit  
22 the court to evaluate whether the redacted communications actually include a lawyer's  
23 legal opinion or advice and whether disclosure to third parties was reasonably  
24 necessary. The 2021 privilege log is silent as to whether there were communications  
25 about a lawyer's opinions or advice and whether disclosure to third parties was  
26 reasonably necessary.

27 A privilege log that is insufficient to enable a determination of whether the  
28 attorney-client privilege applies does not give the court authority to find there is no  
privilege; rather, a supplemental log may be ordered. (*Catalina Island Yacht Club v.*  
*Superior Court* (2015) 242 Cal.App.4th 1116, 1126.) If Deloitte seeks to claim the  
attorney client privilege on the grounds that the communication discussed a lawyer's  
opinion or advice and that disclosure to third parties was necessary, Deloitte must  
produce a more detailed privilege log that permits evaluation of this particular claim.

Despite the above, however, and as noted below under "APPLICABILITY OF  
CRIME FRAUD EXCEPTION," the Court finds that the crime-fraud exception is



1 applicable to communications on the 2021 and 2023 privilege logs that reasonably relate  
2 to the prima facie frauds of the IRS response and the AEDG sale.

3  
4 **(DELOITTE'S 2023 PRIVILEGE LOG)**

5 Deloitte's 2023 log uses the same "for the purposes of obtaining or providing legal  
6 advice" language seen in SOLAR SENSE'S attachment E motion. With regard to  
7 Deloitte's 2023 log, there is sufficient information to evaluate the claim, in part.

8 Based upon the reasoning above when discussing SOLAR SENSE'S  
9 Attachments B and E motions:

- 10 1. Any communication solely between Foley & Lardner and Defendant HAYS is  
11 privileged under-attorney client.
- 12 2. Any communication solely between Foley & Lardner and Deloitte is privileged  
13 under-attorney client.
- 14 3. Any communication solely between Foley & Lardner, Defendant HAYS, and  
15 Deloitte is privileged under-attorney client.
- 16 4. Any communication solely between Deloitte employees or non-attorneys is not  
17 facially privileged and must be disclosed subject to the following exception. If  
18 DELOITTE or HAYS seeks to claim that the communication involved a lawyer's  
19 opinion or advice and disclosure to a third party was reasonably necessary to  
20 accomplish the purpose for consulting a lawyer, then DELOITTE or HAYS must  
21 amend his privilege log.
- 22 5. Any communication sent to or from Foley & Lardner that includes anyone other  
23 than Defendant HAYS and/or Deloitte is facially not privileged due to unnecessary  
24 disclosure to third parties and must be disclosed subject to the following  
25 exception. If DELOITTE or HAYS seeks to claim that the communication involved  
26 a lawyer's opinion or advice and disclosure to a third party was reasonably  
27 necessary to accomplish the purpose for consulting a lawyer, then DELOITTE or  
28 HAYS must amend his privilege log.

29  
30 **(APPLICABILITY OF THE CRIME FRAUD EXCEPTION AS TO BOTH THE 2021  
31 PRIVILEGE LOG AND 2023 PRIVILEGE LOG)**

32 Any communication on either privilege log sent to or from Foley but also  
33 concerning the IRS SO-7 request and dated between May 10, 2017 and June 13, 2017,

1 or concerning the AEDG sale, is not privileged due to the crime-fraud exception. (See  
2 section regarding Attachment C to SOLAR SENSE's motion)

3 The court notes that, unlike the privilege log at issue in SOLAR SENSE's motion,  
4 the Deloitte logs include a large number of documents from before 2017. These are  
5 generally marked to be about "distributions" or "transactions" between HAYS and DC  
6 Solar or are just "about Solar Eclipse Fund." The court clarifies that none of these  
7 documents are subject to the crime-fraud exception as they all predate both prima facie  
8 frauds.

9 **Motions to Seal.** There exists a First Amendment right of access to documents  
10 used at trial or as a basis of adjudication. (*NBC Subsidiary (KNBC-TV), Inc. v. Superior*  
11 *Court* (1999) 20 Cal.4th 1178, 1208; *Mercury Interactive Corporation v. Klein* (2007) 158  
12 Cal.App.4th 60, 84.) Accordingly, a court record must not be filed under seal without a  
13 court order. (Cal. Rules of Court, rule 2.551(a).) The court may order the record sealed  
14 only upon express findings that facts establish that there exists an overriding interest that  
15 overcomes the right of public access to the record, the overriding interest supports  
16 sealing the record, a substantial probability exists that the overriding interest will be  
17 prejudiced if the record is not sealed, the proposed sealing is narrowly tailored, and no  
18 less restrictive means exist to achieve the overriding interest. (Cal. Rules of Court, rule  
19 2.550(d).)

20 The court finds that movants Nixon Peabody and Defendants have established an  
21 overriding interest in sealing the identified materials and that the overriding interest will  
22 be prejudiced without sealing in that the materials concern the movants' confidential  
23 business information and were circulated with a reasonable expectation of confidentiality.  
24 (Declaration of Ellen Ahrens Wickham in Support of Defendant's Motion to Seal at ¶¶ 5-  
25 7; Declaration of Eric H. MacMichael in Support of Nixon Peabody's Motion to Seal at ¶¶  
26 3-4.) The court further finds that the proposed sealing is narrowly tailored and no less  
27 restrictive means of protecting the movants' interests exists.

## 28 CONCLUSION.

(Fund 0). SOLAR SENSE's motion to compel HAYS's production of his tax information  
is granted.

(ATTACHMENT A). SOLAR SENSE's motion to compel Defendant's further responses  
to requests for production is granted as follows: the documents in SOLAR SENSE's  
Attachment A are to be produced except for information that can be found directly on  
HAYS's tax return.

(ATTACHMENT B). Regarding the documents listed on Attachment B: (1) If the  
communication solely involves Foley, HAYS, and/or Deloitte, the communication is  
facially privileged. (2) If Foley is a sender or recipient of the communication, but the  
communication involves third parties other than solely HAYS or Deloitte, the  
communication is facially not privileged. If HAYS seeks to claim that any communication

1 in item (2) involved a lawyer's opinion or advice and disclosure to a third party was  
2 reasonably necessary to accomplish the purpose for consulting a lawyer, HAYS must  
3 then amend his privilege log. Absent a proper amendment to the privilege log, the  
communications must be disclosed.

4 DEFS021 and DEFS022 (Housman emails) are to be produced.

5 **(ATTACHMENT C).** The documents in Attachment C that either relate to the IRS inquiry  
6 and are dated between May 10, 2017 and June 13, 2017 or that relate to the AEDG sale  
7 are subject to the crime-fraud exception to the attorney-client privilege.

8 **(ATTACHMENT D).** The documents in Attachment D are not subject to waiver of the  
attorney-client privilege on the basis of the Deloitte engagement letter.

9 **(ATTACHMENT E).** The documents in Attachment E that includes anyone beyond Foley  
10 & Lardner, HAYS, and/or Deloitte are to be produced except where HAYS seeks to claim  
11 that any communication involved a lawyer's opinion or advice and disclosure to a third  
12 party was reasonably necessary to accomplish the purpose for consulting a lawyer. If  
13 so, HAYS must amend his privilege log. Absent a proper amendment to the privilege  
log, the communications must be disclosed.

14 As to any documents that overlap between the attachments, the document is  
15 discoverable if any waiver or exception applies. Stated differently, as to any documents  
16 that overlap between the attachments, the document is privileged if no waiver or  
exception applies.

17 In all cases, however, the production is to exclude any document that can also be found  
18 on Attachment B that refers to work product.

19 **(KEYBANK).** KEYBANK's motion to compel is granted, in part, as follows:

- 20 1. Any communication solely between Foley & Lardner and Defendant HAYS is  
21 privileged under attorney-client.
- 22 2. Any communication solely between Foley & Lardner and Deloitte is privileged  
23 under attorney-client.
- 24 3. Any communication solely between Foley & Lardner, Defendant HAYS, and  
25 Deloitte is privileged under attorney-client.
- 26 4. Any communication solely between Deloitte employees or non-attorneys is not  
27 facially privileged. If DELOITTE or HAYS seek to claim that the  
28 communication involved a lawyer's opinion or advice and disclosure to a third


1 party was reasonably necessary to accomplish the purpose for consulting a  
2 lawyer, then DELOITTE or HAYS must amend the privilege log.

- 3 5. Any communication sent to or from Foley & Lardner that includes anyone  
4 other than Defendant HAYS and/or Deloitte is facially not privileged due to  
5 unnecessary disclosure to third parties and must be disclosed subject to the  
6 following exception. If DELOITTE or HAYS seek to claim that the  
7 communication involved a lawyer's opinion or advice and disclosure to a third  
8 party was reasonably necessary to accomplish the purpose for consulting a  
9 lawyer, then DELOITTE or HAYS must amend the privilege log.  
10  
11 6. Any communication on either privilege log sent to or from Foley but also  
12 concerning the IRS SO-7 request and dated between May 10, 2017 and June  
13 13, 2017, or concerning the AEDG sale, is not privileged due to the crime-  
14 fraud exception and must be disclosed. (See section regarding Attachment C  
15 to SOLAR SENSE's motion).

#### 13 4. MOTIONS TO SEAL

14 Both motions to seal are granted.

21 Dated: 12/20/2024



22 TIM P. KAM  
23 JUDGE OF THE SUPERIOR COURT  
24 COUNTY OF SOLANO  
25  
26  
27  
28



1 SOLANO COUNTY COURTS  
2 STATE OF CALIFORNIA  
3 580 Texas Street, Fairfield, CA

4 **CERTIFICATE AND AFFIDAVIT OF MAILING** CASE NO. FCS055800

5 I certify under penalty of perjury that I am a Judicial Assistant of the above-entitled Court  
6 and not a party to the within action; that I am readily familiar with the business practice for  
7 collection and processing of correspondence for mailing with the United States Postal Service;  
8 that I served the attached documents as follows:

9 ☒ **By Mail:** by causing to be placed a true copy thereof in an envelope which was then  
10 sealed and postage fully prepaid on the date shown below; and that this document was deposited  
11 in the United States Postal Service on the date indicated. Said envelopes were addressed to the  
12 attorneys/parties and any other interested party as indicated below.

13 ☐ **By Email:** by causing a true copy of said document(s) to be transmitted via e-mail to  
14 each of the parties at the email addresses listed below.

15 ☐ **By Facsimile:** by causing a true copy of said document(s) to be transmitted via facsimile  
16 to the facsimile numbers listed below. A transmission report was properly issued by the sending  
17 facsimile machine, and the transmission was reported as complete and without error.

18 Document Served: RULING AND ORDER AFTER HEARING


19 WILLIAM R. WARNE, ESQ.  
20 621 CAPITOL MALL, 18<sup>TH</sup> FLOOR  
21 SACRAMENTO, CA 95814

22 ELLEN AHRENS WICKMAN, ESQ.  
23 800 PENCE BUILDING  
24 800 HENNEPIN AVENUE  
25 MINNEAPOLIS, MN 55403

26 MARY KATE SULLIVAN, ESQ.  
27 595 MARKET STREET, SUITE 2600  
28 SAN FRANCISCO, CA 94105

BENJAMIN K. RILEY, ESQ.  
1100 SANSOME STREET  
SAN FRANCISCO, CA 94111

1  
2 I declare under penalty of perjury that the foregoing is true and correct and that this  
3 declaration was executed on 12/20/24, at Fairfield, California.

4   
5 J. CONNELLY  
6 Judicial Assistant / Deputy Clerk  
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