

Birrell, Kenneth W.

February 14, 2017

1

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

UNITED STATES OF)	
AMERICA,)	Deposition of:
)	
Plaintiff,)	KENNETH W. BIRRELL
)	
vs.)	Time on record: 4 Hours,
)	31 Minutes
RAPOWER3, LLC,)	
INTERNATIONAL)	Case No. 2:15-cv-00828 DN
AUTOMATED SYSTEMS,)	
)	
INC., LTB1, LLC, R.)	Judge David Nuffer
)	
GREGORY SHEPARD,)	
)	
NELDON JOHNSON and)	
)	
ROGER FREEBORN,)	
)	
)	
Defendants.)	

**Plaintiff
Exhibit**

409

February 14, 2017 * 9:06 a.m.

Location: United States Attorney's Office
111 South Main Street, Suite 1800
Salt Lake City, Utah

Reporter: Dawn M. Perry, CSR

Notary Public in and for the State of Utah

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

Birrell, Kenneth W.

February 14, 2017

2 (Pages 2 to 5)

2	4
<p>1 A P P E A R A N C E S</p> <p>2 FOR THE PLAINTIFF:</p> <p>3 Christopher R. Moran</p> <p>4 Erin Healy Gallagher</p> <p>5 Erin R. Hines (Telephonically)</p> <p>6 United States Department of Justice</p> <p>7 Trial Attorneys, Tax Division</p> <p>8 P.O. Box 7328</p> <p>9 Washington, D.C. 20044</p> <p>10 (202) 307-0834 (Moran)</p> <p>11 (202) 353-2452 (Healy Gallagher)</p> <p>12 (202) 514-6770 (fax)</p> <p>13 christopher.r.moran@usdoj.gov</p> <p>14 erin.healygallagher@usdoj.gov</p> <p>15</p> <p>16 FOR THE DEFENDANTS, RAPOWER3, LLC, INTERNATIONAL</p> <p>17 AUTOMATED SYSTEMS, INC., LTB1, LLC, AND NELDON</p> <p>18 JOHNSON:</p> <p>19 Christian D. Austin</p> <p>20 Attorney at Law</p> <p>21 Heideman & Associates</p> <p>22 2969 No. University Avenue</p> <p>23 Suite 180</p> <p>24 Provo, Utah 84604</p> <p>25 (801) 472-7742</p> <p> (801) 374-1724 (fax)</p> <p> caustin@heidlaw.com</p> <p>17 FOR THE WITNESS:</p> <p>18 Christopher S. Hill</p> <p>19 Attorney at Law</p> <p>20 Kirtan McConkie</p> <p>21 50 East South Temple</p> <p>22 Salt Lake City, Utah 84111</p> <p>23 (801) 328-3600</p> <p>24 (801) 212-2019 (fax)</p> <p>25 chill@kmclaw.com</p>	<p>1 Exhibit 359 Letter dated August 8, 2012, to 76</p> <p>2 Potential RaPower3 Customer from</p> <p>3 Anderson Law Center</p> <p>4 Exhibit 360 Undated letter to Dear Client 79</p> <p>5 from Bryan S. Sorenson</p> <p>6 Exhibit 361 E-mail dated October 30, 2012, 82</p> <p>7 to jason@orangeinsure.com from</p> <p>8 Ken Birrell, with attachments</p> <p>9 Exhibit 362 E-mails dated October 30 and 31, 94</p> <p>10 2012, between Ken Birrell and</p> <p>11 Jason Clement, with attachments</p> <p>12 Exhibit 363 E-mail dated November 9, 2012, 101</p> <p>13 to jason@orangeinsure.com from</p> <p>14 Ken Birrell, and attachments</p> <p>15 Exhibit 364 Invoices 106</p> <p>16 Exhibit 365 E-mail dated January 9, 2013, to 117</p> <p>17 Ken Birrell from</p> <p>18 jason@orangeinsure.com</p> <p>19 Exhibit 366 E-mail dated January 14, 2013, 120</p> <p>20 to Ken Birrell from Jill Cottam</p> <p>21</p> <p>22 Exhibit 367 E-mails dated January 14, 2013, 123</p> <p>23 and attachments</p> <p>24 Exhibit 368 E-mails dated January 14, 2013, 125</p> <p>25 and October 30, 2012, with</p> <p> attachments</p> <p> Exhibit 369 E-mail dated October 15, 2013, 130</p> <p> with attachment</p> <p> Exhibit 370 Letter dated January 10, 2014, 146</p> <p> to Neldon Johnson and Greg</p> <p> Shepard, with attachments</p> <p> * * *</p>
3	5
<p>1 I N D E X</p> <p>2 KENNETH W. BIRRELL PAGE</p> <p>3 Examination by Ms. Healy Gallagher 6</p> <p>4 * * *</p> <p>5 E X H I B I T S</p> <p>6 NO. DESCRIPTION PAGE</p> <p>7</p> <p>8 Exhibit 89 E-mail dated January 17, 2014, 149</p> <p>9 with attachment</p> <p>10 Exhibit 143 E-mail chain, December 2013 132</p> <p>11 Exhibit 231 E-mail dated December 11, 2013, 137</p> <p>12 to numerous recipients from Greg</p> <p>13 Shepard</p> <p>14 Exhibit 293 E-mail dated July 8, 2013, to 126</p> <p>15 pgregg@bsfmail.com from Greg</p> <p>16 Shepard, with attachments</p> <p>17 Exhibit 353 E-mail dated December 1, 2016, 34</p> <p>18 to Tate Bennett, Donald Reay and</p> <p>19 Justin Heideman from Christopher</p> <p>20 R. Moran, with attachments</p> <p>21</p> <p>22 Exhibit 354 Answer 35</p> <p>23</p> <p>24 Exhibit 355 E-mail dated August 15, 2012, to 64</p> <p>25 Ken Birrell from</p> <p> jason@orangeinsure.com</p> <p> Exhibit 356 E-mail dated August 15, 2012, to 68</p> <p> Ken Birrell from</p> <p> jason@orangeinsure.com, with</p> <p> attachments</p> <p> Exhibit 357 E-mail dated August 20, 2012, to 70</p> <p> Ken Birrell from</p> <p> jason@orangeinsure.com, and</p> <p> attachments</p> <p> Exhibit 358 Letter dated August 24, 2012, to 74</p> <p> Neldon Johnson from Kenneth W.</p> <p> Birrell</p> <p> Birrell</p>	<p>1 P R O C E E D I N G S</p> <p>2</p> <p>3 MS. HEALY GALLAGHER: Good morning. We</p> <p>4 are on the record in the case of the United States</p> <p>5 versus RaPower3, et al., on February 14th, 2017.</p> <p>6 My name is Erin Healy Gallagher of the</p> <p>7 United States Department of Justice from the tax</p> <p>8 division, appearing on behalf of the United States.</p> <p>9 Counsel, would you please make your</p> <p>10 appearances?</p> <p>11 MR. AUSTIN: Christian Austin for</p> <p>12 defendant RaPower3, et al., and Happy Valentine's</p> <p>13 Day.</p> <p>14 MR. HILL: Christopher Hill, Kirtan</p> <p>15 McConkie, appearing on behalf of the witness,</p> <p>16 Ken Birrell.</p> <p>17 MR. MORAN: And Christopher Moran for the</p> <p>18 United States.</p> <p>19 MS. HEALY GALLAGHER: Erin Hines, also for</p> <p>20 the United States, is on the phone.</p> <p>21 Counsel for R. Gregory Shepard and Roger</p> <p>22 Freeborn is not in attendance. That is Donald Reay.</p> <p>23 This deposition will be governed by the</p> <p>24 Federal Rules of Civil Procedure and the local rules</p> <p>25 of the District of Utah.</p>

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

Birrell, Kenneth W.

February 14, 2017

3 (Pages 6 to 9)

<p style="text-align: right;">6</p> <p>1 All exhibits will be marked and kept by me</p> <p>2 for this week, and then we'll hand them off at the</p> <p>3 end of the week to the court reporter.</p> <p>4 Any other stipulations will be addressed</p> <p>5 as the need arises.</p> <p>6 KENNETH W. BIRRELL,</p> <p>7 called as a witness, being first sworn,</p> <p>8 was examined and testified as follows:</p> <p>9 EXAMINATION</p> <p>10 BY MS. HEALY GALLAGHER:</p> <p>11 Q. Let's see. Mr. Birrell, you've been sworn</p> <p>12 in, correct?</p> <p>13 A. Correct.</p> <p>14 Q. Would you please state and spell your name</p> <p>15 for the record?</p> <p>16 A. Kenneth, K-e-n-n-e-t-h, Birrell,</p> <p>17 B-i-r-r-e-l-l.</p> <p>18 Q. And, Mr. Birrell, what's -- how are you</p> <p>19 employed?</p> <p>20 A. I am an attorney for the law firm Kirton</p> <p>21 and McConkie.</p> <p>22 Q. Okay. Mr. Birrell, have you ever been</p> <p>23 deposed before?</p> <p>24 A. I have.</p> <p>25 Q. About how many times?</p>	<p style="text-align: right;">8</p> <p>1 to rephrase.</p> <p>2 Will you do that?</p> <p>3 A. I will.</p> <p>4 Q. And, of course, sometimes it will happen</p> <p>5 that you'll give an answer as completely as you can</p> <p>6 but later on you may remember something that could</p> <p>7 amplify it, change it, things like that. If that</p> <p>8 happens, just let me know and we can clarify or</p> <p>9 correct the record immediately.</p> <p>10 Will you do that?</p> <p>11 A. I will.</p> <p>12 Q. Also, if you're answering a question and</p> <p>13 you think the document might help refresh your</p> <p>14 recollection, just let me know, we may have it here,</p> <p>15 and we can help you with that.</p> <p>16 A. Okay.</p> <p>17 Q. I will try to remember to take a break</p> <p>18 every 90 minutes or so. I can get tunnel vision in</p> <p>19 depositions, so if at any time you need a break, just</p> <p>20 let me know and we can take one.</p> <p>21 A. Okay.</p> <p>22 Q. I will ask, though, if there is a question</p> <p>23 pending, that you finish the answer and then we can</p> <p>24 go on the break.</p> <p>25 A. Sure.</p>
<p style="text-align: right;">7</p> <p>1 A. Once.</p> <p>2 Q. Okay. And of course you're an attorney,</p> <p>3 so I'm sure you have an understanding of how this</p> <p>4 goes, but I'd like to cover the ground rules just for</p> <p>5 us just so we're all on the same page.</p> <p>6 So, obviously, I will ask questions in the</p> <p>7 deposition. My questions and your answers will be</p> <p>8 recorded by the court reporter, who is here. Please</p> <p>9 speak loudly enough for her to hear you and answer</p> <p>10 the questions verbally.</p> <p>11 Will you do that?</p> <p>12 A. I will.</p> <p>13 Q. As you are already doing a great job of,</p> <p>14 recognizing the court reporter cannot record a nod or</p> <p>15 a shake of the head, and words like uh-huh are not</p> <p>16 clear on the transcript that will be created.</p> <p>17 You're also doing a very good job so far</p> <p>18 of waiting until I finish asking the question before</p> <p>19 answering. If you could keep that up, that will be a</p> <p>20 very clear record for everybody.</p> <p>21 And if we end up talking over each other,</p> <p>22 I'll just pause, we'll start it again so we can get a</p> <p>23 clear record.</p> <p>24 If you don't understand a question that I</p> <p>25 ask today, please just let me know; I'll do my best</p>	<p style="text-align: right;">9</p> <p>1 Q. Similarly, if for any reason you would</p> <p>2 like to talk to your attorney, again, I would ask</p> <p>3 that you finish the question and then you can step</p> <p>4 outside to confer with Mr. Hill.</p> <p>5 All right. So, Mr. Birrell, we're here to</p> <p>6 get as accurate a record as we can of the facts of</p> <p>7 this case, so I have to ask if there is anything that</p> <p>8 would prevent you from listening to and understanding</p> <p>9 my questions to the best of your ability today.</p> <p>10 A. Not that I'm aware of.</p> <p>11 Q. Okay. Are you taking medications or drugs</p> <p>12 of any kind that might interfere with your memory?</p> <p>13 A. No.</p> <p>14 Q. Are you feeling sick or unwell at all</p> <p>15 today?</p> <p>16 A. No.</p> <p>17 Q. Great. Mr. Birrell, would you please tell</p> <p>18 me the city and state where you live?</p> <p>19 A. Holladay, Utah.</p> <p>20 Q. And do you work at Kirton McConkie in Salt</p> <p>21 Lake City?</p> <p>22 A. I work in their Salt Lake City office.</p> <p>23 Q. How old are you, Mr. Birrell?</p> <p>24 A. I'm 41.</p> <p>25 Q. You are an attorney, you said earlier?</p>

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

Birrell, Kenneth W.

February 14, 2017

4 (Pages 10 to 13)

<p style="text-align: right;">10</p> <p>1 A. Yes.</p> <p>2 Q. What's your formal education, college and</p> <p>3 law school?</p> <p>4 A. I received my Juris Doctorate from the</p> <p>5 University of Utah and then an LLM in taxation from</p> <p>6 New York University.</p> <p>7 Q. Where did you go to undergrad?</p> <p>8 A. University of Utah as well.</p> <p>9 Q. When did you get your LLM?</p> <p>10 A. 2004, I believe.</p> <p>11 Q. And your law degree?</p> <p>12 A. 2003, the year before.</p> <p>13 Q. After you got your LLM, where did you go?</p> <p>14 A. I started at Kirton McConkie.</p> <p>15 Q. Have you been at Kirton McConkie since</p> <p>16 2004?</p> <p>17 A. I have been. Actually started during my</p> <p>18 first year of law school, so...</p> <p>19 Q. Are you a partner?</p> <p>20 A. I am.</p> <p>21 Q. When did you become partner?</p> <p>22 A. 2010 or 2011.</p> <p>23 Q. What's your practice area?</p> <p>24 A. Tax.</p> <p>25 Q. Do you have any particular specialties</p>	<p style="text-align: right;">12</p> <p>1 Q. So what kinds of information is important</p> <p>2 for you to get from your client, for example, so that</p> <p>3 you can give accurate advice?</p> <p>4 A. You try to understand their -- their</p> <p>5 current situation. You try to understand what</p> <p>6 they're trying to accomplish. And understanding</p> <p>7 point A, where they currently are, point B, where</p> <p>8 they want to get to and discuss with them the</p> <p>9 alternative pathways of getting there, the pros and</p> <p>10 the cons of the different options available to them,</p> <p>11 and let them make an informed choice.</p> <p>12 Q. Typically, in the course of your practice</p> <p>13 how do you go about making sure you understand the</p> <p>14 client's current situation when they come to you at</p> <p>15 first?</p> <p>16 MR. AUSTIN: Objection. Calls for expert</p> <p>17 opinion.</p> <p>18 THE WITNESS: Discuss with them. In some</p> <p>19 situations you simply rely upon them to describe to</p> <p>20 you what they have. Others, you ask follow-up</p> <p>21 questions. I mean, it varies from situation to</p> <p>22 situation.</p> <p>23 Q. (BY MS. HEALY GALLAGHER) Do you typically</p> <p>24 ask your clients for relevant documents?</p> <p>25 MR. AUSTIN: Objection. Calls for expert</p>
<p style="text-align: right;">11</p> <p>1 within that practice or...</p> <p>2 A. Partnership and corporate transactions,</p> <p>3 then employee benefits and executive compensation.</p> <p>4 Q. Have those areas always been your areas of</p> <p>5 practice?</p> <p>6 A. Primarily. I mean, different things come</p> <p>7 and go as things come up, but that's been the primary</p> <p>8 focus throughout.</p> <p>9 Q. Can you tell me a little bit about your</p> <p>10 practice? So what I'm asking is, generally, like,</p> <p>11 I'm a litigator, cases are filed, I litigate the</p> <p>12 case, but it sounds like your practice is a little</p> <p>13 bit different than that.</p> <p>14 A. So it's primarily transaction-based. A</p> <p>15 client will come in with something that they are</p> <p>16 wanting to do and we help them plan for the</p> <p>17 transaction or structure the transaction. I mean, it</p> <p>18 varies widely from interaction to interaction.</p> <p>19 Q. And what sorts of things are important to</p> <p>20 you in the course of giving clients advice about</p> <p>21 transactions they're interested in?</p> <p>22 A. Accuracy of the advice. Taking into</p> <p>23 account all of the -- to the extent we can</p> <p>24 anticipate, the important variables that would affect</p> <p>25 the outcome they're hoping to achieve.</p>	<p style="text-align: right;">13</p> <p>1 opinion.</p> <p>2 THE WITNESS: Sometimes, but not always.</p> <p>3 Q. (BY MS. HEALY GALLAGHER) Just out of</p> <p>4 curiosity, you know, why might you not ask a client</p> <p>5 for documents?</p> <p>6 MR. AUSTIN: Objection. Calls for expert</p> <p>7 opinion.</p> <p>8 THE WITNESS: In certain situations there</p> <p>9 may not be any documents that are relevant. For</p> <p>10 example, if you have a client and you say, "What type</p> <p>11 of entity are you," and they say, "Well, I'm a</p> <p>12 C corporation," I typically don't ask for documents</p> <p>13 to prove that they are a C corporation. I take them</p> <p>14 at their word for it.</p> <p>15 Q. (BY MS. HEALY GALLAGHER) If you do get</p> <p>16 documents from a client, do you have a particular</p> <p>17 place to store them within your office or on IT</p> <p>18 infrastructure?</p> <p>19 MR. AUSTIN: Objection. Calls for expert</p> <p>20 opinion.</p> <p>21 THE WITNESS: We do. I normally maintain</p> <p>22 a physical file for each client, and then we can also</p> <p>23 scan documents into our online document management</p> <p>24 system.</p> <p>25 MS. HEALY GALLAGHER: Off the record for a</p>

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

Birrell, Kenneth W.

February 14, 2017

5 (Pages 14 to 17)

<p style="text-align: right;">14</p> <p>1 moment, please.</p> <p>2 (Discussion off the record.)</p> <p>3 MS. HEALY GALLAGHER: Back on the record,</p> <p>4 please.</p> <p>5 Q. We took a short break, Mr. Birrell.</p> <p>6 Before that we were talking about the way you manage</p> <p>7 documents from your clients.</p> <p>8 If you keep a hard copy file for your</p> <p>9 clients, where do you typically keep that?</p> <p>10 A. Some of them are in my office. We also</p> <p>11 have storage space in the larger office. Mine's down</p> <p>12 the hall.</p> <p>13 Q. Do you have a practice of sort of, you</p> <p>14 know, moving a hard copy file from your office to</p> <p>15 further away as time passes or do you generally keep</p> <p>16 things pretty close?</p> <p>17 A. Yes, we also have off-site storage that</p> <p>18 periodically when the on-site storage space fills up</p> <p>19 we move stuff to the off-site storage location.</p> <p>20 Q. And tell me about your IT a little bit.</p> <p>21 How is it that you are able to track where you have</p> <p>22 saved electronic documents for a particular client?</p> <p>23 A. So our online document management system</p> <p>24 is called NetDocuments, and whenever a document is</p> <p>25 saved you have to enter in the name of the document,</p>	<p style="text-align: right;">16</p> <p>1 been received on the system someplace.</p> <p>2 Q. That's helpful too, actually. So your</p> <p>3 NetDocs, you said?</p> <p>4 A. NetDocuments is the document management</p> <p>5 system, yeah.</p> <p>6 Q. Okay. And that's for documents other than</p> <p>7 e-mail?</p> <p>8 A. Yes. You can save e-mails into</p> <p>9 NetDocuments, but, yeah, they're separate systems.</p> <p>10 Q. Okay. So then in addition to</p> <p>11 NetDocuments, what I heard you say was on --</p> <p>12 A. Outlook -- we have Outlook and I</p> <p>13 normally -- I don't -- because to save every single</p> <p>14 e-mail you have to enter in all the information into</p> <p>15 NetDocuments, I don't save every e-mail into</p> <p>16 NetDocuments; it takes too much time. And so I've</p> <p>17 created folders within Outlook for each client and</p> <p>18 then I move the e-mails into that relevant client's</p> <p>19 folder as a way of kind of keeping my e-mails managed</p> <p>20 in that way.</p> <p>21 Q. So in responding to the subpoena that was</p> <p>22 sent to you in this case, you searched your Outlook</p> <p>23 folder for the client, SOLCO, right?</p> <p>24 A. Right.</p> <p>25 Q. And you also searched the NetDocuments?</p>
<p style="text-align: right;">15</p> <p>1 the author of the document, a client number and a</p> <p>2 matter number, and then classify the type of</p> <p>3 document, whether it's notes or correspondence or a</p> <p>4 corporate document or something like that.</p> <p>5 And so every client has a client number,</p> <p>6 and so my practice is, when I save a document, I put</p> <p>7 it for that client under that client's matter</p> <p>8 number -- client number.</p> <p>9 Q. And, Mr. Birrell, you received a subpoena</p> <p>10 from the United States in this matter for the</p> <p>11 production of documents.</p> <p>12 A. I did.</p> <p>13 Q. So how did you go about searching for</p> <p>14 documents responsive to that subpoena?</p> <p>15 A. So I retrieved the physical file for the</p> <p>16 client, SOLCO. I did a review of our document</p> <p>17 management system. I also have a practice of saving</p> <p>18 my e-mails into separate client files, and I pulled</p> <p>19 all of the e-mails from that.</p> <p>20 Then we have a system as part of our</p> <p>21 e-mail called Mimecast that you're able to do a query</p> <p>22 of everything that was received or sent. And so I</p> <p>23 did a search for Neldon Johnson and Jason Clements</p> <p>24 and the names that were involved to see if there were</p> <p>25 any e-mails that weren't in my SOLCO file that had</p>	<p style="text-align: right;">17</p> <p>1 A. On the e-mail we have Mimecast, which is</p> <p>2 a -- it's kind of an archiving. I'm not an IT guy,</p> <p>3 but it's an archiving system that even if I receive</p> <p>4 an e-mail in Outlook and delete it, it's still</p> <p>5 maintained in Mimecast. And so if I go into Mimecast</p> <p>6 and do a search for every e-mail I ever received from</p> <p>7 Jason Clements, it would come up in there, even if I</p> <p>8 hadn't saved it into the SOLCO client file.</p> <p>9 Q. And do you recall which names you searched</p> <p>10 in Mimecast?</p> <p>11 A. I remember doing Neldon Johnson, his</p> <p>12 wife's name. I can't remember what her name is.</p> <p>13 Jason Clements. All the names that showed up inside</p> <p>14 the SOLCO folder. There weren't that many people I</p> <p>15 interacted with, so...</p> <p>16 Q. Does the name Glenda Johnson ring a bell?</p> <p>17 A. That sounds right.</p> <p>18 Q. Okay. So that was your search for e-mail.</p> <p>19 And then in terms of the hard copy file, I think you</p> <p>20 said you -- what did you do with that?</p> <p>21 A. I photocopied it.</p> <p>22 Q. And produced it to the United States?</p> <p>23 A. Yeah, the entire folder. Everything that</p> <p>24 was in there.</p> <p>25 Q. And then what about the NetDocuments?</p>

Birrell, Kenneth W.

February 14, 2017

6 (Pages 18 to 21)

<p style="text-align: right;">18</p> <p>1 A. So I did the NetDocument search and 2 everything that was in NetDocuments was also an 3 attachment to an e-mail. And so they had all -- I 4 didn't produce multiple copies of them, but 5 everything that was on there was produced as part of 6 it. 7 Q. Okay. Did you withhold anything from 8 the -- well, actually, let me ask this question 9 first. 10 You mentioned that your client -- or the 11 client matter that you saved things under was SOLCO? 12 A. (Witness nods head.) 13 Q. Is that the name of the client for Kirton 14 McConkie's recordkeeping purposes? 15 A. Yes. 16 Q. Did you withhold any documents that you 17 had in your possession related to SOLCO? 18 A. Not that I'm aware of. 19 Q. Do you have any reason to believe that any 20 documents that were once in your possession related 21 to SOLCO may have been destroyed over the course of 22 time? 23 A. I do not. 24 Q. All right. Mr. Birrell, help me 25 understand how you first came to even initiate a</p>	<p style="text-align: right;">20</p> <p>1 at all. 2 Q. To your understanding, Mr. Birrell, what's 3 Mr. Clement -- Clements or Clement? 4 A. Clements. 5 Q. Clements. What is his role with respect 6 to SOLCO? 7 A. He was kind of like a salesman on behalf 8 of them is my understanding, is that he was going out 9 and -- kind of like the marketing arm. 10 Q. So Mr. Clements, to your understanding, 11 was a salesperson for SOLCO? 12 A. I think he may have been an independent 13 person, kind of like a -- he -- his business before 14 was -- he had a company called, like, Orange Insure 15 or something like that, doing insurance sales. And I 16 don't know how long he had been involved with SOLCO 17 and was involved in doing solar lenses for them. And 18 I don't know the full nature of the relationship 19 between him and Neldon Johnson and the other people, 20 so... 21 Q. Just very quickly, other than 22 Mr. Clements, who, if anyone else, did you talk to 23 throughout the SOLCO representation? You can just 24 list names. 25 A. All my phone calls were with Mr. Clements.</p>
<p style="text-align: right;">19</p> <p>1 client matter at Kirton McConkie related to SOLCO. 2 A. So Jason Clements reached out to another 3 attorney at our firm and asked if there was anybody 4 in the firm that could help with a tax credit issue. 5 It was referred to me and so I -- there was an 6 initial phone call or something. I don't remember 7 exactly how we started talking, but it was through a 8 referral through another attorney in the firm. 9 Q. What's the name of that other attorney? 10 A. Randy Austin. 11 Q. Is that last name A-u-s -- 12 A. A-u-s-t-i-n. 13 Q. Do you happen to know what, if any, 14 relationship Mr. Clements and Mr. Austin had? 15 A. I believe they've lived in the same 16 neighborhood, but I don't know the -- how close, 17 exactly what relationship. 18 Q. Once the matter was referred to you, did 19 you talk with Mr. Austin at all about the -- about 20 Mr. Clement or the content of the matter? 21 A. No, not that I recall. 22 Q. Was Mr. Austin involved in anything to do 23 with the SOLCO matter going forward? 24 A. No. Mr. Austin's practice has -- not at 25 all tax-related, so he didn't -- he wasn't involved</p>	<p style="text-align: right;">21</p> <p>1 I talked with Neldon Johnson and Glenda Johnson maybe 2 once or twice each. I don't remember speaking with 3 anybody else that was a -- with SOLCO or a 4 representative or anything like that, so... 5 Q. In the course of the SOLCO client matter, 6 did you talk with anyone else in addition to 7 Mr. Clements, Glenda Johnson and Neldon Johnson? 8 A. Not that I can recall. 9 Q. Do you remember when you first spoke to 10 Mr. Clements? 11 A. I do not. 12 Q. So even if -- regardless of what Mr. 13 Clements' role was with respect to SOLCO, what was 14 his role with you? 15 A. So he was kind of the interface that -- he 16 was the person that provided documents, that I 17 provided drafts of documents to. He was the one 18 that -- I -- I don't think I ever had a telephone 19 conversation with Nelson Johnson; everything always 20 went through Mr. Clements, so... 21 Q. What understanding, if any, did you have 22 about where Mr. Clements was getting the information 23 that he gave you? 24 MR. AUSTIN: Objection. Foundation. 25 THE WITNESS: I assumed he was getting it</p>

Birrell, Kenneth W.

February 14, 2017

7 (Pages 22 to 25)

<p style="text-align: right;">22</p> <p>1 from Neldon Johnson and the SOLCO folks, but I didn't</p> <p>2 ask exactly where the stuff was coming from.</p> <p>3 Q. (BY MS. HEALY GALLAGHER) And what</p> <p>4 understanding, if any, do you have about what he did</p> <p>5 with the information that you gave him?</p> <p>6 MR. AUSTIN: Objection. Foundation.</p> <p>7 THE WITNESS: My expectation was that he</p> <p>8 was sharing it with Neldon Johnson, but I did not</p> <p>9 know.</p> <p>10 Q. (BY MS. HEALY GALLAGHER) Do you remember</p> <p>11 approximately when in the course of your</p> <p>12 representation -- I'm sorry -- in terms of the SOLCO</p> <p>13 client matter you did speak to Neldon Johnson?</p> <p>14 A. It was towards the end when we had kind of</p> <p>15 the documents all prepared. That was the only time.</p> <p>16 Q. And what about your conversation with</p> <p>17 Glenda Johnson?</p> <p>18 A. There was some e-mail correspondence. I</p> <p>19 don't know if there was ever a telephone</p> <p>20 conversation. She was at that same meeting towards</p> <p>21 the end with -- with Neldon. They were both there.</p> <p>22 Jason.</p> <p>23 Q. Oh, okay. So that was a meeting?</p> <p>24 A. Uh-huh (affirmative).</p> <p>25 Q. Yes?</p>	<p style="text-align: right;">24</p> <p>1 confidential communications that may or may not</p> <p>2 relate to the creation or production of the letter,</p> <p>3 since those are often produced by attorneys for</p> <p>4 various business purposes.</p> <p>5 MR. HILL: We don't take a position either</p> <p>6 way, whether the privilege is maintained or has been</p> <p>7 waived. We just need to make sure that the privilege</p> <p>8 is -- is not being asserted in order to permit the</p> <p>9 testimony to go forward so that we don't --</p> <p>10 MR. AUSTIN: And it is being asserted, and</p> <p>11 every attorney has a duty to maintain the</p> <p>12 attorney-client privilege unless it has been waived.</p> <p>13 The privilege belongs to the client. And regardless</p> <p>14 of whether or not there's some affirmative</p> <p>15 representation, I would expect an attorney to</p> <p>16 understand that the privilege must be maintained</p> <p>17 unless there's an express waiver.</p> <p>18 And, for the record, I think you can</p> <p>19 certainly ask him about the -- if you're going to ask</p> <p>20 him about statements made in an opinion letter, you</p> <p>21 can certainly ask him questions about those to the</p> <p>22 extent that they don't encroach upon the privilege,</p> <p>23 but beyond that I would certainly object.</p> <p>24 MS. HEALY GALLAGHER: Mr. Austin, do you</p> <p>25 have an understanding of the confidentiality with</p>
<p style="text-align: right;">23</p> <p>1 A. Yes. Sorry.</p> <p>2 Q. That's okay. All right. We'll circle</p> <p>3 back to that meeting in a couple minutes.</p> <p>4 So what, Mr. Birrell, did you understand</p> <p>5 from Mr. Clements in your first contact with him?</p> <p>6 What did you all talk about?</p> <p>7 MR. HILL: I need to be sure -- raise an</p> <p>8 objection preliminarily. Ordinarily the question</p> <p>9 you've asked would be protected by the</p> <p>10 attorney-client privilege. We don't continue to</p> <p>11 represent that client. We understand that client has</p> <p>12 separate representation. And we have a duty as the</p> <p>13 attorneys for that client to maintain that privilege</p> <p>14 unless and until it has been waived or is not being</p> <p>15 asserted by that client. And we're not parties to</p> <p>16 the lawsuit, so we look to counsel for the -- our</p> <p>17 former client to raise the issue of privilege that's</p> <p>18 going to be raised in this issue.</p> <p>19 MR. AUSTIN: Yes, and to the extent that</p> <p>20 it's appropriate for us to raise it, we do. I don't</p> <p>21 think you're entitled to know about their</p> <p>22 attorney-client communications. I think that to the</p> <p>23 extent you're going to question him about an opinion</p> <p>24 letter, I think that the fact that an opinion letter</p> <p>25 was issued does not, in and of itself, waive the</p>	<p style="text-align: right;">25</p> <p>1 which the Kirton McConkie memorandum that Mr. Birrell</p> <p>2 wrote has been made public?</p> <p>3 MR. AUSTIN: I don't know if you listened</p> <p>4 to what I just said. I think that to the extent that</p> <p>5 you want to maintain the -- I don't think this is a</p> <p>6 letter that was ever intended to be a confidential</p> <p>7 attorney-client communication necessarily.</p> <p>8 MS. HEALY GALLAGHER: And confidentiality,</p> <p>9 correct, is --</p> <p>10 MR. AUSTIN: Pardon?</p> <p>11 MS. HEALY GALLAGHER: -- is the key to</p> <p>12 maintaining the attorney-client privilege, correct?</p> <p>13 MR. AUSTIN: What are we -- are you</p> <p>14 deposing me now, because I can cross-examine you too,</p> <p>15 but if you want to have an actual conversation, that</p> <p>16 would work a little differently.</p> <p>17 MS. HEALY GALLAGHER: Well, Mr. Austin,</p> <p>18 I'm trying to understand the basis for the assertion</p> <p>19 of the privilege.</p> <p>20 MR. AUSTIN: I think I -- I have rarely</p> <p>21 been accused of speaking too little, but if you want,</p> <p>22 me to wax more eloquent, I think I can.</p> <p>23 The assertion of the privilege,</p> <p>24 Miss Hines --</p> <p>25 MS. HEALY GALLAGHER: Healy Gallagher.</p>

Birrell, Kenneth W.

February 14, 2017

8 (Pages 26 to 29)

<p style="text-align: right;">26</p> <p>1 MR. AUSTIN: Healy Gallagher, excuse me.</p> <p>2 -- is that the communications regarding</p> <p>3 the reasons, rationals, motivations, thought</p> <p>4 processes, advice, underpinning the issuance of an</p> <p>5 attorney opinion letter that may or may not be</p> <p>6 intended to be made public, as is often done for</p> <p>7 multiple business purposes, does not render all those</p> <p>8 communications nonconfidential or waive the</p> <p>9 privilege.</p> <p>10 If I produce, for example, Miss Healy</p> <p>11 Gallagher, a contract, that doesn't -- and I provide</p> <p>12 it to another party to sign, that does not mean that</p> <p>13 I can now depose the attorney for the party that</p> <p>14 drafted the contract and ask them about everything</p> <p>15 that was discussed in the context of coming up with</p> <p>16 that proposed contract draft. The work product</p> <p>17 itself does not waive the privilege with regard to</p> <p>18 the production of the work product.</p> <p>19 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, do</p> <p>20 you mind if I come around to stand next to you to</p> <p>21 give you some instructions about this laptop?</p> <p>22 A. No.</p> <p>23 Q. Mr. Birrell, the laptop that's in front of</p> <p>24 you is currently on a blank tab in Google Chrome; is</p> <p>25 that correct?</p>	<p style="text-align: right;">28</p> <p>1 says, "Click here for our tax attorney memorandum</p> <p>2 from Kirton McConkie on 'tax issues relating to</p> <p>3 purchase of solar lenses.'"</p> <p>4 Did I read that correctly?</p> <p>5 A. Yes.</p> <p>6 Q. Would you please click on the "click here"</p> <p>7 hyperlink?</p> <p>8 Mr. Birrell, what document popped up after</p> <p>9 you clicked on that link?</p> <p>10 A. It appears to be a copy of the memorandum</p> <p>11 that we provided to SOLCO.</p> <p>12 Q. Okay. The very top line of that document,</p> <p>13 what does it say?</p> <p>14 A. Kirton McConkie.</p> <p>15 Q. What's the date of the memorandum?</p> <p>16 A. October 31st, 2012.</p> <p>17 Q. Who is the memorandum to?</p> <p>18 A. SOLCO I, LLC, attention Neldon Johnson.</p> <p>19 Q. Who is it from?</p> <p>20 A. Kenneth W. Birrell, me.</p> <p>21 Q. And what is the subject line?</p> <p>22 A. Tax issues relating to purchase of solar</p> <p>23 lenses.</p> <p>24 Q. How many pages is this memorandum,</p> <p>25 Mr. Birrell?</p>
<p style="text-align: right;">27</p> <p>1 MR. AUSTIN: I'll object with regard to</p> <p>2 foundation.</p> <p>3 Go ahead.</p> <p>4 THE WITNESS: It appears so, yes.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) Okay.</p> <p>6 Mr. Birrell, would you please type into the URL</p> <p>7 bar no www, just rapower3.com?</p> <p>8 A. Okay.</p> <p>9 Q. And press enter. Okay. Did a website</p> <p>10 come up in response to that command?</p> <p>11 A. Yes.</p> <p>12 Q. What does this website look to be?</p> <p>13 A. The name at the top is RaPower3.</p> <p>14 Q. All right. Would you please go to the tab</p> <p>15 that says Tax Info and click on it?</p> <p>16 MR. AUSTIN: If the point of this exercise</p> <p>17 is to demonstrate that the letter is on the Internet,</p> <p>18 then I think you're not listening to me. And maybe</p> <p>19 instead of talking to Chris while I'm speaking to you</p> <p>20 and making an objection you'd understand the basis of</p> <p>21 my objection. It's not that the letter itself is not</p> <p>22 obtainable.</p> <p>23 Q. (BY MS. HEALY GALLAGHER) Would you please</p> <p>24 take a look, Mr. Birrell, down actually to the last</p> <p>25 sentence that's visible on the page right now? It</p>	<p style="text-align: right;">29</p> <p>1 A. Thirteen.</p> <p>2 Q. Thank you.</p> <p>3 A. Can we take a break for a minute for me to</p> <p>4 talk with my counsel?</p> <p>5 MS. HEALY GALLAGHER: We may go off the</p> <p>6 record.</p> <p>7 MR. AUSTIN: Well, back on the record for</p> <p>8 one moment.</p> <p>9 I'm just going to renew my objection that</p> <p>10 the privilege has not been waived and, as I indicated</p> <p>11 previously, the fact that a letter has been made</p> <p>12 public does not render anything related to the</p> <p>13 production of the letter waived and I think breaching</p> <p>14 the attorney-client privilege and inviting counsel to</p> <p>15 do so could place him in peril legally.</p> <p>16 MS. HEALY GALLAGHER: We can go off the</p> <p>17 record.</p> <p>18 (A break was taken from 9:44 a.m. to</p> <p>19 9:50 a.m.)</p> <p>20 MS. HEALY GALLAGHER: We're back on the</p> <p>21 record.</p> <p>22 All right, Mr. Austin, you know, as you</p> <p>23 agreed and as we established with the witness, the</p> <p>24 memorandum that Mr. Birrell wrote has, in fact, been</p> <p>25 made public, so the contents of that memorandum,</p>

Birrell, Kenneth W.

February 14, 2017

9 (Pages 30 to 33)

<p style="text-align: right;">30</p> <p>1 confidentiality has been waived by the client.</p> <p>2 MR. AUSTIN: Are you arguing to me on the</p> <p>3 record?</p> <p>4 MS. HEALY GALLAGHER: I'm asking you if</p> <p>5 you agree with that.</p> <p>6 MR. AUSTIN: You know that I don't. And,</p> <p>7 you know, you're not a judge.</p> <p>8 MS. HEALY GALLAGHER: But the contents of</p> <p>9 the memorandum, though, right, they have been made</p> <p>10 public?</p> <p>11 MR. AUSTIN: So what's your question?</p> <p>12 MS. HEALY GALLAGHER: Then my question and</p> <p>13 the conversation that we're having is the scope of</p> <p>14 the waiver so --</p> <p>15 MR. AUSTIN: There is no waiver.</p> <p>16 MS. HEALY GALLAGHER: Having -- having</p> <p>17 made the memorandum containing Mr. Birrell's analysis</p> <p>18 public, attorney-client privilege has been waived</p> <p>19 with respect to the memorandum.</p> <p>20 MR. AUSTIN: Yeah, and I don't -- I don't</p> <p>21 agree with you the way you're using -- I don't want</p> <p>22 to get very Clintonesque here, but you're stating</p> <p>23 propositions of laws as conclusions as if you're a</p> <p>24 judge who has decided what the scope of waiver is in</p> <p>25 this case.</p>	<p style="text-align: right;">32</p> <p>1 conversation with you or I could have a meaningful</p> <p>2 legal analysis with you, but I've also been to law</p> <p>3 school and I also have -- have read legal cases.</p> <p>4 And I understand that your position is,</p> <p>5 like most people who want to get a document into</p> <p>6 evidence and ask an attorney about a document that</p> <p>7 they have access to, that waiver extends to anything</p> <p>8 and everything under the sun that could or could have</p> <p>9 related to that document, and it's just not that</p> <p>10 broad, Erin.</p> <p>11 MS. HEALY GALLAGHER: Mr. Austin, I'm</p> <p>12 trying to understand the underpinnings for your</p> <p>13 privilege objection here, because there is authority</p> <p>14 that does provide for a broad waiver of the facts and</p> <p>15 information underlying a document that could have</p> <p>16 been privileged and the privilege has been waived.</p> <p>17 So what I want -- what I want to understand is -- I</p> <p>18 would like to cite a case on the record --</p> <p>19 MR. AUSTIN: No, I'm not going to listen</p> <p>20 to citations of authority on the record.</p> <p>21 MS. HEALY GALLAGHER: Well, we're going to</p> <p>22 put on the record --</p> <p>23 MR. AUSTIN: Objection. Not a question.</p> <p>24 MS. HEALY GALLAGHER: Mr. Austin --</p> <p>25 MR. AUSTIN: Exposition.</p>
<p style="text-align: right;">31</p> <p>1 MS. HEALY GALLAGHER: Well, my question --</p> <p>2 MR. AUSTIN: I agree with you that the</p> <p>3 document speaks for itself and that it exists and</p> <p>4 that it has been apparently disclosed on the website</p> <p>5 and maybe other places. So if your question to me is</p> <p>6 may you ask him to read from it, sure. May you ask</p> <p>7 him to offer any other testimony regarding the</p> <p>8 method, manner or other features of its creation, no.</p> <p>9 That's privileged. And you shouldn't be asking for</p> <p>10 privileged information when the privilege has been</p> <p>11 raised.</p> <p>12 MS. HEALY GALLAGHER: So, Mr. Austin, I'm</p> <p>13 going to point you to a Tenth Circuit opinion, United</p> <p>14 States --</p> <p>15 MR. AUSTIN: Erin, I'm not going to -- I'm</p> <p>16 not going to -- I'm not going to -- do you want to,</p> <p>17 like, Lexis bash here and I'll find a case that -- I</p> <p>18 mean, you're not a judge, so you can't sit here and</p> <p>19 tell the witness or instruct me with regard to the</p> <p>20 scope of waiver.</p> <p>21 MS. HEALY GALLAGHER: Mr. Austin --</p> <p>22 MR. AUSTIN: I know it would be great if</p> <p>23 you could but you -- I'm not going to argue, you</p> <p>24 know, competing specific authority with you. I can</p> <p>25 pull cases and I could have a philosophical</p>	<p style="text-align: right;">33</p> <p>1 MS. HEALY GALLAGHER: Stop cutting me off.</p> <p>2 MR. AUSTIN: Exposition on the record --</p> <p>3 MS. HEALY GALLAGHER: Mr. Austin --</p> <p>4 MR. AUSTIN: Exposition on the record is</p> <p>5 inappropriate, Miss Gallagher. You are not going to</p> <p>6 argue your legal case here on the record. This is a</p> <p>7 deposition. I'm not the witness, so please direct</p> <p>8 your questions to the witness and behave</p> <p>9 appropriately.</p> <p>10 MS. HEALY GALLAGHER: I am offering to</p> <p>11 Mr. Austin United States versus Bernard --</p> <p>12 MR. AUSTIN: I object to your speech.</p> <p>13 MS. HEALY GALLAGHER: 877 F.2d 1463 from</p> <p>14 the Tenth Circuit. That's June 7, 1989.</p> <p>15 MR. AUSTIN: I'm going to object to this</p> <p>16 entire speech on the record. I would refer you to</p> <p>17 the Federal Rules of Civil Procedure. Speeches on</p> <p>18 the record where you make -- I don't want to look at</p> <p>19 it. Speeches on the record, where you make legal</p> <p>20 argument in an attempt to persuade a witness to</p> <p>21 breach the attorney-client privilege once an</p> <p>22 objection has been raised is beyond inappropriate.</p> <p>23 Please ask your questions to the witness</p> <p>24 and quit trying to brief a legal issue with me here</p> <p>25 and now on the record. Totally inappropriate.</p>

Birrell, Kenneth W.

February 14, 2017

10 (Pages 34 to 37)

<p style="text-align: right;">34</p> <p>1 MS. HEALY GALLAGHER: Let the record 2 reflect Mr. Austin was offered a copy of this 3 opinion, printed out for him to review, and he 4 declined to accept that copy.</p> <p>5 MR. AUSTIN: Let the record reflect that 6 Miss Healy Gallagher is inappropriately attempting to 7 grandstand in a deposition and waste everyone's time 8 arguing points of law with another attorney in an 9 effort to breach the attorney-client privilege once 10 it's been raised.</p> <p>11 (EXHIBIT 353 WAS MARKED.)</p> <p>12 MS. HEALY GALLAGHER: Further, I will 13 place on the record Plaintiff's Exhibit 353.</p> <p>14 MR. AUSTIN: I object to its admission.</p> <p>15 MS. HEALY GALLAGHER: And, Mr. Birrell, 16 I'm just going to hand this to you because this is 17 your deposition. You can take a look at this.</p> <p>18 MR. HILL: Thank you.</p> <p>19 MS. HEALY GALLAGHER: And I'm also handing 20 a copy of Plaintiff's Exhibit 353 to Mr. Hill and to 21 Mr. Austin.</p> <p>22 For purposes of the record, Plaintiff's 23 Exhibit 353 is 49 pages total. The cover page is an 24 e-mail from Christopher Moran. It was sent on 25 Thursday, December 1, 2016, to Tate Bennett,</p>	<p style="text-align: right;">36</p> <p>1 and reasonably investigated the facts and relied upon 2 the tax advice provided by defendants' attorneys."</p> <p>3 Did I read that correctly?</p> <p>4 MR. AUSTIN: Objection. Form.</p> <p>5 THE WITNESS: Yes.</p> <p>6 MS. HEALY GALLAGHER: Mr. Austin, it's our 7 position that the defendants have placed the advice 8 of their attorneys at issue in this case, and that 9 waives the attorney-client privilege with response 10 to -- or with respect to the memorandum that 11 Mr. Birrell wrote. And in doing that we rely on 12 United States v. Evanson 584 F.3d 904, Tenth Circuit, 13 2009. I'm offering you a copy of that case now.</p> <p>14 MR. AUSTIN: Thank you.</p> <p>15 MS. HEALY GALLAGHER: Do you have a 16 response?</p> <p>17 MR. AUSTIN: Yes, I disagree with your 18 position.</p> <p>19 MS. HEALY GALLAGHER: On what basis?</p> <p>20 MR. AUSTIN: I'm not being deposed today. 21 If you want to talk to me about that after the 22 deposition, perhaps we can speak.</p> <p>23 MS. HEALY GALLAGHER: Go off the record. 24 (Discussion off the record.)</p> <p>25 MS. HEALY GALLAGHER: On the record,</p>
<p style="text-align: right;">35</p> <p>1 Donald Reay, Justin Heideman, with cc's to Erin Healy 2 Gallagher, Erin Hines, Travis Sorenson, 3 Christian Austin, with the subject, USA v. RaPower3, 4 et al.; letter regarding Todd Anderson's subpoena 5 response.</p> <p>6 MR. AUSTIN: Objection. Not a question.</p> <p>7 MS. HEALY GALLAGHER: Next I would like to 8 mark Plaintiff's Exhibit 354.</p> <p>9 (EXHIBIT 354 WAS MARKED.)</p> <p>10 Q. I'm handing you, Mr. Birrell, what's been 11 marked as Plaintiff's Exhibit 354. For the record, 12 Plaintiff's Exhibit 354 is the Answer filed by 13 defendants RaPower3, LLC, International Automated 14 Systems, Inc., LTB1, LLC, and Neldon Johnson.</p> <p>15 Mr. Birrell...</p> <p>16 Off the record for one second, please. 17 (Discussion off the record.)</p> <p>18 MS. HEALY GALLAGHER: Back on the record, 19 please.</p> <p>20 Q. All right. Mr. Birrell, would you please 21 take a look at page 21 of Plaintiff's Exhibit 354?</p> <p>22 A. Okay.</p> <p>23 Q. About in the middle of the page, under the 24 heading Sixth Defense, it says, "Plaintiff's claims 25 are barred to the extent that defendants diligently</p>	<p style="text-align: right;">37</p> <p>1 please.</p> <p>2 MICHELLE: Hi, you have reached Michelle, 3 case manager for U.S. Magistrate Judge Brooke Wells. 4 Please leave a message and I will return the call as 5 soon as possible.</p> <p>6 OPERATOR: Record your message at the 7 tone. When you are finished, hang up or press pound 8 for more options.</p> <p>9 MS. HEALY GALLAGHER: Good morning. This 10 is Erin Healy Gallagher representing the United 11 States in United States versus RaPower3, case number 12 15-cv-828.</p> <p>13 I'm here at a deposition. We have 14 opposing counsel present, along with counsel for a 15 witness, and we were hoping to touch base with 16 Judge Wells on an issue that has come up about 17 objections based on attorney-client privilege. 18 I will also try the docketing clerk and, if possible, 19 to have a return call.</p> <p>20 What's your cell phone number? Sorry about that.</p> <p>21 MR. MORAN: (202).</p> <p>22 MS. HEALY GALLAGHER: Please contact 23 (202).</p> <p>24 MR. MORAN: 305.</p> <p>25 MS. HEALY GALLAGHER: 305.</p>

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

Birrell, Kenneth W.

February 14, 2017

11 (Pages 38 to 41)

<p style="text-align: right;">38</p> <p>1 MR. MORAN: 5172.</p> <p>2 MS. HEALY GALLAGHER: 5172. We'll do our</p> <p>3 best to reach you and if we can't, we will carry on</p> <p>4 here. Thank you so much.</p> <p>5 MR. AUSTIN: We're still on the record.</p> <p>6 I want to state for the record, I haven't</p> <p>7 instructed the witness not to answer. This is not my</p> <p>8 client, and I haven't instructed him not to answer,</p> <p>9 nor has his counsel. So it's up to the witness to</p> <p>10 decide whether or not to answer.</p> <p>11 If the witness decides to answer, then you</p> <p>12 want to -- not to answer, then you want to call Judge</p> <p>13 Wells? That might make sense, but go ahead and do</p> <p>14 what you're doing. Otherwise, I will just state for</p> <p>15 the record that my client objects on the basis of</p> <p>16 attorney-client privilege. And no -- no judge can</p> <p>17 order my client not to raise the attorney-client</p> <p>18 privilege.</p> <p>19 MR. HILL: On the basis of the objection</p> <p>20 that has been raised by the former client of</p> <p>21 Mr. Birrell, as Mr. Birrell's counsel I have a duty</p> <p>22 to instruct Mr. Birrell not to answer the question</p> <p>23 that is pending.</p> <p>24 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>25 were you going to answer the questions pending?</p>	<p style="text-align: right;">40</p> <p>1 number of conversations between Mr. Birrell and</p> <p>2 Mr. Clements is protected by attorney-client</p> <p>3 privilege?</p> <p>4 MR. AUSTIN: When the clients talked, how</p> <p>5 often they spoke, the manner and method of their</p> <p>6 communications, all those things are, in my view,</p> <p>7 protected by the attorney-client privilege.</p> <p>8 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>9 will you follow the advice of your attorney?</p> <p>10 A. I will.</p> <p>11 Q. Mr. Birrell, did Mr. Clements send you</p> <p>12 documents?</p> <p>13 MR. AUSTIN: Objection. Privilege.</p> <p>14 MR. HILL: On the basis of the privilege</p> <p>15 being asserted by the former client, I must instruct</p> <p>16 the witness not to answer.</p> <p>17 MS. HEALY GALLAGHER: Mr. Austin, what's</p> <p>18 the basis for the privilege objection as to whether</p> <p>19 Mr. Clements sent Mr. Birrell documents?</p> <p>20 MR. AUSTIN: The nature and the method and</p> <p>21 manner of communication between an attorney and his</p> <p>22 counsel and the specific bases for provision of legal</p> <p>23 advice is inherently a communication between the</p> <p>24 attorney and the client, and that information is</p> <p>25 privileged, in my view.</p>
<p style="text-align: right;">39</p> <p>1 A. On the advice of counsel, no.</p> <p>2 WENDY: Sorry. Wendy Bernack is not</p> <p>3 available. Record your message at the tone. When</p> <p>4 you are finished, hang up or press pound for more</p> <p>5 options.</p> <p>6 MS. HEALY GALLAGHER: I'll just leave it</p> <p>7 at that.</p> <p>8 MR. MORAN: Okay.</p> <p>9 MS. HEALY GALLAGHER: Go off the record.</p> <p>10 (Discussion off the record.)</p> <p>11 MS. HEALY GALLAGHER: Back on the record,</p> <p>12 please.</p> <p>13 Q. Mr. Birrell, about how many actual</p> <p>14 conversations did you have with Mr. Clements?</p> <p>15 MR. AUSTIN: Objection. Found -- or,</p> <p>16 pardon me, privilege.</p> <p>17 MR. HILL: Without taking a position as to</p> <p>18 the application of the attorney-client privilege in</p> <p>19 this instance or of any contended waiver thereof, the</p> <p>20 privilege has been asserted by the former client and</p> <p>21 on that basis I must instruct the witness not to</p> <p>22 answer the question regarding client communications</p> <p>23 until the privilege dispute has been resolved.</p> <p>24 MS. HEALY GALLAGHER: Mr. Austin, what's</p> <p>25 the basis for your privilege objection that the</p>	<p style="text-align: right;">41</p> <p>1 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, did</p> <p>2 you get facts and information from Mr. Clements that</p> <p>3 helped inform your legal analysis for SOLCO?</p> <p>4 MR. AUSTIN: Objection. Privilege.</p> <p>5 MS. HEALY GALLAGHER: Off the record.</p> <p>6 (Discussion off the record.)</p> <p>7 MR. HILL: Without taking a position as to</p> <p>8 the application of the privilege, the former client</p> <p>9 has raised the attorney-client privilege, and on that</p> <p>10 basis I will instruct the witness not to answer the</p> <p>11 question.</p> <p>12 MS. HEALY GALLAGHER: Mr. Austin, what's</p> <p>13 the basis for your objection?</p> <p>14 MR. AUSTIN: The method and manner of</p> <p>15 communication between an attorney and a client, the</p> <p>16 nature of the information exchanged and their</p> <p>17 communications, unless waived, is privileged,</p> <p>18 particularly under circumstances where it is already</p> <p>19 being argued and may be argued that any -- the</p> <p>20 disclosure of any information that would otherwise be</p> <p>21 privileged acts as a comprehensive waiver of any and</p> <p>22 all information relating to a communication or to a</p> <p>23 provision of advice as it relates to one or more</p> <p>24 specific issues.</p> <p>25 Based on that, I think in order to</p>

Birrell, Kenneth W.

February 14, 2017

12 (Pages 42 to 45)

<p style="text-align: right;">42</p> <p>1 preserve the privilege, it is incumbent upon the</p> <p>2 party raising the privilege to object to any attempt</p> <p>3 to breach the attorney-client relationship in</p> <p>4 communications between the attorney and the client,</p> <p>5 including, without limitation, the method, manner and</p> <p>6 basis upon which legal advice is rendered.</p> <p>7 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, in</p> <p>8 drafting the memorandum did you rely on facts and</p> <p>9 information given to you by Mr. Clements?</p> <p>10 MR. AUSTIN: Objection. Privilege.</p> <p>11 MR. HILL: If I could have a moment.</p> <p>12 MS. HEALY GALLAGHER: Take your time.</p> <p>13 MR. HILL: Could you read the question</p> <p>14 back, please?</p> <p>15 (Record was read as follows:</p> <p>16 "Mr. Birrell, in drafting the memorandum did you</p> <p>17 rely on facts and information given to you by</p> <p>18 Mr. Clements?")</p> <p>19 MR. AUSTIN: Again, same objection.</p> <p>20 Again, the basis thereof being that once it begins --</p> <p>21 you begin an examination of the foundation for an</p> <p>22 attorney's provision of legal advice to a client,</p> <p>23 then it could be argued that the door has been opened</p> <p>24 with regard to the remainder of the foundation and</p> <p>25 basis for the provision of that advice and,</p>	<p style="text-align: right;">44</p> <p>1 being asserted by the former counsel -- I'm sorry --</p> <p>2 former client, I instruct the witness not to answer</p> <p>3 the question.</p> <p>4 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>5 will you answer?</p> <p>6 A. I will follow the advice of counsel.</p> <p>7 Q. Mr. Birrell, what facts did you learn from</p> <p>8 any source other than Mr. Clements did you rely upon</p> <p>9 in drafting your memo?</p> <p>10 MR. AUSTIN: Objection. Privilege.</p> <p>11 MR. HILL: To the extent that you can</p> <p>12 answer that question without disclosing the</p> <p>13 communications -- the content of any communications</p> <p>14 with a client, I will -- I will raise the limited</p> <p>15 objection as to privileged communications and allow</p> <p>16 the question to be answered.</p> <p>17 THE WITNESS: Could you repeat the</p> <p>18 question?</p> <p>19 (Record was read as follows:</p> <p>20 "Mr. Birrell, what facts did you learn from any</p> <p>21 source other than Mr. Clements did you rely upon</p> <p>22 in drafting your memo?")</p> <p>23 THE WITNESS: I did independent legal</p> <p>24 research.</p> <p>25 Q. (BY MS. HEALY GALLAGHER) So do I</p>
<p style="text-align: right;">43</p> <p>1 accordingly, the question, as phrased, is calling for</p> <p>2 the disclosure of protected attorney-client</p> <p>3 information.</p> <p>4 MR. HILL: The problem with this one is</p> <p>5 that it may or may not be calling for the disclosure.</p> <p>6 If the answer is no, then it opens a line of</p> <p>7 questioning that's not privileged or protected.</p> <p>8 However, if the answer is yes, then it</p> <p>9 falls within the disputed assertion of privilege</p> <p>10 without taking a position as to the scope of the</p> <p>11 privilege, its application or the argued waiver of</p> <p>12 that privilege. The privilege has been raised as</p> <p>13 to -- with respect to the content of that -- the</p> <p>14 provisional content of the answer to that question,</p> <p>15 and on the basis of the privilege being asserted, I</p> <p>16 have to instruct the witness not answer the question.</p> <p>17 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell?</p> <p>18 A. I will follow the advice of counsel.</p> <p>19 Q. Mr. Birrell, what was your -- what did you</p> <p>20 learn from Mr. Clements about --</p> <p>21 MR. AUSTIN: Object.</p> <p>22 Q. (BY MS. HEALY GALLAGHER) -- anything to do</p> <p>23 with the transaction that they proposed?</p> <p>24 MR. AUSTIN: Objection. Privilege.</p> <p>25 MR. HILL: On the basis of the privilege</p>	<p style="text-align: right;">45</p> <p>1 understand correctly -- withdraw that.</p> <p>2 So putting your legal research to one</p> <p>3 side, Mr. Birrell, was Mr. Clements your only source</p> <p>4 for facts about the proposed transaction that you</p> <p>5 were examining for SOLCO?</p> <p>6 MR. AUSTIN: Objection. Privilege.</p> <p>7 Especially to the extent --</p> <p>8 MR. HILL: Go ahead and continue.</p> <p>9 MR. AUSTIN: I was going to say,</p> <p>10 especially to the extent that your question, as</p> <p>11 phrased, is so broad that it could include</p> <p>12 appropriate agents and/or others to whom the</p> <p>13 privilege would extend.</p> <p>14 MR. HILL: And because the answer to that</p> <p>15 question could disclose information, by inference,</p> <p>16 that could only be asserted -- or obtained through</p> <p>17 attorney-client communication on the basis of the</p> <p>18 dispute as to the application of the privilege and</p> <p>19 any waiver, I will assert the privilege and instruct</p> <p>20 the client not to answer the question.</p> <p>21 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>22 will you answer the question?</p> <p>23 A. I will follow the advice of counsel.</p> <p>24 Q. Mr. Birrell, the memorandum that we looked</p> <p>25 at from the Internet has to do with solar lenses. Do</p>

Birrell, Kenneth W.

February 14, 2017

13 (Pages 46 to 49)

<p style="text-align: right;">46</p> <p>1 you recall that?</p> <p>2 A. Yes.</p> <p>3 Q. Did you ever see the solar lenses?</p> <p>4 MR. AUSTIN: Objection. Privilege.</p> <p>5 MS. HEALY GALLAGHER: What's the basis for</p> <p>6 your objection?</p> <p>7 MR. AUSTIN: The question, as phrased, is</p> <p>8 so broad as to encompass attorney-client</p> <p>9 communications regarding the business and legal</p> <p>10 advice rendered in this instance and, accordingly,</p> <p>11 it's protected by the attorney-client privilege.</p> <p>12 Particularly, given that counsel has taken</p> <p>13 the position that any waiver of the privilege, in any</p> <p>14 respect as it relates to all or a portion of legal</p> <p>15 advice, acts as a waiver of the privilege as to all</p> <p>16 issues that are or could be related to that legal</p> <p>17 advice.</p> <p>18 MR. HILL: I'm not going to instruct the</p> <p>19 client not to answer that question.</p> <p>20 THE WITNESS: No, I did not.</p> <p>21 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, did</p> <p>22 you ever visit any site at which one or more solar</p> <p>23 lenses were purportedly placed in service?</p> <p>24 MR. AUSTIN: Objection. Privilege and</p> <p>25 foundation.</p>	<p style="text-align: right;">48</p> <p>1 MS. HEALY GALLAGHER: We'll go off the</p> <p>2 record.</p> <p>3 (Discussion off the record.)</p> <p>4 MS. HEALY GALLAGHER: Back on the record,</p> <p>5 please.</p> <p>6 Q. All right. Mr. Birrell, there did come a</p> <p>7 point in time, correct, where you drafted a</p> <p>8 memorandum, the memorandum that we saw online earlier</p> <p>9 this morning, correct?</p> <p>10 A. Correct.</p> <p>11 MS. HEALY-GALLAGHER: Off the record,</p> <p>12 please, for a moment.</p> <p>13 (Discussion off the record.)</p> <p>14 MS. HEALY GALLAGHER: Back on the record,</p> <p>15 please.</p> <p>16 All right. Miss Hines has rejoined us on</p> <p>17 the phone.</p> <p>18 Q. Mr. Birrell, to whom did you send the</p> <p>19 memorandum?</p> <p>20 MR. AUSTIN: Objection. Privilege.</p> <p>21 MS. HEALY GALLAGHER: What's the basis for</p> <p>22 your privilege objection?</p> <p>23 MR. AUSTIN: That the method and manner of</p> <p>24 communication between an attorney and a client in the</p> <p>25 communication and provision of legal advice is, by</p>
<p style="text-align: right;">47</p> <p>1 MR. MORAN: What's the basis for your</p> <p>2 privilege objection?</p> <p>3 MR. AUSTIN: I think it's already well</p> <p>4 stated on the record. But to the extent it would</p> <p>5 help you, again, communications between the client</p> <p>6 and the attorney regarding the lenses at issue,</p> <p>7 whether or not they were quote, unquote, put in</p> <p>8 service, the nature of that determination, all of</p> <p>9 those are communications between the client and the</p> <p>10 attorney that are directly related to the provision</p> <p>11 of legal advice, and that is protected by the</p> <p>12 attorney-client privilege.</p> <p>13 MR. HILL: Can you read the question back,</p> <p>14 please?</p> <p>15 (Record was read as follows:</p> <p>16 "Mr. Birrell, did you ever visit any site at</p> <p>17 which one or more solar lenses were purportedly</p> <p>18 placed in service?")</p> <p>19 MR. HILL: Because the answer to that</p> <p>20 question may implicate the issue of the disputed</p> <p>21 assertion of privilege, until the privilege issue is</p> <p>22 resolved, I'll instruct the client not to answer the</p> <p>23 question.</p> <p>24 MR. AUSTIN: Let's go off the record for a</p> <p>25 minute.</p>	<p style="text-align: right;">49</p> <p>1 definition, axiomatically attorney-client</p> <p>2 communication. It's protected.</p> <p>3 MR. HILL: Without taking a position as to</p> <p>4 the application of the asserted privilege,</p> <p>5 attorney-client privilege or of any contended waiver</p> <p>6 thereof, the privilege has been asserted by the</p> <p>7 client, and I will instruct the witness not to answer</p> <p>8 that question.</p> <p>9 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell?</p> <p>10 A. I will follow the advice of counsel.</p> <p>11 Q. Mr. Birrell, other than the memorandum,</p> <p>12 did you draft any other documents for SOLCO?</p> <p>13 MR. AUSTIN: Objection. May or may not</p> <p>14 call for the provision of information protected from</p> <p>15 disclosure by the attorney-client privilege.</p> <p>16 MR. HILL: To the extent you can answer</p> <p>17 the question without disclosing the content of</p> <p>18 communications with the client, I will allow you to</p> <p>19 answer the question.</p> <p>20 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell?</p> <p>21 A. On the advice of counsel, I will not</p> <p>22 respond.</p> <p>23 Q. Mr. Birrell, are you familiar with the</p> <p>24 name R. Gregory Shepard?</p> <p>25 A. Yes.</p>

Birrell, Kenneth W.

February 14, 2017

14 (Pages 50 to 53)

<p style="text-align: right;">50</p> <p>1 Q. Who do you understand that to be?</p> <p>2 A. I understand that he is in some way</p> <p>3 affiliated with SOLCO and Mr. Johnson, but I do not</p> <p>4 know the details.</p> <p>5 Q. Have you ever had any conversations with</p> <p>6 Mr. Shepard?</p> <p>7 A. Not to my recollection, no.</p> <p>8 Q. Have you ever had any other correspondence</p> <p>9 or communication with Mr. Shepard?</p> <p>10 A. Not that I'm aware of, no.</p> <p>11 Q. How did you come to understand that he was</p> <p>12 connected with SOLCO and/or Mr. Johnson?</p> <p>13 MR. AUSTIN: Objection. May call for the</p> <p>14 disclosure of information protected by the</p> <p>15 attorney-client privilege.</p> <p>16 MR. HILL: To the extent that you can</p> <p>17 answer the question without reference to</p> <p>18 communication with a client, I'll allow the question.</p> <p>19 Otherwise, I will instruct the witness not to answer.</p> <p>20 THE WITNESS: On the advice of counsel, I</p> <p>21 won't respond.</p> <p>22 Q. (BY MS. HEALY GALLAGHER) To your</p> <p>23 knowledge, Mr. Birrell, have you ever received any</p> <p>24 information from Greg Shepard about SOLCO or the</p> <p>25 transactions at issue in the memo?</p>	<p style="text-align: right;">52</p> <p>1 you receive any facts or documents from anyone acting</p> <p>2 on behalf of XSun Energy, LLC, in the course of</p> <p>3 preparing the memo for SOLCO?</p> <p>4 A. The documents that I received from</p> <p>5 Mr. Clements, I don't know if he was acting on behalf</p> <p>6 of SOLCO or XSun or...</p> <p>7 Q. Do you have an understanding as to how, if</p> <p>8 at all, XSun Energy fit into the transaction that you</p> <p>9 were evaluating?</p> <p>10 MR. AUSTIN: Objection. Calls for the</p> <p>11 disclosure of protected attorney-client</p> <p>12 communications.</p> <p>13 MR. HILL: And to the extent that your</p> <p>14 understanding arises from the content of</p> <p>15 communications with the client or representative, I</p> <p>16 will instruct you not to answer, but allow you to</p> <p>17 answer if you have knowledge independent of that.</p> <p>18 THE WITNESS: On the advice of counsel, I</p> <p>19 will not respond.</p> <p>20 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>21 have you heard of an entity called RaPower3?</p> <p>22 A. Yes.</p> <p>23 Q. What's your understanding of what RaPower3</p> <p>24 does?</p> <p>25 A. I do not know. I did not hear about that</p>
<p style="text-align: right;">51</p> <p>1 MR. AUSTIN: Objection. May call for the</p> <p>2 disclosure of information protected by the</p> <p>3 attorney-client privilege which, of course, extends</p> <p>4 to agents of the client.</p> <p>5 MR. HILL: To the extent you can answer</p> <p>6 the question without reference to a communication</p> <p>7 with a client or agent, I will allow you to answer</p> <p>8 the question. Otherwise, I would instruct you not to</p> <p>9 answer.</p> <p>10 THE WITNESS: I do not believe I have, no.</p> <p>11 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>12 have you heard of an entity called XSun Energy, LLC?</p> <p>13 That's the letter X, capital S-u-n, space, Energy,</p> <p>14 LLC.</p> <p>15 MR. AUSTIN: Objection. May call for the</p> <p>16 disclosure of information protected by the</p> <p>17 attorney-client privilege.</p> <p>18 MR. HILL: On the basis of privilege being</p> <p>19 asserted, if you can answer the question without</p> <p>20 regard to communications with a client, former</p> <p>21 client, I will allow the answer. Otherwise, I will</p> <p>22 instruct the witness not to answer.</p> <p>23 THE WITNESS: On the advice of counsel, I</p> <p>24 will not respond.</p> <p>25 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, did</p>	<p style="text-align: right;">53</p> <p>1 entity during the representation of the client. I</p> <p>2 only heard the name afterwards, when the lawsuit was</p> <p>3 filed.</p> <p>4 Q. What, if any, understanding do you have</p> <p>5 about how RaPower3 may fit in with the transaction</p> <p>6 that you evaluated for SOLCO?</p> <p>7 MR. AUSTIN: Objection to the extent it</p> <p>8 calls for privileged communications.</p> <p>9 THE WITNESS: I do not have any.</p> <p>10 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, do</p> <p>11 you recognize the name Bryan Bolander?</p> <p>12 A. Yes.</p> <p>13 Q. What's the context that you have for</p> <p>14 Mr. Bolander?</p> <p>15 A. My recollection is he is a -- I believe</p> <p>16 was a certified public accountant that had worked</p> <p>17 with SOLCO or one of Mr. Johnson's entities</p> <p>18 previously.</p> <p>19 Q. How did you come to that understanding?</p> <p>20 A. I received communications from</p> <p>21 Mr. Clements from Mr. Bolander.</p> <p>22 Q. Did you ever speak with Mr. Bolander</p> <p>23 yourself?</p> <p>24 A. Not that I recall.</p> <p>25 Q. Did you ever correspond directly with</p>

Birrell, Kenneth W.

February 14, 2017

15 (Pages 54 to 57)

<p style="text-align: right;">54</p> <p>1 Mr. Bolander in writing?</p> <p>2 A. Not that I recall.</p> <p>3 Q. What, if anything, did you get related to</p> <p>4 Mr. Bolander from Mr. Clements?</p> <p>5 MR. AUSTIN: Objection. Calls for</p> <p>6 production of privileged information.</p> <p>7 MR. HILL: On the basis of the asserted</p> <p>8 privilege, I will instruct the client not to answer</p> <p>9 to the extent it calls for the disclosure of</p> <p>10 communications with the client regarding the subject</p> <p>11 matter of the representation. Otherwise, he is</p> <p>12 permitted to answer.</p> <p>13 THE WITNESS: On the advice of counsel, I</p> <p>14 won't respond.</p> <p>15 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>16 after you delivered your memorandum to Mr. Clements,</p> <p>17 was that the end of your client relationship with</p> <p>18 SOLCO?</p> <p>19 MR. AUSTIN: Objection.</p> <p>20 MS. HEALY GALLAGHER: Actually, I'll</p> <p>21 withdraw that.</p> <p>22 Q. Once you delivered your memo to</p> <p>23 Mr. Clements, did you have any further correspondence</p> <p>24 with him or anyone else on behalf of SOLCO?</p> <p>25 MR. AUSTIN: Objection, to the extent it</p>	<p style="text-align: right;">56</p> <p>1 will not respond.</p> <p>2 Q. (BY MS. HEALY GALLAGHER) At that meeting,</p> <p>3 Mr. Birrell, who, if anyone else, was also present?</p> <p>4 MR. AUSTIN: Well, yeah, I'll object to</p> <p>5 the extent that it discloses attorney-client</p> <p>6 communications.</p> <p>7 MR. HILL: On the basis of the asserted</p> <p>8 privilege raised by the prior client, I will instruct</p> <p>9 the witness not to answer the question until the</p> <p>10 privilege dispute has been resolved.</p> <p>11 THE WITNESS: On the advice of counsel, I</p> <p>12 will not respond.</p> <p>13 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>14 what's your understanding of the use to which your</p> <p>15 memorandum has been placed?</p> <p>16 MR. AUSTIN: Objection to the extent it</p> <p>17 calls for disclosure of privileged attorney-client</p> <p>18 communications.</p> <p>19 MR. HILL: On the basis of the asserted</p> <p>20 privilege, I will instruct the client -- or the</p> <p>21 witness not to answer any portions or any portions of</p> <p>22 the question which require the -- with reference to a</p> <p>23 communication with a client or agent. However, I</p> <p>24 will allow the witness to answer any understandings</p> <p>25 he has independent of communications with the client</p>
<p style="text-align: right;">55</p> <p>1 calls for disclosure of attorney-client privileged</p> <p>2 communication.</p> <p>3 MR. HILL: To the extent you can answer</p> <p>4 that question without disclosing a communication with</p> <p>5 the client or agent that is the subject of the</p> <p>6 disputed privilege, I will allow you to answer.</p> <p>7 Otherwise, I will instruct you not to answer the</p> <p>8 question.</p> <p>9 THE WITNESS: On the advice of counsel, I</p> <p>10 will not respond.</p> <p>11 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, you</p> <p>12 said earlier that towards the end of your process</p> <p>13 with SOLCO there was a meeting at which you were</p> <p>14 present, along with Glenda Johnson and</p> <p>15 Neldon Johnson. Do you recall that?</p> <p>16 A. Yes.</p> <p>17 Q. What, if anything, did you talk about at</p> <p>18 that meeting?</p> <p>19 MR. AUSTIN: Objection. Very obviously</p> <p>20 calls for the disclosure of protected attorney-client</p> <p>21 communications.</p> <p>22 MR. HILL: On the basis of the asserted</p> <p>23 privilege objection, I will instruct the witness not</p> <p>24 to answer the question.</p> <p>25 THE WITNESS: On the advice of counsel, I</p>	<p style="text-align: right;">57</p> <p>1 or agent.</p> <p>2 THE WITNESS: I understand that the</p> <p>3 memorandum has been posted on the website, posted by</p> <p>4 RaPower3.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, did</p> <p>6 there come a time when you asked anyone to stop using</p> <p>7 your memorandum?</p> <p>8 MR. AUSTIN: Objection, to the extent it</p> <p>9 calls for the disclosure of a protected</p> <p>10 attorney-client communication.</p> <p>11 MR. HILL: On the basis of the asserted</p> <p>12 privilege, until the privilege dispute is resolved, I</p> <p>13 will instruct the witness not to answer the question.</p> <p>14 THE WITNESS: On the advice of counsel, I</p> <p>15 will not respond.</p> <p>16 MR. HILL: Can we take a break for a</p> <p>17 minute?</p> <p>18 MS. HEALY GALLAGHER: We certainly can.</p> <p>19 We have been going for a while.</p> <p>20 (A break was taken from 10:59 a.m. to</p> <p>21 11:06 a.m.)</p> <p>22 MS. HEALY GALLAGHER: We'll go back on the</p> <p>23 record when you are all ready.</p> <p>24 Q. We're back on, Mr. Birrell, after a short</p> <p>25 break.</p>

Birrell, Kenneth W.

February 14, 2017

16 (Pages 58 to 61)

<p style="text-align: right;">58</p> <p>1 Did you talk to anyone about the content</p> <p>2 of your testimony today other than discussing any</p> <p>3 attorney-client privilege issues with your attorney?</p> <p>4 A. No.</p> <p>5 Q. All right. So, Mr. Birrell, what, if</p> <p>6 anything, did you say to anyone asking or instructing</p> <p>7 them to stop using your memorandum?</p> <p>8 MR. AUSTIN: Objection to the extent it</p> <p>9 calls for protected attorney-client information.</p> <p>10 MR. HILL: On the basis of the asserted</p> <p>11 privilege, if your answer calls for the disclosure of</p> <p>12 communication with a client, I'll instruct you not to</p> <p>13 answer. Otherwise, you may answer the question.</p> <p>14 THE WITNESS: I was contacted by a Special</p> <p>15 Agent Lawson of the IRS who first informed me that</p> <p>16 the memorandum was available on the website. We</p> <p>17 discussed the fact it's a memorandum rather than an</p> <p>18 opinion letter and that it was, by its very nature,</p> <p>19 addressed to the tax treatment of a C corporation,</p> <p>20 purchaser of solar lenses, rather than an individual,</p> <p>21 and that it would not be applicable to somebody who</p> <p>22 was an individual.</p> <p>23 Q. (BY MS. HEALY GALLAGHER) Let's unpack</p> <p>24 that answer a little bit. Do you remember around</p> <p>25 when you first heard from Special Agent Lawson?</p>	<p style="text-align: right;">60</p> <p>1 the C corp --</p> <p>2 A. An analysis --</p> <p>3 Q. I'm sorry, let me finish the question.</p> <p>4 Which entity in the transaction did you</p> <p>5 assume was a C corp?</p> <p>6 A. The purchaser of the lenses.</p> <p>7 Q. And why was that important?</p> <p>8 A. Because the analysis is different based</p> <p>9 upon the type of taxpayer who purchases the lenses.</p> <p>10 Q. Why, Mr. Birrell, did you write this</p> <p>11 memorandum with the buyer as a C corp?</p> <p>12 MR. AUSTIN: Objection. Calls for the</p> <p>13 disclosure of protected attorney-client</p> <p>14 communications.</p> <p>15 MR. HILL: On the basis of the asserted</p> <p>16 privilege objection, I will instruct the witness not</p> <p>17 to answer the question.</p> <p>18 THE WITNESS: On the advice of counsel, I</p> <p>19 will not respond.</p> <p>20 Q. (BY MS. HEALY GALLAGHER) Very quickly,</p> <p>21 Mr. Birrell, we've mentioned Special Agent Lawson a</p> <p>22 couple of times. Do you have an understanding of who</p> <p>23 Special Agent Lawson worked for?</p> <p>24 A. I believed for the IRS, but I'm not</p> <p>25 certain.</p>
<p style="text-align: right;">59</p> <p>1 A. I do not.</p> <p>2 Q. What, if any, understanding did you have</p> <p>3 as to why Special Agent Lawson was reaching out to</p> <p>4 you?</p> <p>5 A. Because he was investigating SOLCO and</p> <p>6 their related entities in connection with an</p> <p>7 investigation into their activities.</p> <p>8 Q. And was this the first time you had come</p> <p>9 to understand that your memorandum was -- had been</p> <p>10 made public?</p> <p>11 A. Yes.</p> <p>12 Q. You mentioned in your answer just now</p> <p>13 something about C corporations?</p> <p>14 A. Yes.</p> <p>15 Q. What, specifically, did you talk to</p> <p>16 Special Agent Lawson about with respect to C corps</p> <p>17 and your memo?</p> <p>18 A. That the memo expressly states that the</p> <p>19 analysis applies to a corporation or a limited</p> <p>20 liability company that is taxed as a C corporation.</p> <p>21 Different rules apply if it were taxed as an</p> <p>22 S corporation or a partnership or if it was an</p> <p>23 individual, the purchaser of the lenses, so...</p> <p>24 Q. Okay, so that is my question. So when you</p> <p>25 say "it" or the memo was addressed to a company that</p>	<p style="text-align: right;">61</p> <p>1 Q. Do you know if he does criminal</p> <p>2 investigations or civil investigations?</p> <p>3 A. My understanding was criminal.</p> <p>4 Q. Mr. Birrell, what, if anything, else did</p> <p>5 you talk about with Special Agent Lawson?</p> <p>6 A. I do not recall any other issues.</p> <p>7 Q. Was that your only contact with Special</p> <p>8 Agent Lawson, or did you speak to him or write with</p> <p>9 him at any other time?</p> <p>10 A. I believe there were multiple</p> <p>11 conversations.</p> <p>12 Q. Do you remember any of the content of your</p> <p>13 other conversations with him?</p> <p>14 A. They all related to the memorandum.</p> <p>15 Q. After your first contact with Special</p> <p>16 Agent Lawson, what, if anything, did you do with</p> <p>17 respect to SOLCO?</p> <p>18 MR. AUSTIN: Objection to the extent it</p> <p>19 calls for protected communications.</p> <p>20 MR. HILL: On the basis of the objection,</p> <p>21 if there is any portion of your answer that would</p> <p>22 disclose the content of communications with the</p> <p>23 client, I'll instruct you not to answer. Otherwise,</p> <p>24 you may answer the question.</p> <p>25 THE WITNESS: There were no specific</p>

Birrell, Kenneth W.

February 14, 2017

17 (Pages 62 to 65)

<p style="text-align: right;">62</p> <p>1 communications with him after the first meeting.</p> <p>2 Q. (BY MS. HEALY GALLAGHER) With anyone at</p> <p>3 SOLCO?</p> <p>4 A. Correct.</p> <p>5 Q. Mr. Birrell, did you ever speak with any</p> <p>6 prospective buyers of the solar lenses?</p> <p>7 A. Shortly after we provided the memorandum</p> <p>8 to them there was one caller. I spoke with them for</p> <p>9 10 or 15 minutes. It wasn't a very long</p> <p>10 conversation. I don't remember the details of --</p> <p>11 whether it was an individual or an entity or what,</p> <p>12 but there was one conversation with somebody that was</p> <p>13 possibly interested.</p> <p>14 Q. Do you remember any of the content of that</p> <p>15 conversation?</p> <p>16 A. They were aware of the opportunity, and</p> <p>17 there was some limited discussion. When I entered a</p> <p>18 time entry for that conversation, it was sent as part</p> <p>19 of the billing to the client, and they instructed me</p> <p>20 not to speak with anybody else without their prior</p> <p>21 approval, and so I did not engage in any other</p> <p>22 conversations after that time.</p> <p>23 Q. You said that someone instructed you not</p> <p>24 to speak with any other --</p> <p>25 A. Glenda Johnson.</p>	<p style="text-align: right;">64</p> <p>1 Otherwise, if you have independent knowledge</p> <p>2 sufficient to answer the question, I'll allow it.</p> <p>3 THE WITNESS: I'm not aware of what their</p> <p>4 involvement was.</p> <p>5 MS. HEALY GALLAGHER: Please mark 355.</p> <p>6 (EXHIBIT 355 WAS MARKED.)</p> <p>7 Q. Mr. Birrell, I'm handing you what has been</p> <p>8 marked Plaintiff's Exhibit 355. Would you please</p> <p>9 take a look at this document, refresh your</p> <p>10 recollection of it and let me know when you're</p> <p>11 finished.</p> <p>12 While you do that, for the record,</p> <p>13 Plaintiff's Exhibit 355, it's Bates-marked KM00083</p> <p>14 through 90.</p> <p>15 A. It is an e-mail from Jason Clements to me.</p> <p>16 Q. And the date of this e-mail is Wednesday,</p> <p>17 August 15, 2012, correct?</p> <p>18 A. Correct.</p> <p>19 Q. Mr. Birrell, what's the context for your</p> <p>20 having received this e-mail from Mr. Clements?</p> <p>21 MR. AUSTIN: Objection to the extent it</p> <p>22 calls for privileged communications.</p> <p>23 MR. HILL: On the basis of the objection,</p> <p>24 to the extent your answer with respect to the context</p> <p>25 implicates a communication with a client or agent,</p>
<p style="text-align: right;">63</p> <p>1 Q. Sorry. Let me finish the question so that</p> <p>2 it's clear for the record.</p> <p>3 Who was it that instructed you not to</p> <p>4 speak with anyone else or prospective buyers in the</p> <p>5 future?</p> <p>6 MR. AUSTIN: Objection. Privileged.</p> <p>7 THE WITNESS: Glenda Johnson.</p> <p>8 Q. (BY MS. HEALY GALLAGHER) And forgive me</p> <p>9 if you may have already answered this. Do you</p> <p>10 remember anything about the prospective buyer that</p> <p>11 you spoke with?</p> <p>12 A. I do not.</p> <p>13 Q. Mr. Birrell, do you recognize the name</p> <p>14 Sam Alba?</p> <p>15 A. I do not.</p> <p>16 Q. Or the law firm Snow, Christensen?</p> <p>17 A. I'm aware of the law firm.</p> <p>18 Q. Do you have any recollection of how Snow,</p> <p>19 Christensen may have been involved, to any extent,</p> <p>20 with the SOLCO client matter?</p> <p>21 MR. AUSTIN: Objection. Privilege.</p> <p>22 MR. HILL: On the basis of the asserted</p> <p>23 privilege objection, to the extent any portion of</p> <p>24 your answer would implicate communications with a</p> <p>25 client or agent, I will instruct you not to answer.</p>	<p style="text-align: right;">65</p> <p>1 I'll instruct the witness not to answer. Otherwise,</p> <p>2 you may answer only to the extent it's not</p> <p>3 implicating any such communication.</p> <p>4 THE WITNESS: On the advice of counsel, I</p> <p>5 will not respond.</p> <p>6 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, do</p> <p>7 you see the line that says, "Attachments: Info for</p> <p>8 accountants_new2.pdf"?</p> <p>9 A. I do.</p> <p>10 Q. And in the body of the e-mail it says,</p> <p>11 "Ken, we send out the attached document to clients to</p> <p>12 help their accountants quickly understand what the</p> <p>13 program is and how to take care of accounting for</p> <p>14 it."</p> <p>15 Did I read that correctly?</p> <p>16 A. Yes.</p> <p>17 Q. Do you have an understanding of who "we"</p> <p>18 is at the beginning of that sentence?</p> <p>19 MR. AUSTIN: Objection. Privilege.</p> <p>20 MR. HILL: To the extent -- yeah, on the</p> <p>21 basis of the asserted privilege, until the disputed</p> <p>22 privilege issue is resolved, I'll instruct the</p> <p>23 witness not to answer.</p> <p>24 THE WITNESS: On the advice of counsel, I</p> <p>25 will not respond.</p>

Birrell, Kenneth W.

February 14, 2017

18 (Pages 66 to 69)

<p style="text-align: right;">66</p> <p>1 Q. (BY MS. HEALY GALLAGHER) Would you take a 2 look, please, sir, at KM84 through 90? 3 A. Yes. 4 Q. Those pages appear to be -- the title of 5 this appears to be Information for Accountants. Do 6 you see that? 7 A. Yes. 8 Q. At the top of page KM84? 9 A. Yes. 10 Q. And this is a document on behalf of XSun 11 Energy. Do you see that? 12 A. Yes. 13 Q. Mr. Birrell, what, if anything, did you do 14 with this document from XSun Energy? 15 MR. AUSTIN: Objection. Privilege. 16 MR. HILL: To the extent your answer -- on 17 the basis of the asserted privilege, to the extent 18 your answer would disclose a communication with a 19 client or its contents, I'll instruct you not to 20 answer. Otherwise, if you can answer without 21 reference to such communications, you are permitted. 22 THE WITNESS: I reviewed the document. 23 Q. (BY MS. HEALY GALLAGHER) Did you use any 24 information from this document as any part of the 25 factual basis for your legal analysis in the memo?</p>	<p style="text-align: right;">68</p> <p>1 did you rely upon in drafting your memorandum? 2 MR. AUSTIN: Objection. Asked and 3 answered. And calls for the disclosure of protected 4 attorney-client communications. 5 MR. HILL: On the basis of the asserted 6 privilege raised by the former client, until the 7 dispute privilege issue is resolved, I will instruct 8 the client -- or the witness not to answer the 9 question. 10 THE WITNESS: On the advice of counsel, I 11 will not respond. 12 (EXHIBIT 356 WAS MARKED.) 13 Q. Mr. Birrell, I'm handing you what's been 14 marked as Plaintiff's Exhibit 356. Please take a 15 look at that exhibit, and let me know when you are 16 done. 17 For the record, Plaintiff's Exhibit 356 is 18 Bates-marked KM00057 through 82. 19 A. It is an e-mail from Jason Clements to me, 20 with various attachments. 21 Q. So the cover page for Plaintiff's 22 Exhibit 356 is the e-mail that you mentioned. The 23 date on that e-mail is August 15, 2012, correct? 24 A. Correct. 25 Q. That's from Jason Clements to you, right?</p>
<p style="text-align: right;">67</p> <p>1 MR. AUSTIN: Objection. Privileged. 2 MR. HILL: I'd be interested in the 3 defendants' realms for the asserted privilege before 4 I raise an instruction for my client on that point. 5 MR. AUSTIN: Well, yeah, I would just say 6 that this is what happens when you start answering 7 potentially de minimus or harmless questions, because 8 now we're getting into the potential bases for the 9 advice rendered to the client, the documents or 10 information that may or may not have been considered 11 in the process of forming that legal advice, the 12 communications with regard to what pieces of 13 information may or may not bear upon that advice and 14 the consequences of individual communications on the 15 overall advice rendered to the client. 16 MR. HILL: Without taking a position as to 17 the efficacy of the privilege or the argument as to 18 the waiver thereof, on the basis of the privilege 19 having been raised by the former client, until the 20 privilege dispute can be resolved, I'll instruct the 21 witness not to answer the question. 22 THE WITNESS: On the advice of counsel, I 23 will not respond. 24 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, 25 what, if any, information in Plaintiff's Exhibit 355</p>	<p style="text-align: right;">69</p> <p>1 A. Correct. 2 Q. The e-mail lists a series of attachments 3 in that line. Do you see that? 4 A. I do. 5 Q. And do you see the attachments actually in 6 Plaintiff's Exhibit 356 that are listed on the cover 7 e-mail? 8 A. Yes. 9 Q. The first couple of lines of the body of 10 the e-mail say, "Ken, here is the contracts designed 11 for clients to participate in the solar program." 12 Did I read that correctly? 13 A. Yes. 14 Q. Do you know who wrote these contracts? 15 MR. AUSTIN: Objection to the extent it 16 calls for attorney-client communications. 17 MR. HILL: On the basis of the objection, 18 I will instruct the witness not to answer to the 19 extent any answer would implicate the content of 20 communication with a client or its agent. Otherwise, 21 if he has independent knowledge outside of that, he 22 may be permitted to answer. 23 THE WITNESS: On the advice of counsel, I 24 will not respond. 25 Q. (BY MS. HEALY GALLAGHER) Looking at</p>

Birrell, Kenneth W.

February 14, 2017

19 (Pages 70 to 73)

<p style="text-align: right;">70</p> <p>1 Plaintiff's Exhibit 356 as a whole, what, if any,</p> <p>2 information in this exhibit did you rely upon in</p> <p>3 drafting your memorandum?</p> <p>4 MR. AUSTIN: Objection. Privilege.</p> <p>5 MR. HILL: On the basis of the asserted</p> <p>6 privilege, until the disputed privilege issue can be</p> <p>7 resolved, I'll instruct the witness not to answer.</p> <p>8 THE WITNESS: On the advice of counsel, I</p> <p>9 will not respond.</p> <p>10 Q. (BY MS. HEALY GALLAGHER) What, if</p> <p>11 anything, did you do with the documents or</p> <p>12 information in Plaintiff's Exhibit 356?</p> <p>13 MR. AUSTIN: Objection. Privilege.</p> <p>14 MR. HILL: On the basis of the objection,</p> <p>15 to the extent you are able to answer the question</p> <p>16 without any reference to communication with a client</p> <p>17 or agent, or the content of such communication, you</p> <p>18 are permitted to answer. Otherwise, I would instruct</p> <p>19 you not to answer.</p> <p>20 THE WITNESS: I reviewed them. Otherwise,</p> <p>21 on the advice of counsel, I will not respond.</p> <p>22 (EXHIBIT 357 WAS MARKED.)</p> <p>23 Q. Mr. Birrell, I'm handing you what's been</p> <p>24 marked Plaintiff's Exhibit 357. Please take a look</p> <p>25 through that exhibit, and let me know when you're</p>	<p style="text-align: right;">72</p> <p>1 A. Correct.</p> <p>2 Q. This e-mail from Mr. Clement was sent</p> <p>3 Tuesday, August 21, 2012, right?</p> <p>4 A. Correct.</p> <p>5 Q. And is this e-mail following up with one</p> <p>6 additional drawing?</p> <p>7 A. It appears to be.</p> <p>8 Q. And does that drawing appear to follow at</p> <p>9 Bates number KM00101?</p> <p>10 A. Yes.</p> <p>11 Q. Mr. Birrell, what, if anything, did you do</p> <p>12 with the documents or information in Plaintiff's</p> <p>13 Exhibit 357?</p> <p>14 MR. AUSTIN: Objection. Privilege.</p> <p>15 MR. HILL: On the basis of the objection,</p> <p>16 to the extent you are able to answer the question</p> <p>17 without reference to any communication with the</p> <p>18 client or an agent, or the content of such</p> <p>19 communications, you are permitted to answer.</p> <p>20 Otherwise, I would instruct you not to answer.</p> <p>21 THE WITNESS: I reviewed them. Otherwise,</p> <p>22 on the advice of counsel, I will not respond further.</p> <p>23 Q. (BY MS. HEALY GALLAGHER) And what, if</p> <p>24 any, information did you rely upon in Plaintiff's</p> <p>25 Exhibit 357 in drafting your memorandum?</p>
<p style="text-align: right;">71</p> <p>1 done.</p> <p>2 For the record, Plaintiff's Exhibit 357 is</p> <p>3 Bates-marked KM00091 through 101.</p> <p>4 A. It is two e-mails from Jason Clements to</p> <p>5 me, with various attachments.</p> <p>6 Q. And the cover e-mail in Plaintiff's 357</p> <p>7 was sent Monday, August 20th, 2012; is that right?</p> <p>8 A. Correct.</p> <p>9 Q. The subject is technical specs for solar</p> <p>10 designs, right?</p> <p>11 A. Correct.</p> <p>12 Q. And the cover e-mail indicates a series of</p> <p>13 attachments to the e-mail. Do you see that?</p> <p>14 A. Yes.</p> <p>15 Q. And taking a look at the cover e-mail and</p> <p>16 the attachment -- or the pages that follow that</p> <p>17 e-mail, do you believe, Mr. Birrell, that the pages</p> <p>18 that follow are the attachments?</p> <p>19 A. I believe so.</p> <p>20 Q. Okay. And then, yes, we'll also take a</p> <p>21 look at the document Bates numbered KM100. You</p> <p>22 identified a second ago, Mr. Birrell, that this</p> <p>23 entire exhibit is actually two e-mails, correct?</p> <p>24 A. Correct.</p> <p>25 Q. And this is the second e-mail?</p>	<p style="text-align: right;">73</p> <p>1 MR. AUSTIN: Objection. Privilege.</p> <p>2 MR. HILL: On the basis of the privilege</p> <p>3 objection, I will instruct the witness not to answer.</p> <p>4 THE WITNESS: On the advice of counsel, I</p> <p>5 will not respond.</p> <p>6 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>7 would you please take a look at the second sentence</p> <p>8 of this e-mail? It says, "These are the same</p> <p>9 drawings that were submitted to the feds the for the</p> <p>10 1603 grant program that they were approved for."</p> <p>11 Did I read that correctly?</p> <p>12 A. Yes.</p> <p>13 Q. Do you have an understanding of what the</p> <p>14 1603 grant program is or was?</p> <p>15 A. The 1603 grant program is related to the</p> <p>16 manufacturers of various types of energy equipment,</p> <p>17 that they can be approved for subsidies from the</p> <p>18 federal government.</p> <p>19 Q. Did you have an understanding of whether</p> <p>20 SOLCO or any related entity was approved for</p> <p>21 participation in the 1603 grant program?</p> <p>22 MR. AUSTIN: Objection. Privilege.</p> <p>23 MR. HILL: On the basis of the objection,</p> <p>24 to the extent you can answer that question without</p> <p>25 reference to any communication with a client or</p>

Birrell, Kenneth W.

February 14, 2017

20 (Pages 74 to 77)

<p style="text-align: right;">74</p> <p>1 agent, or the content of any such communication, you 2 are allowed to answer. Otherwise, I would instruct 3 the witness not to answer the question. 4 THE WITNESS: On the advice of counsel, I 5 will not respond. 6 (EXHIBIT 358 WAS MARKED.) 7 Q. Mr. Birrell, I'm handing you what's been 8 marked Plaintiff's Exhibit 358. Please take a look 9 at. 10 For the record, Plaintiff's Exhibit 358 is 11 Bates-marked KM00001 through 4. 12 Mr. Birrell, what is Plaintiff's Exhibit 13 358? 14 A. This is the engagement letter between our 15 firm and XSun Energy, LLC. 16 Q. The date on the retainer is August 24, 17 2012, correct? 18 A. Correct. 19 Q. And I see the addressee is XSun Energy, 20 LLC, which you just mentioned, right, and the 21 attention line is to Neldon Johnson, correct? 22 A. Correct. 23 Q. Why was the attention line to Neldon 24 Johnson? 25 MR. AUSTIN: Objection. Privileged.</p>	<p style="text-align: right;">76</p> <p>1 Q. And if you take a look, please, below that 2 at acknowledgement of client, in the "by" line there 3 is a signature there. Do you know whose signature 4 that is? 5 A. It appears to be Neldon Johnson. 6 Q. And next to Mr. Johnson's name it says 7 International Automated Sys, Inc. Do you see that? 8 A. Yes. 9 Q. Do you have any idea why that's written 10 there? 11 A. It is another company owned or controlled 12 by Mr. Johnson. 13 Q. Do you have an understanding of what, if 14 any, relationship International Automated Systems had 15 in the question presented to you for your analysis? 16 MR. AUSTIN: Objection. Privilege. 17 MR. HILL: To the extent your answer -- on 18 the basis of the objection, to the extent you can 19 answer the question without reference to a 20 communication with a client or agent, or the content 21 of such communication, I'll permit you to answer. 22 Otherwise, I'll instruct you not to answer. 23 THE WITNESS: On the advice of counsel, I 24 will not respond. 25 (EXHIBIT 359 WAS MARKED.)</p>
<p style="text-align: right;">75</p> <p>1 MR. HILL: On the basis of the objection 2 raised that this is a -- the question inquires into 3 attorney-client privileged communications, I will 4 instruct the witness not to answer the question until 5 the privilege issue is resolved. 6 THE WITNESS: On the advice of counsel, I 7 will not respond. 8 Q. (BY MS. HEALY GALLAGHER) And, 9 Mr. Birrell, you've mentioned a few times your client 10 matter number is related to SOLCO, but here the 11 client is identified as XSun Energy. Why is that? 12 MR. AUSTIN: Objection. Privilege. 13 MR. HILL: On the basis of the objection, 14 to the extent your answer involves a communication 15 with a client or agent, or the disclosure of the 16 content thereof, I would instruct you not to answer. 17 However, to the extent you can answer without 18 reference to any disputed issues, you are permitted. 19 THE WITNESS: On the advice of counsel, I 20 will not respond. 21 Q. (BY MS. HEALY GALLAGHER) Take a look, 22 please, at the last page of Plaintiff's Exhibit 358. 23 Mr. Birrell, is that your signature in the signature 24 block? 25 A. Above Kenneth Birrell, yes.</p>	<p style="text-align: right;">77</p> <p>1 Q. Mr. Birrell, I'm handing you what's been 2 marked Plaintiff's Exhibit 359. Would you take a 3 look at that, please? 4 While you do that, for the record, 5 Plaintiff's 359 is Bates numbered KM00050 through 53. 6 A. Yes. 7 Q. Mr. Birrell, do you know what Plaintiff's 8 Exhibit 359 is? 9 A. It appears to be a letter from Anderson 10 Law Center, PC. 11 Q. Other than this letter, have you ever 12 heard of Anderson Law Center, PC? 13 A. I have not. 14 Q. Are you familiar at all with 15 Todd Anderson? 16 A. I am not. 17 Q. Do you see at the top right-hand section 18 of the page -- the first page of Plaintiff's 359 19 there appears to be handwriting that says, "Written 20 11-15-10"? Did I read that correctly? 21 A. Yes. 22 Q. Whose handwriting is that? 23 MR. AUSTIN: Objection. Privilege. 24 MR. HILL: On the basis of the objection, 25 to the extent you are able to answer the question</p>

Birrell, Kenneth W.

February 14, 2017

21 (Pages 78 to 81)

<p style="text-align: right;">78</p> <p>1 without regard to any communications with a client or</p> <p>2 agent, you are permitted to answer. Otherwise, I</p> <p>3 would instruct you not to answer.</p> <p>4 THE WITNESS: I do not know.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) Did you make</p> <p>6 that notation, Mr. Birrell?</p> <p>7 A. I did not.</p> <p>8 Q. Who did you get this document from,</p> <p>9 Mr. Birrell?</p> <p>10 MR. AUSTIN: Objection. Privilege.</p> <p>11 MR. HILL: On the basis of the objection,</p> <p>12 to the extent you are able to answer the question</p> <p>13 without regard to any communication with a client or</p> <p>14 agent, you are permitted to answer. Otherwise, I</p> <p>15 will instruct the witness not to answer.</p> <p>16 THE WITNESS: On the advice of counsel, I</p> <p>17 will not respond.</p> <p>18 Q. (BY MS. HEALY GALLAGHER) What, if</p> <p>19 anything, did you do with Plaintiff's Exhibit 359 --</p> <p>20 I'm sorry. What, if anything, did you do with</p> <p>21 Plaintiff's Exhibit 359 or the information in it?</p> <p>22 MR. AUSTIN: Objection. Privilege.</p> <p>23 MR. HILL: On the basis of the objection,</p> <p>24 to the extent you are able to answer the question</p> <p>25 without regard to any communication with a client or</p>	<p style="text-align: right;">80</p> <p>1 A. Other than seeing this, no.</p> <p>2 Q. Do you have any idea of the date on which</p> <p>3 this letter was written?</p> <p>4 A. No.</p> <p>5 Q. Who gave you Plaintiff's Exhibit 360?</p> <p>6 MR. AUSTIN: Objection. Privilege.</p> <p>7 MR. HILL: On the basis of the objection,</p> <p>8 if you are able to answer the question without regard</p> <p>9 to a communication between a client or agent, you are</p> <p>10 permitted to answer. Otherwise, I will instruct the</p> <p>11 witness not to answer the question.</p> <p>12 THE WITNESS: On the advice of counsel, I</p> <p>13 will not respond.</p> <p>14 Q. (BY MS. HEALY GALLAGHER) Do you recall</p> <p>15 when you received Plaintiff's 360?</p> <p>16 MR. AUSTIN: Objection. Privilege.</p> <p>17 THE WITNESS: I do not.</p> <p>18 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, if</p> <p>19 you could take a look back at Plaintiff's 359 --</p> <p>20 Plaintiff's Exhibit 359. Do you recall when you</p> <p>21 received Plaintiff's Exhibit 359?</p> <p>22 A. I do not.</p> <p>23 Q. Do you recall if it was before or after</p> <p>24 you wrote your memorandum?</p> <p>25 MR. AUSTIN: Objection. Privilege.</p>
<p style="text-align: right;">79</p> <p>1 an agent, you are permitted to answer. Otherwise, I</p> <p>2 instruct you not to answer.</p> <p>3 THE WITNESS: I reviewed it. Otherwise,</p> <p>4 on the advice of counsel, I will not respond further.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) What, if any,</p> <p>6 information in Plaintiff's Exhibit 359 did you rely</p> <p>7 on in drafting your memorandum?</p> <p>8 MR. AUSTIN: Objection. Privilege.</p> <p>9 MR. HILL: On the basis of the objection,</p> <p>10 until the disputed privilege issue is resolved, I</p> <p>11 instruct the witness not to answer.</p> <p>12 THE WITNESS: On the advice of counsel, I</p> <p>13 will not respond.</p> <p>14 (EXHIBIT 360 WAS MARKED.)</p> <p>15 Q. (BY MS. HEALY GALLAGHER) I am handing you</p> <p>16 what has been marked as Plaintiff's Exhibit 360.</p> <p>17 For the record, Plaintiff's 360 is Bates-</p> <p>18 marked KM00054 through 586.</p> <p>19 Mr. Birrell, what's Plaintiff's</p> <p>20 Exhibit 360?</p> <p>21 A. It appears to be a letter from Cloward and</p> <p>22 Sorenson, LLC, to International Automated Systems,</p> <p>23 Inc.</p> <p>24 Q. Have you ever heard of Cloward and</p> <p>25 Sorenson, LLC?</p>	<p style="text-align: right;">81</p> <p>1 MR. HILL: On the basis of the objection,</p> <p>2 until the disputed privilege issue is resolved, I'll</p> <p>3 instruct the witness not to answer the question.</p> <p>4 THE WITNESS: On the advice of counsel, I</p> <p>5 will not respond.</p> <p>6 Q. (BY MS. HEALY GALLAGHER) And looking back</p> <p>7 at Plaintiff's Exhibit 360, do you remember whether</p> <p>8 you received Plaintiff's Exhibit 360 before or after</p> <p>9 you wrote your memorandum?</p> <p>10 MR. AUSTIN: Objection. Privilege.</p> <p>11 MR. HILL: On the basis of the privilege</p> <p>12 objection, I will instruct the witness not to answer</p> <p>13 the question until the privilege dispute is resolved.</p> <p>14 THE WITNESS: On the advice of counsel, I</p> <p>15 will not respond.</p> <p>16 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>17 what, if anything, did you do with Plaintiff's</p> <p>18 Exhibit 360 after you received it?</p> <p>19 MR. AUSTIN: Objection. Privilege.</p> <p>20 MR. HILL: On the basis of the objection,</p> <p>21 to the extent the witness is able to answer the</p> <p>22 question without regard to any communication with a</p> <p>23 client or agent, he'll be permitted to answer.</p> <p>24 Otherwise, I will instruct the witness not to answer.</p> <p>25 THE WITNESS: I reviewed it. Otherwise,</p>

Birrell, Kenneth W.

February 14, 2017

22 (Pages 82 to 85)

<p style="text-align: right;">82</p> <p>1 on the advice of counsel, I will not respond further.</p> <p>2 Q. (BY MS. HEALY GALLAGHER) What, if any,</p> <p>3 information in Plaintiff's Exhibit 360 did you rely</p> <p>4 upon in writing your memorandum?</p> <p>5 MR. AUSTIN: Objection. Privilege.</p> <p>6 MR. HILL: On the basis of the privileged</p> <p>7 objection, until the disputed privilege issue is</p> <p>8 resolved, I'll instruct the witness not to answer the</p> <p>9 question.</p> <p>10 THE WITNESS: On the advice of counsel, I</p> <p>11 will not respond.</p> <p>12 (EXHIBIT 361 WAS MARKED.)</p> <p>13 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, I'm</p> <p>14 handing you what's been marked Plaintiff's</p> <p>15 Exhibit 361. Please take a look at that.</p> <p>16 For the record, Plaintiff's Exhibit 361 is</p> <p>17 Bates-marked KM00112 through 143.</p> <p>18 A. Yes.</p> <p>19 Q. Do you recognize Plaintiff's Exhibit 361,</p> <p>20 Mr. Birrell?</p> <p>21 A. Yes.</p> <p>22 Q. What is it?</p> <p>23 A. It is an e-mail from me to Jason Clements,</p> <p>24 with various attachments.</p> <p>25 Q. You sent this e-mail on Tuesday,</p>	<p style="text-align: right;">84</p> <p>1 MR. AUSTIN: Objection. Privilege.</p> <p>2 MR. HILL: I'll allow the answer.</p> <p>3 THE WITNESS: I revised them. I do not</p> <p>4 think I drafted them from whole cloth.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) What makes you</p> <p>6 think that?</p> <p>7 MR. HILL: To the extent that the answer</p> <p>8 to that question implicates a communication with a</p> <p>9 client or an agent, I'll instruct the witness not to</p> <p>10 answer on the basis of attorney-client privilege.</p> <p>11 Otherwise, if he can answer independent of the</p> <p>12 communication with the client, he is permitted.</p> <p>13 THE WITNESS: On the advice of counsel, I</p> <p>14 will not respond.</p> <p>15 Q. (BY MS. HEALY GALLAGHER) In the first</p> <p>16 line of Plaintiff's Exhibit 361 you say, "Attached</p> <p>17 are generalized versions of the purchase agreement,"</p> <p>18 with a parenthetical, "in the operation and</p> <p>19 maintenance agreement."</p> <p>20 What did you mean by "generalized</p> <p>21 version"?</p> <p>22 MR. AUSTIN: Objection. Privilege.</p> <p>23 MR. HILL: Because this communication has</p> <p>24 been previously disclosed and is not subject to an</p> <p>25 unwaived privilege and is asking for the meaning of</p>
<p style="text-align: right;">83</p> <p>1 October 30th, 2012; is that right?</p> <p>2 A. Yes.</p> <p>3 Q. And the attachments line contains a few</p> <p>4 documents named there. Do you see that?</p> <p>5 A. I do.</p> <p>6 Q. And starting with KM00113 and going</p> <p>7 through the end of the document, does Plaintiff's</p> <p>8 Exhibit 361 appear to contain all of the attachments</p> <p>9 mentioned in your e-mail?</p> <p>10 A. It does.</p> <p>11 Q. The attachments to this e-mail, these</p> <p>12 different agreements -- we'll just walk through it.</p> <p>13 So the first attachment, Mr. Birrell, is a solar</p> <p>14 lenses purchase agreement, correct?</p> <p>15 A. Correct.</p> <p>16 Q. And after that comes an operation and</p> <p>17 maintenance agreement, right?</p> <p>18 A. Correct.</p> <p>19 Q. And that's on that page KM124, right?</p> <p>20 A. Correct.</p> <p>21 Q. And, last, on page KM141, there is a</p> <p>22 secured promissory note, right?</p> <p>23 A. Correct.</p> <p>24 Q. Mr. Birrell, did you draft those documents</p> <p>25 attached and included in Plaintiff's Exhibit 361?</p>	<p style="text-align: right;">85</p> <p>1 the author, who is the witness, I will permit the</p> <p>2 question to be answered.</p> <p>3 THE WITNESS: So the meaning is a</p> <p>4 generalized document that could be used for various</p> <p>5 purchasers, with blanks to be filled in specific to</p> <p>6 that transaction.</p> <p>7 Q. (BY MS. HEALY GALLAGHER) Okay. So the --</p> <p>8 so correct me if I'm wrong, but what you meant by</p> <p>9 that is that any buyer could fill in a name and</p> <p>10 contact information?</p> <p>11 A. And other applicable information.</p> <p>12 Q. Sure, and other information, but the same</p> <p>13 form agreements could be used for different buyers.</p> <p>14 A. Yes.</p> <p>15 Q. Would you take a look, please, at page</p> <p>16 KM113? In the very first paragraph of the solar</p> <p>17 lenses purchase agreement, the agreement identifies</p> <p>18 the seller as SOLCO I, LLC, a Utah limited liability</p> <p>19 company, with offices at 4035 South 4000 West,</p> <p>20 Suite 150, Deseret, Utah 84624.</p> <p>21 Did I read that correctly?</p> <p>22 A. Yes.</p> <p>23 Q. And there are blanks for the party that</p> <p>24 will be called buyer in this transaction, right?</p> <p>25 A. Correct.</p>

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com

Birrell, Kenneth W.

February 14, 2017

23 (Pages 86 to 89)

<p style="text-align: right;">86</p> <p>1 Q. What did you intend to be filled in in 2 those blanks? Take them in turn, if you would, 3 please. 4 MR. AUSTIN: Objection. Privilege. 5 MR. HILL: The basis of the objection, to 6 the extent the answer to the question refers or 7 relates to any communication with a client or agent, 8 or the substance of such communications, I will 9 instruct the witness not to answer. Otherwise, to 10 the extent the intent of the witness is independent 11 of such communications, the witness is authorized to 12 answer. 13 THE WITNESS: On the advice of counsel, I 14 will not respond. 15 Q. (BY MS. HEALY GALLAGHER) Well, I'll ask 16 you this way. Is the first blank for the name of a 17 buyer? 18 A. Yes. 19 Q. That's followed by "a blank." Was that 20 blank intended to identify the kind of entity the 21 buyer is? 22 A. Yes. 23 Q. And the third blank is for the address of 24 the buyer entity, correct? 25 A. Yes.</p>	<p style="text-align: right;">88</p> <p>1 is SOLCO, is actually filled out. There are no 2 blanks there, correct? 3 A. Correct. 4 Q. So in paragraph 8a was "seller" a typo? 5 A. It would appear so. 6 Q. In fact, the second sentence of paragraph 7 8a reads, "This agreement is the legal, valid and 8 binding obligation of buyer, enforceable in 9 accordance with its terms." 10 Did I read that correctly? 11 A. Yes. 12 Q. And the last sentence is, "The execution, 13 delivery and performance of this agreement by buyer 14 has been duly authorized by all necessary blank 15 action." 16 What is that blank for? 17 A. It would be to describe whether it was 18 corporate action or limited liability company action, 19 or whatever was necessary. 20 Q. So, Mr. Birrell, the solar lenses purchase 21 agreement intended for the buyer to be an entity, 22 correct? 23 MR. AUSTIN: Objection. Calls for -- 24 well, go ahead, I guess. 25 MR. HILL: Could you reread the question</p>
<p style="text-align: right;">87</p> <p>1 Q. Take a look, please, at page KM115. At 2 the bottom of the page, paragraph eight is entitled 3 Representations and Warranties of Buyer. 4 Did I read that correctly? 5 A. Yes. 6 Q. Subparagraph a -- whoops; hmm. Says, 7 Organization and Authority. 8 Did I read that right? 9 A. Yes. 10 Q. Then it says, "Seller is a blank duly 11 organized, validly existing and in good standing 12 under the laws of the state of blank and has all 13 requisite authority and power to enter into this 14 agreement." 15 Did I read that correctly? 16 A. Yes. 17 Q. Mr. Birrell, should "seller" at the start 18 of that sentence actually read "buyer"? 19 A. Probably, yes. 20 Q. Because up above in paragraph seven, 21 paragraph seven is called Representations and 22 Warranties of Seller. 23 A. Correct. 24 Q. And under paragraph a there, Organization 25 and Authority, the information for the seller, which</p>	<p style="text-align: right;">89</p> <p>1 back again? 2 (Record was read as follows: "So, 3 Mr. Birrell, the solar lenses purchase agreement 4 intended for the buyer to be an entity, 5 correct?") 6 THE WITNESS: That is what was 7 anticipated. 8 Q. (BY MS. HEALY GALLAGHER) And, in fact, 9 that's what's written in the agreement, correct? 10 A. Correct. 11 Q. Then looking at page KM124, the Operation 12 and Maintenance Agreement, the operator for the 13 Operation and Maintenance agreement is written there 14 as LTB, LLC." 15 Do you see that? 16 A. Yes. 17 Q. Do you have an understanding of what LTB, 18 LLC, does or is? 19 MR. AUSTIN: Objection. Privilege. 20 MR. HILL: On the basis of the objection, 21 to the extent that you can answer the question 22 without regard to any communication with a client or 23 agent of the client, you are authorized to answer. 24 Otherwise, I would instruct the witness not to answer 25 the question.</p>

Birrell, Kenneth W.

February 14, 2017

24 (Pages 90 to 93)

<p style="text-align: right;">90</p> <p>1 THE WITNESS: On the advice of counsel, I</p> <p>2 will not respond.</p> <p>3 Q. (BY MS. HEALY GALLAGHER) The counter</p> <p>4 party to the Operation and Maintenance Agreement is</p> <p>5 called the owner; is that right?</p> <p>6 A. Correct.</p> <p>7 Q. And, Mr. Birrell, did you intend for the</p> <p>8 owner also to be an entity?</p> <p>9 MR. AUSTIN: Objection. Foundation. And</p> <p>10 privilege.</p> <p>11 MR. HILL: To the extent -- on the basis</p> <p>12 of the objection, to the extent the answer to the</p> <p>13 question can be made without reference to any</p> <p>14 communication with a client or agent of the client,</p> <p>15 the witness is permitted to answer. Otherwise, I</p> <p>16 would instruct the witness not to answer.</p> <p>17 THE WITNESS: It was expected to be an</p> <p>18 entity.</p> <p>19 Q. (BY MS. HEALY GALLAGHER) And, in fact,</p> <p>20 you wrote this Operation and Maintenance Agreement</p> <p>21 expressly for an owner to be an entity.</p> <p>22 MR. AUSTIN: Objection. Form.</p> <p>23 THE WITNESS: Correct.</p> <p>24 Q. (BY MS. HEALY GALLAGHER) Let's take a</p> <p>25 look, please, at KM141, the secured promissory note.</p>	<p style="text-align: right;">92</p> <p>1 MS. HEALY GALLAGHER: We'll go back on the</p> <p>2 record.</p> <p>3 Q. Mr. Birrell, we're back on the record</p> <p>4 after a lunch break. Did you talk to anyone about</p> <p>5 the content of your testimony other than any</p> <p>6 discussions with your counsel about any attorney-</p> <p>7 client privilege issues?</p> <p>8 A. I did not.</p> <p>9 Q. And to the extent that you answered</p> <p>10 questions this morning, did you remember anything</p> <p>11 additional or supplemental or different than the</p> <p>12 answers that you gave this morning that you'd like to</p> <p>13 address now?</p> <p>14 A. No.</p> <p>15 Q. All right. We're going to try Judge</p> <p>16 Wells' chambers.</p> <p>17 MICHELLE: This is Michelle.</p> <p>18 MS. HEALY GALLAGHER: Hi, Michelle. This</p> <p>19 is Erin Healy Gallagher calling from the U.S.</p> <p>20 Department of Justice, the tax division. How are</p> <p>21 you?</p> <p>22 MICHELLE: I'm fine, thank you. How are</p> <p>23 you?</p> <p>24 MS. HEALY GALLAGHER: I'm well.</p> <p>25 We're actually on the record in the course</p>
<p style="text-align: right;">91</p> <p>1 In the secured promissory note, Mr. Birrell, the word</p> <p>2 "borrower" is a defined term, correct?</p> <p>3 A. Correct.</p> <p>4 Q. And you anticipated that the borrower on</p> <p>5 the secured promissory note would be an entity,</p> <p>6 correct?</p> <p>7 A. Correct.</p> <p>8 Q. Mr. Birrell, what, if anything, happened</p> <p>9 next with respect to these generalized documents --</p> <p>10 MR. AUSTIN: Object.</p> <p>11 Q. (BY MS. HEALY GALLAGHER) -- after you</p> <p>12 sent them to Mr. Clements?</p> <p>13 MR. AUSTIN: Objection privilege.</p> <p>14 MR. HILL: On the basis of the objection,</p> <p>15 to the extent your answer would disclose the</p> <p>16 communication with a client or agent, or the</p> <p>17 substance of a communication, I instruct you not to</p> <p>18 answer. However, otherwise, you are permitted to</p> <p>19 proceed with the answer.</p> <p>20 THE WITNESS: On the advice of counsel, I</p> <p>21 will not respond.</p> <p>22 MS. HEALY-GALLAGHER: Go off the record,</p> <p>23 please.</p> <p>24 (A break was taken from 12:09 p.m. to</p> <p>25 1:08 p.m.)</p>	<p style="text-align: right;">93</p> <p>1 of a deposition in the United States versus RaPower3,</p> <p>2 et al., case, and I have that case number for you if</p> <p>3 you like.</p> <p>4 MICHELLE: Okay, please.</p> <p>5 MS. HEALY GALLAGHER: 15-cv-828.</p> <p>6 MICHELLE: Okay.</p> <p>7 MS. HEALY GALLAGHER: And it's Judge</p> <p>8 Nuffer's case, also assigned to Judge Wells.</p> <p>9 MICHELLE: Okay.</p> <p>10 MS. HEALY GALLAGHER: And we were -- I was</p> <p>11 wondering -- we saw that the judge, of course, had</p> <p>12 issued the short form discovery practice order, and</p> <p>13 in that short form --</p> <p>14 MICHELLE: Okay. Let me transfer you. I</p> <p>15 was just wondering if you were going to ask to speak</p> <p>16 to the judge, because she's out of town, but let me</p> <p>17 have you speak to the law clerk that's handling that</p> <p>18 case. Let me see if he's in. Hold on just a minute.</p> <p>19 MS. HEALY GALLAGHER: Well, actually, if</p> <p>20 the judge is out of town, we can probably move</p> <p>21 forward here on our own.</p> <p>22 I'm already being transferred. Okay.</p> <p>23 Sorry.</p> <p>24 VOICE MESSAGE: Sorry, Matthew Williams is</p> <p>25 not available. Record your message at the tone.</p>

Birrell, Kenneth W.

February 14, 2017

25 (Pages 94 to 97)

<p style="text-align: right;">94</p> <p>1 When you are finished, hang up or press pound for 2 more options.</p> <p>3 MS. HEALY GALLAGHER: Hello, Matthew. 4 This is Erin Healy Gallagher calling from the U.S. 5 Department of Justice, Tax Division, with respect to 6 case United States versus RaPower3, Case Number 7 15-cv-828. We're actually on the record in a 8 deposition. We had a question for the judge pursuant 9 to the short form discovery practice order, but we 10 understand that the judge is out of town, so I think 11 we probably wouldn't be able to get an answer anyway so 12 all is well.</p> <p>13 If you have any questions, you can feel 14 free to contact Chris Moran at (202) 305-5172. 15 Thanks so much.</p> <p>16 You want to call Erin back? 17 Off the record. 18 (Discussion off the record.)</p> <p>19 MS. HEALY GALLAGHER: Back on the record, 20 please. 21 (EXHIBIT 362 WAS MARKED.)</p> <p>22 Q. Mr. Birrell, I'm handing you what's been 23 marked as Plaintiff's Exhibit 362. Take a look at 24 that, please. 25 For the record, Plaintiff's Exhibit 362 is</p>	<p style="text-align: right;">96</p> <p>1 A. Yes.</p> <p>2 Q. All right, Mr. Birrell. The text of your 3 e-mail to Mr. Clement says, "Please see the attached 4 memo which contains a generalized analysis of the tax 5 consequences relating to purchasing the solar lenses. 6 Please note that this analysis is limited to 7 C corporations. There would be different issues for 8 an individual, partnership or S corporation 9 purchaser."</p> <p>10 Did I read that correctly?</p> <p>11 A. Yes.</p> <p>12 Q. What did you mean by "generalized 13 analysis" in the first sentence?</p> <p>14 A. The analysis didn't apply to any specific 15 purchaser, but it was based upon the generic facts 16 described in the memo.</p> <p>17 Q. And in the second sentence, noting that 18 the analysis is limited to C corporations, why was 19 that important to you to state at the outset?</p> <p>20 A. As mentioned earlier, there are different 21 issues that would need to be addressed if you had 22 somebody other than a C corporation as the purchaser.</p> <p>23 Q. So if a purchaser was someone other than 24 an entity taxed as a C corporation, your analysis 25 might change?</p>
<p style="text-align: right;">95</p> <p>1 Bates-marked KM148 through 163.</p> <p>2 A. Yes.</p> <p>3 Q. Mr. Birrell, this is an e-mail from you to 4 Mr. Clement, correct?</p> <p>5 A. Correct.</p> <p>6 Q. You sent this on Wednesday, October 31, 7 2012?</p> <p>8 A. Correct.</p> <p>9 Q. The subject is "Re: Generalized 10 documents." 11 Do you see that?</p> <p>12 A. Yes.</p> <p>13 Q. And the attachment is "Tax issues relating 14 to purchase of solar lenses memo.pdf." 15 Do you see that?</p> <p>16 A. Yes.</p> <p>17 Q. And if you'd take a look, please, at pages 18 KM150 through 163. 19 Off the record, please. 20 (Discussion off the record.)</p> <p>21 Q. Back on the record, please. 22 Mr. Birrell, we're looking at pages KM150 23 through 163. Do those pages appear to be the memo 24 that is identified in the attachments field in your 25 e-mail?</p>	<p style="text-align: right;">97</p> <p>1 A. Yes.</p> <p>2 Q. Let's take a look at the memorandum 3 itself. It starts on page KM150. The memorandum is 4 addressed to SOLCO I, LLC, attention Neldon Johnson, 5 correct?</p> <p>6 A. Correct?</p> <p>7 Q. Why is this memorandum addressed to SOLCO 8 rather than XSun Energy or IAS, for example?</p> <p>9 MR. AUSTIN: Objection. Privilege.</p> <p>10 MR. HILL: On the basis of the objection, 11 to the extent the witness can answer the question 12 without reference to a communication with a client or 13 an agent, he is permitted to answer. Otherwise, I 14 would instruct him not to answer the question.</p> <p>15 THE WITNESS: On the advice of counsel, I 16 will not respond.</p> <p>17 Q. (BY MS. HEALY GALLAGHER) Will you take a 18 look, please, sir, at the first sentence of the 19 executive summary on this page? It says, "The solar 20 lenses that buyers purchased from seller (the 'solar 21 lenses') will qualify as 'energy property' that is 22 eligible for the energy tax credit under Code 23 Section 48." 24 Did I read that correctly? 25 A. Yes.</p>

Birrell, Kenneth W.

February 14, 2017

26 (Pages 98 to 101)

<p style="text-align: right;">98</p> <p>1 Q. Where did you get the information that the</p> <p>2 solar lenses would qualify as energy property under</p> <p>3 Section 48?</p> <p>4 MR. AUSTIN: Objection. Privilege.</p> <p>5 MR. HILL: To the extent the answer can be</p> <p>6 given without reference to a communication with the</p> <p>7 client or an agent, the witness is allowed to answer.</p> <p>8 Otherwise, to the extent it does implicate such</p> <p>9 communication, I would instruct the witness not to</p> <p>10 answer on the basis of the objection.</p> <p>11 THE WITNESS: On the advice of counsel, I</p> <p>12 will not respond.</p> <p>13 Q. (BY MS. HEALY GALLAGHER) Take a look,</p> <p>14 please, at the first sentence of the last paragraph</p> <p>15 on this page. It says, "The solar lenses will be</p> <p>16 eligible for depreciation under Code Section 168(a)</p> <p>17 as five-year property."</p> <p>18 Did I read that correctly?</p> <p>19 A. Yes.</p> <p>20 Q. Where did you get the information that the</p> <p>21 lenses would be eligible for depreciation?</p> <p>22 MR. AUSTIN: Objection. Privilege.</p> <p>23 MR. HILL: On the basis of the objection</p> <p>24 raised, I will instruct the witness not to answer</p> <p>25 unless he can do so without any reference to any</p>	<p style="text-align: right;">100</p> <p>1 Q. (BY MS. HEALY GALLAGHER) On this page,</p> <p>2 Mr. Birrell, do you see references to Exhibit A,</p> <p>3 Purchase Agreement; Exhibit B, promissory note, and</p> <p>4 Exhibit C, the Operation and Maintenance Agreement?</p> <p>5 A. Yes.</p> <p>6 Q. Are those exhibits the documents that you</p> <p>7 drafted?</p> <p>8 A. They are the documents in the previous</p> <p>9 exhibits, yes.</p> <p>10 Q. So that would be referring to the</p> <p>11 documents attached to your e-mail in Plaintiff's</p> <p>12 Exhibit 361?</p> <p>13 A. Yes.</p> <p>14 Q. Other than your comments, Mr. Birrell,</p> <p>15 about the exhibits in this factual background, where</p> <p>16 did you get the information that supports the factual</p> <p>17 background laid out in your letter?</p> <p>18 MR. AUSTIN: Objection. Privilege.</p> <p>19 MR. HILL: On the basis of the objection,</p> <p>20 to the extent the witness can answer the question</p> <p>21 without reference to a communication with the client</p> <p>22 or an agent of the client, he may proceed with an</p> <p>23 answer. Otherwise, I instruct him not to answer the</p> <p>24 question.</p> <p>25 THE WITNESS: On the advice of counsel, I</p>
<p style="text-align: right;">99</p> <p>1 communication with counsel -- with client or an agent</p> <p>2 of client.</p> <p>3 THE WITNESS: On advice of counsel, I will</p> <p>4 not respond.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) Please turn to</p> <p>6 the next page. The first sentence of Factual</p> <p>7 Background. It says, "The solar lenses will be</p> <p>8 purchased by buyers that are (i) corporations or</p> <p>9 limited liability companies organized in the United</p> <p>10 States, (ii) neither tax-exempt nor governmental</p> <p>11 entities and (iii) taxed as subchapter C corporations</p> <p>12 for federal income tax purposes."</p> <p>13 Did I read that correctly?</p> <p>14 A. Yes.</p> <p>15 Q. Where did you get the information about</p> <p>16 the characteristics of the prospective buyer of solar</p> <p>17 lenses?</p> <p>18 MR. AUSTIN: Objection. Privilege.</p> <p>19 MR. HILL: On the basis of the objection,</p> <p>20 to the extent the witness can answer the question</p> <p>21 without reference to a communication with a client or</p> <p>22 agent of the client, he is permitted to answer.</p> <p>23 Otherwise, I instruct the witness not to answer.</p> <p>24 THE WITNESS: On the advice of counsel, I</p> <p>25 will not respond.</p>	<p style="text-align: right;">101</p> <p>1 will not respond.</p> <p>2 Q. (BY MS. HEALY GALLAGHER) So, Mr. Birrell,</p> <p>3 to the extent that there is a fact stated or an</p> <p>4 assumption made in this memo, did you get that fact</p> <p>5 or instruction about assumptions from your clients in</p> <p>6 this matter?</p> <p>7 MR. AUSTIN: Objection. Privilege.</p> <p>8 MR. HILL: On the basis of the objection</p> <p>9 that has been asserted, I will instruct the witness</p> <p>10 not to answer the question.</p> <p>11 THE WITNESS: On the advice of counsel, I</p> <p>12 will not respond.</p> <p>13 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>14 what, if any, follow-up was there from your client</p> <p>15 after you sent this memo to Mr. Clement?</p> <p>16 MR. AUSTIN: Objection. Privilege.</p> <p>17 MR. HILL: On the basis of the objection,</p> <p>18 I will instruct the witness not to answer the</p> <p>19 question.</p> <p>20 THE WITNESS: On the advice of counsel, I</p> <p>21 will not respond.</p> <p>22 (EXHIBIT 363 WAS MARKED.)</p> <p>23 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, I'm</p> <p>24 handing you what's been marked as Plaintiff's</p> <p>25 Exhibit 363. Please take a look at that, and let me</p>

Birrell, Kenneth W.

February 14, 2017

27 (Pages 102 to 105)

<p style="text-align: right;">102</p> <p>1 know when you're done.</p> <p>2 For the record, Plaintiff's Exhibit 363 is</p> <p>3 marked with Bates numbers KM00164 through 208.</p> <p>4 A. It is an e-mail from me to Mr. Clements</p> <p>5 with various attachments.</p> <p>6 Q. Mr. Birrell, you sent this e-mail on</p> <p>7 Friday, November 9, 2012, correct?</p> <p>8 A. Correct.</p> <p>9 Q. And the subject is "revised documents"?</p> <p>10 A. Correct.</p> <p>11 Q. And there is a list of documents</p> <p>12 identified as attachments to this e-mail. Do you see</p> <p>13 those documents included in Plaintiff's Exhibit 363?</p> <p>14 A. Yes.</p> <p>15 Q. Those attachments are a solar lens -- I'm</p> <p>16 sorry -- solar lenses purchase agreement at KM165,</p> <p>17 right?</p> <p>18 A. Correct.</p> <p>19 Q. And an operation and maintenance agreement</p> <p>20 at KM176?</p> <p>21 A. Correct.</p> <p>22 Q. A secured promissory note at KM193?</p> <p>23 A. Correct.</p> <p>24 Q. And a memorandum from you to SOLCO I,</p> <p>25 attention Neldon Johnson, dated November -- I'm</p>	<p style="text-align: right;">104</p> <p>1 speak for themselves. And privileged.</p> <p>2 MR. HILL: If the witness can answer that</p> <p>3 question without reference to a communication from</p> <p>4 counsel, he will be permitted to answer. Otherwise,</p> <p>5 on the basis of the objection, I will instruct the</p> <p>6 witness not to answer the question.</p> <p>7 THE WITNESS: On the advice of counsel, I</p> <p>8 will not respond.</p> <p>9 Q. (BY MS. HEALY GALLAGHER) What were your</p> <p>10 revisions to the purchase agreement?</p> <p>11 MR. AUSTIN: Objection. Privilege.</p> <p>12 MR. HILL: On the basis of the objection,</p> <p>13 I'll instruct the witness not to answer the question</p> <p>14 unless he can do so without reference to a</p> <p>15 communication with the client.</p> <p>16 THE WITNESS: On the advice of counsel, I</p> <p>17 will not respond.</p> <p>18 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell,</p> <p>19 what, if any, communications did you have with your</p> <p>20 client between October 31, 2012, and November 9,</p> <p>21 2012, that -- well, I'll just leave it at that.</p> <p>22 MR. AUSTIN: Objection. Privilege.</p> <p>23 MR. HILL: On the basis of the objection,</p> <p>24 until the privilege dispute is resolved, I will</p> <p>25 instruct the witness not to answer the question.</p>
<p style="text-align: right;">103</p> <p>1 sorry -- dated October 31, 2012, regarding tax issues</p> <p>2 relating to purchase of solar lenses at KM196; is</p> <p>3 that right?</p> <p>4 A. Correct.</p> <p>5 Q. Mr. Birrell, do you recall why you sent</p> <p>6 revised documents to Mr. Clements?</p> <p>7 MR. AUSTIN: Objection. Privilege.</p> <p>8 MR. HILL: On the basis of the objection,</p> <p>9 to the extent the witness can answer the question</p> <p>10 without reference to any communication with the</p> <p>11 client or an agent of the client, I will allow the</p> <p>12 client to answer the question. Otherwise, I would</p> <p>13 instruct the witness not to answer.</p> <p>14 THE WITNESS: On the advice of counsel, I</p> <p>15 will not respond.</p> <p>16 Q. (BY MS. HEALY GALLAGHER) Who asked you to</p> <p>17 revise the memorandum and purchase agreement?</p> <p>18 MR. AUSTIN: Objection. Privilege.</p> <p>19 MR. HILL: On the basis of the objection I</p> <p>20 will instruct the witness not to answer the question.</p> <p>21 THE WITNESS: On the advice of counsel,</p> <p>22 will not respond.</p> <p>23 Q. (BY MS. HEALY GALLAGHER) What were your</p> <p>24 revisions to the memorandum?</p> <p>25 MR. AUSTIN: Objection. The documents</p>	<p style="text-align: right;">105</p> <p>1 THE WITNESS: On the advice of counsel, I</p> <p>2 will not respond.</p> <p>3 Q. (BY MS. HEALY GALLAGHER) What, if any,</p> <p>4 conversations or communication did you have with your</p> <p>5 client after you sent these revised documents?</p> <p>6 MR. AUSTIN: Objection. Privilege.</p> <p>7 MR. HILL: On the basis of the objection,</p> <p>8 until the privilege dispute is resolved, I will</p> <p>9 instruct the witness not to answer the question.</p> <p>10 THE WITNESS: On the advice of counsel, I</p> <p>11 will not respond.</p> <p>12 Q. (BY MS. HEALY GALLAGHER) With respect to</p> <p>13 the memorandum and the form agreement documents, did</p> <p>14 you do any subsequent work on these documents after</p> <p>15 you sent these revisions?</p> <p>16 MR. AUSTIN: Objection. Privilege.</p> <p>17 THE WITNESS: On the basis of the</p> <p>18 objection, to the extent the witness can answer that</p> <p>19 question in a way that does not implicate a</p> <p>20 communication with a client or an agent, the client</p> <p>21 is allowed to answer the question. Otherwise, if it</p> <p>22 implicates such communication, I instruct the witness</p> <p>23 not to answer.</p> <p>24 THE WITNESS: On the advice of counsel, I</p> <p>25 will not respond.</p>

Birrell, Kenneth W.

February 14, 2017

28 (Pages 106 to 109)

<p style="text-align: right;">106</p> <p>1 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, do</p> <p>2 you know whether these documents in Exhibit 363 are</p> <p>3 the final versions that you sent to your client?</p> <p>4 MR. AUSTIN: Objection. Privilege.</p> <p>5 Particularly now that you're asking about documents</p> <p>6 that have not been disclosed.</p> <p>7 MR. HILL: The documents --</p> <p>8 MR. AUSTIN: Well, if there is another</p> <p>9 version, then -- and you don't have it, then that's a</p> <p>10 document that has not been produced. Now you're just</p> <p>11 asking if there's a confidential document he's</p> <p>12 willing to tell you about.</p> <p>13 MR. HILL: On the basis of the objection,</p> <p>14 until the privilege dispute can be resolved, I'll</p> <p>15 instruct the witness not to answer the question.</p> <p>16 THE WITNESS: On the advice of counsel, I</p> <p>17 will not respond.</p> <p>18 (EXHIBIT 364 WAS MARKED.)</p> <p>19 Q. (BY MS. HEALY GALLAGHER) I'm handing you,</p> <p>20 sir, what's been marked Plaintiff's Exhibit 364.</p> <p>21 Please take a look at that.</p> <p>22 For the record, Plaintiff's 364 is Bates-</p> <p>23 marked KM0014 through 25.</p> <p>24 A. Yes.</p> <p>25 Q. What is Plaintiff's Exhibit 364?</p>	<p style="text-align: right;">108</p> <p>1 Q. So, for example, on the date 9-25-12, the</p> <p>2 initials KWB appear after that date. Are those your</p> <p>3 initials?</p> <p>4 A. They are.</p> <p>5 Q. Then there is a description that says,</p> <p>6 "Conference with N. Johnson and J. Clement re:</p> <p>7 revisions to documents for standard transactions."</p> <p>8 Did I read that correctly?</p> <p>9 A. Yes.</p> <p>10 Q. And hours for that entry are .7. Is that</p> <p>11 right?</p> <p>12 A. Yes.</p> <p>13 Q. Does that mean .7 of an hour?</p> <p>14 A. Yes.</p> <p>15 Q. And the date on this invoice is October 8,</p> <p>16 2012. Do you see that?</p> <p>17 A. Yeah. Yes.</p> <p>18 Q. So it appears to me, Mr. Birrell, that you</p> <p>19 would have input this information for your firm's</p> <p>20 recordkeeping purposes between September 25th, 2012,</p> <p>21 and October 8, 2012. Do I understand that correctly?</p> <p>22 MR. AUSTIN: Objection. Does he</p> <p>23 understand your understanding correctly?</p> <p>24 MR. HILL: You can answer.</p> <p>25 THE WITNESS: Yes, I expect that the</p>
<p style="text-align: right;">107</p> <p>1 A. It's various invoices from our firm to</p> <p>2 Mr. Johnson of XSun Energy.</p> <p>3 Q. Mr. Birrell, to the best of your</p> <p>4 knowledge, was the information on these invoices</p> <p>5 provided to your firm at or near the time -- at or</p> <p>6 near the dates that appear on these invoices?</p> <p>7 MR. AUSTIN: Objection. Foundation.</p> <p>8 Privilege.</p> <p>9 MR. HILL: Can you restate the -- repeat</p> <p>10 the question, please.</p> <p>11 (Record was read as follows:</p> <p>12 "Mr. Birrell, to the best of your knowledge, was</p> <p>13 the information on these invoices provided to</p> <p>14 your firm at or near the time -- at or near the</p> <p>15 dates that appear on these invoices?")</p> <p>16 MR. HILL: I'm not sure I understand the</p> <p>17 question. I'm sorry, I'm not trying to be difficult.</p> <p>18 MS. HEALY GALLAGHER: Sure. No, I can ask</p> <p>19 it a different way.</p> <p>20 Q. Let's take a look at the first couple of</p> <p>21 pages, Mr. Birrell. If you take a look at page KM15,</p> <p>22 1-5, this appears to be part of an invoice with</p> <p>23 specific line items on it.</p> <p>24 Do you see that?</p> <p>25 A. Yes.</p>	<p style="text-align: right;">109</p> <p>1 information was entered between 9-25 and 10-8.</p> <p>2 Q. (BY MS. HEALY GALLAGHER) So for the other</p> <p>3 line item entries in this collection of invoices --</p> <p>4 and please feel free to take a look and satisfy</p> <p>5 yourself of this. Do you have any reason to believe</p> <p>6 that your entries of this information were not made</p> <p>7 at or near the time of the invoices?</p> <p>8 A. No.</p> <p>9 Q. So let's take a look back at that page,</p> <p>10 KM15, please. I read the description for the first</p> <p>11 line item a moment ago.</p> <p>12 A. (Witness nods head.)</p> <p>13 Q. The description says, "Conference with N.</p> <p>14 Johnson and J. Clement. Does that have any impact on</p> <p>15 your recollection of whether you spoke to Mr. Johnson</p> <p>16 at the beginning of the engagement or only at the</p> <p>17 end?</p> <p>18 A. I do not recollect talking with</p> <p>19 Mr. Johnson, but he must have been on the phone that</p> <p>20 time.</p> <p>21 Q. And you think that because his name is</p> <p>22 also in the description with Mr. Clement?</p> <p>23 A. Yes. I don't know why I would have put</p> <p>24 that there if he hadn't been on the call.</p> <p>25 Q. That same line item also mentions</p>

Birrell, Kenneth W.

February 14, 2017

29 (Pages 110 to 113)

<p style="text-align: right;">110</p> <p>1 revisions to documents for standard transactions, 2 correct?</p> <p>3 A. Correct.</p> <p>4 Q. So do I take that to mean that you 5 received documents from your client that you then 6 revised to provide back to them?</p> <p>7 MR. AUSTIN: Objection. Privilege.</p> <p>8 MR. HILL: To the extent that -- on the 9 basis of the objection, to the extent you can answer 10 that question independent of communication with the 11 client or its agent, you may proceed with an answer. 12 Otherwise, I instruct you not to answer the question.</p> <p>13 THE WITNESS: On the advice of counsel, I 14 will not respond.</p> <p>15 Q. (BY MS. HEALY GALLAGHER) Why were 16 Mr. Johnson and Mr. Clement seeking revisions to 17 their documents for standard transactions?</p> <p>18 MR. AUSTIN: Objection. Privilege.</p> <p>19 MR. HILL: On the basis of the objection, 20 until the privilege dispute is resolved, I will 21 instruct the witness not to answer the question.</p> <p>22 THE WITNESS: On the advice of counsel, I 23 will not respond.</p> <p>24 Q. (BY MS. HEALY GALLAGHER) What, if any, 25 facts did Mr. Johnson and/or Mr. Clement give you in</p>	<p style="text-align: right;">112</p> <p>1 A. Correct.</p> <p>2 Q. Your initials are next to the date, 3 correct?</p> <p>4 A. Correct.</p> <p>5 Q. And the description reads, "Review 6 questions and comments from J. Clement on 7 standardized transaction documents and reasoned 8 analysis relating to same."</p> <p>9 Did I read that correctly?</p> <p>10 A. Yes.</p> <p>11 Q. What were Mr. Clement's questions and 12 comments?</p> <p>13 MR. AUSTIN: Objection. Privilege.</p> <p>14 MR. HILL: On the basis of the objection, 15 I will instruct the witness not to answer the 16 question.</p> <p>17 THE WITNESS: On the advice of counsel, I 18 will not respond.</p> <p>19 Q. (BY MS. HEALY GALLAGHER) At any time 20 during this conversation did Mr. Clement tell you 21 that any comment or question came from someone other 22 than him?</p> <p>23 MR. AUSTIN: Objection. Privilege.</p> <p>24 MR. HILL: On the basis of the objection, 25 until the privilege dispute is resolved, I will</p>
<p style="text-align: right;">111</p> <p>1 that conversation about the transaction they asked 2 you to evaluate?</p> <p>3 MR. AUSTIN: Objection. Privilege.</p> <p>4 MR. HILL: On the basis of the objection, 5 until the dispute -- privilege dispute is resolved, I 6 am instructing the witness not to answer the 7 question.</p> <p>8 THE WITNESS: On the advice of counsel, I 9 will not respond.</p> <p>10 Q. (BY MS. HEALY GALLAGHER) What, if 11 anything, else did you talk about with Mr. Johnson 12 and Mr. Clement on September 25th, 2012?</p> <p>13 MR. AUSTIN: Objection. Privilege.</p> <p>14 MR. HILL: On the basis of that objection, 15 I will instruct the witness not to answer the 16 question.</p> <p>17 THE WITNESS: On the advice of counsel, I 18 will not respond.</p> <p>19 Q. (BY MS. HEALY GALLAGHER) Take a look, 20 please, at page KM21. The first line item on this 21 invoice is dated November 8th, 2012, correct?</p> <p>22 A. Correct.</p> <p>23 Q. And that's after you had sent the first 24 version of both your memorandum and the contract 25 documents, correct?</p>	<p style="text-align: right;">113</p> <p>1 instruct the witness not to answer.</p> <p>2 THE WITNESS: On the advice of counsel, I 3 will not respond.</p> <p>4 Q. (BY MS. HEALY GALLAGHER) What, if 5 anything, else did you talk about with Mr. Clement on 6 November 8th, 2012?</p> <p>7 MR. AUSTIN: Objection. Privilege.</p> <p>8 MR. HILL: On the basis of the objection, 9 until the privilege dispute is resolved, I will 10 instruct the witness not to answer that question.</p> <p>11 THE WITNESS: On the advice of counsel, I 12 will not respond.</p> <p>13 Q. (BY MS. HEALY GALLAGHER) What, if any, 14 information from Mr. Clement did you rely on in 15 drafting your revisions to the memo and any other 16 document here?</p> <p>17 MR. AUSTIN: Objection. Privilege.</p> <p>18 MR. HILL: On the basis of the objection, 19 I will instruct the witness not to answer the 20 question.</p> <p>21 THE WITNESS: On the advice of counsel, I 22 will not respond.</p> <p>23 Q. (BY MS. HEALY GALLAGHER) Let's take a 24 look back, please, at KM18. Just take a look, if you 25 would, for a moment at the descriptions on this</p>

Birrell, Kenneth W.

February 14, 2017

30 (Pages 114 to 117)

<p style="text-align: right;">114</p> <p>1 invoice. A number of them, if not all of them, 2 identify e-mail correspondence with J. Clement 3 regarding the generalized transaction documents and 4 reasoned analysis. 5 Do you see that? 6 A. Yes. 7 Q. What, if any, information from Mr. Clement 8 on these days in 2012 did you rely upon in drafting 9 any of these documents? 10 MR. AUSTIN: Objection. Privilege. 11 MR. HILL: On the basis of the objection, 12 I will instruct the witness not to answer the 13 question. 14 THE WITNESS: On the advice of counsel, I 15 will not respond. 16 Q. (BY MS. HEALY GALLAGHER) What, if 17 anything, did you do with the information from 18 Mr. Clement in the correspondence identified on KM18? 19 MR. AUSTIN: Objection. Privilege. And 20 I'll also say at this point that I just want the 21 record to reflect that you've elected to continue 22 keeping everybody here taking the deposition, asking 23 questions that you know are going to be objected to 24 on the basis of privilege, and I just want the record 25 to reflect that we are going to oppose additional</p>	<p style="text-align: right;">116</p> <p>1 including, not limited to, waiver of the privilege or 2 violation of the privilege as it relates to the 3 method, manner or means of creation of any documents, 4 any communications with the client regarding the 5 content or nature of those documents, categorically, 6 and including categorically any communications of any 7 kind regarding the transactions and legal advice that 8 are at issue in this case. 9 Having said that, I don't think my -- my 10 objections are necessary. I think that should 11 suffice to put counsel on notice as to the stance of 12 my client, but I'm certainly happy to clarify, if 13 need be. 14 MR. HILL: On the basis of -- now -- thank 15 you. Can you repeat back the question? 16 (Record was read as follows: "And what, 17 if any, information from Mr. Clement, as noted 18 here, did you rely upon in revising the 19 documents that you drafted for this client?") 20 MR. HILL: On the basis of the objection 21 and the privilege asserted by the client, I will 22 instruct the witness not to answer the question until 23 the privilege dispute can be resolved. 24 THE WITNESS: On the advice of counsel, I 25 will not respond.</p>
<p style="text-align: right;">115</p> <p>1 deposition of this witness. So go ahead. 2 MR. HILL: On the basis of the objection, 3 I will instruct the witness not to answer the 4 question until the privilege dispute will be 5 resolved. 6 THE WITNESS: On the advice of counsel, I 7 will not respond. 8 Q. (BY MS. HEALY GALLAGHER) Going back to 9 KM21. What, if anything, did you do with the 10 information from Mr. Clement in the correspondence 11 you've identified in the descriptions here? 12 MR. AUSTIN: Objection. Privilege. 13 MR. HILL: On the basis of the objection, 14 I will instruct the witness not to answer the 15 question. 16 THE WITNESS: On the advice of counsel, I 17 will not respond. 18 Q. (BY MS. HEALY GALLAGHER) And what, if 19 any, information from Mr. Clement, as noted here, did 20 you rely upon in revising the documents that you 21 drafted for this client? 22 MR. AUSTIN: For the record, I'm just 23 going to make a blanket objection and make it known 24 to counsel for the witness that my client objects to 25 the waiver of the privilege in any respect,</p>	<p style="text-align: right;">117</p> <p>1 Q. (BY MS. HEALY GALLAGHER) Take a look, 2 please, at KM24. The one line item on this invoice 3 is dated December 27, 2012. Do you see that? 4 A. Yes. 5 Q. This description here mentions a telephone 6 conference with a potential purchaser. Mr. Birrell, 7 to your knowledge, was this the conversation you 8 addressed -- you mentioned earlier in your 9 deposition? 10 A. Yes. 11 (EXHIBIT 365 WAS MARKED.) 12 Q. I'm handing you, Mr. Birrell, what's been 13 marked as Plaintiff's Exhibit 365. Please take a 14 look at that document. 15 Plaintiff's Exhibit 365 is Bates number 16 KM00211. 17 A. Yes. 18 Q. Mr. Birrell, this is an e-mail from, it 19 appears, Jason Clement; is that right? 20 A. Yes. 21 Q. To you? 22 A. Correct. 23 Q. Dated Wednesday, January 9, 2013. Do you 24 see that? 25 A. Yes.</p>

Birrell, Kenneth W.

February 14, 2017

31 (Pages 118 to 121)

<p style="text-align: right;">118</p> <p>1 Q. And if you look about a quarter of the way 2 down the page, it looks like Mr. Clement's e-mail is 3 in response to an e-mail from you. Do you see that?</p> <p>4 A. I do.</p> <p>5 Q. Okay. And your e-mail is regarding a 6 request for documents, right?</p> <p>7 A. Correct.</p> <p>8 Q. Okay. Do you recall, sir, you know, what 9 the context was for your e-mail to Mr. Clement in 10 January 2013?</p> <p>11 A. I do not.</p> <p>12 MR. HILL: On the basis of the prior -- 13 the answer having been what it is, it does not 14 disclose a privileged communication, so I'll withdraw 15 my objection.</p> <p>16 Q. (BY MS. HEALY GALLAGHER) Then -- so take 17 a minute, if you would, please, sir, and read your 18 e-mail.</p> <p>19 A. Yes.</p> <p>20 Q. Reading your e-mail, does that refresh 21 your recollection of what the context was in 22 January 2013?</p> <p>23 MR. AUSTIN: Objection. Privilege.</p> <p>24 MR. HILL: On the basis of the objection, 25 and to the extent that any answer would involve the</p>	<p style="text-align: right;">120</p> <p>1 correspondence did you have with Neldon Johnson on 2 the issues in this e-mail?</p> <p>3 MR. AUSTIN: Objection. Privilege.</p> <p>4 MR. HILL: On the basis of the objection, 5 I will instruct the witness not to answer.</p> <p>6 THE WITNESS: On the advice of counsel, I 7 will not respond.</p> <p>8 Q. (BY MS. HEALY GALLAGHER) Did you, in 9 fact, ever provide documents to Sam Alba at Snow 10 Christensen?</p> <p>11 MR. AUSTIN: Objection. Privilege.</p> <p>12 MR. HILL: On the basis of the objection, 13 if you can answer that question without regard to a 14 communication with the client or agent of the client, 15 you may answer. Otherwise, I would instruct you not 16 to answer.</p> <p>17 THE WITNESS: I do not recall ever sending 18 any documents to Sam Alba. 19 (EXHIBIT 366 WAS MARKED.)</p> <p>20 Q. I'm handing you, sir, what's been marked 21 as Exhibit 366. Take a look at that, please.</p> <p>22 For the record, Plaintiff's Exhibit 366 is 23 Bates numbered KM00212.</p> <p>24 A. Yes.</p> <p>25 Q. Do you recognize Plaintiff's Exhibit 366?</p>
<p style="text-align: right;">119</p> <p>1 identification -- or reference to any communication 2 with the client or an agent, I will instruct the 3 witness not to answer the question unless such answer 4 can be given without reference to any such 5 communications.</p> <p>6 THE WITNESS: It does not. I don't have 7 any recollection of this.</p> <p>8 Q. (BY MS. HEALY GALLAGHER) Turning to 9 Mr. Clement's response to you, he says, "Neldon said 10 he would get in touch with you directly on this 11 issue."</p> <p>12 Did I read that correctly?</p> <p>13 A. Yes.</p> <p>14 Q. The Neldon in that sentence, to your 15 understanding, is that Neldon Johnson?</p> <p>16 A. Yes.</p> <p>17 Q. Did Mr. Johnson ever get in touch with you 18 directly on this issue?</p> <p>19 MR. AUSTIN: Objection. Privilege.</p> <p>20 MR. HILL: On the basis of the objection, 21 I will instruct the witness not to answer until the 22 privilege issue can be resolved.</p> <p>23 THE WITNESS: On the advice of counsel, I 24 will not respond.</p> <p>25 Q. (BY MS. HEALY GALLAGHER) What, if any,</p>	<p style="text-align: right;">121</p> <p>1 A. It's an e-mail from Jill Cottam, who at 2 the time was my legal assistant, to me, and it 3 includes as a trailing e-mail an e-mail from 4 Glenda Johnson to Jill Cottam.</p> <p>5 Q. In the trailing e-mail, Ms. Johnson, Miss 6 Glenda Johnson, sent the e-mail January 14, 2013. 7 Does that look right?</p> <p>8 A. Yes.</p> <p>9 Q. Forgive me, Mr. Birrell, if I'm not 10 remembering correctly, but is this the first 11 communication you had from Glenda Johnson or were 12 there others before this?</p> <p>13 MR. HILL: On the basis --</p> <p>14 MR. AUSTIN: Objection. Privilege.</p> <p>15 MR. HILL: On the basis of the objection 16 and the generalized objection previously asserted, I 17 will instruct the witness not to answer the question 18 unless he can do so without reference to any 19 communication with the client or an agent of the 20 client.</p> <p>21 THE WITNESS: On the advice of counsel, I 22 will not respond.</p> <p>23 Q. (BY MS. HEALY GALLAGHER) Before 24 January 14, 2013, what, if anything, did you speak 25 with Glenda Johnson about?</p>

Birrell, Kenneth W.

February 14, 2017

32 (Pages 122 to 125)

<p style="text-align: right;">122</p> <p>1 MR. AUSTIN: Objection. Privilege.</p> <p>2 MR. HILL: On the basis of the objection,</p> <p>3 I will instruct the witness not to answer the</p> <p>4 question until the privilege issue can be resolved.</p> <p>5 THE WITNESS: On the advice of counsel, I</p> <p>6 will not respond.</p> <p>7 Q. (BY MS. HEALY GALLAGHER) What, if</p> <p>8 anything, Mr. Birrell, did you do with any</p> <p>9 information you may have received from</p> <p>10 Glenda Johnson?</p> <p>11 MR. AUSTIN: Objection. Privilege.</p> <p>12 MR. HILL: On the basis of the objection,</p> <p>13 to the extent an answer can be provided without</p> <p>14 reference to communication with the client or an</p> <p>15 agent of the client, the witness is authorized to</p> <p>16 answer. Otherwise, I would instruct the witness not</p> <p>17 to answer.</p> <p>18 THE WITNESS: On the advice of counsel, I</p> <p>19 will not respond.</p> <p>20 Q. (BY MS. HEALY GALLAGHER) What, if any,</p> <p>21 information that you received from Glenda Johnson did</p> <p>22 you rely upon in drafting or revising any of the</p> <p>23 documents you delivered to the client in this matter?</p> <p>24 MR. AUSTIN: Objection. Privilege.</p> <p>25 MR. HILL: On the basis of the objection,</p>	<p style="text-align: right;">124</p> <p>1 Bates-marked KM00213 through 226.</p> <p>2 A. Yes.</p> <p>3 Q. Mr. Birrell, the cover page for</p> <p>4 Plaintiff's Exhibit 367 is an e-mail from you to</p> <p>5 Glenda Johnson sent Monday, January 14, 2013. Is</p> <p>6 that right?</p> <p>7 A. Yes.</p> <p>8 Q. There is an attachment to this e-mail</p> <p>9 identified as solar lenses memo.pdf. Do you see</p> <p>10 that?</p> <p>11 A. Yes.</p> <p>12 Q. And the remaining pages of Plaintiff's</p> <p>13 Exhibit 367, do those pages appear to be solar lenses</p> <p>14 memo.pdf?</p> <p>15 A. Yes.</p> <p>16 Q. And, in fact, you mentioned to Ms. Glenda</p> <p>17 Johnson, "Attached is a corrected copy of the memo."</p> <p>18 Did I read that correctly?</p> <p>19 A. Yes.</p> <p>20 Q. And, of course, below your initial e-mail</p> <p>21 we see the e-mail from Jill Cottam to you; is that</p> <p>22 right?</p> <p>23 A. Yes.</p> <p>24 Q. And then below that Miss Johnson's</p> <p>25 original e-mail asking for the corrections?</p>
<p style="text-align: right;">123</p> <p>1 I will instruct the witness not to answer the</p> <p>2 question.</p> <p>3 THE WITNESS: On the advice of counsel, I</p> <p>4 will not respond.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) In this e-mail</p> <p>6 in generalized 366 -- withdrawn.</p> <p>7 Actually, in the e-mail in Plaintiff's</p> <p>8 Exhibit 366 Miss Johnson asks you to make two</p> <p>9 corrections in the tax letter, as she calls it. Do</p> <p>10 you see that?</p> <p>11 A. I do.</p> <p>12 Q. Did you make those corrections?</p> <p>13 MR. AUSTIN: Objection. Privilege.</p> <p>14 MR. HILL: On the basis of the objection,</p> <p>15 if the witness can answer the question without regard</p> <p>16 to a communication with the client or agent, you may</p> <p>17 do so. Otherwise, I would instruct the witness not</p> <p>18 to answer.</p> <p>19 THE WITNESS: On advice of counsel, I will</p> <p>20 not respond.</p> <p>21 (EXHIBIT 367 WAS MARKED.)</p> <p>22 Q. (BY MS. HEALY GALLAGHER) I'm handing you,</p> <p>23 sir, what's been marked Plaintiff's Exhibit 367.</p> <p>24 Please familiarize yourself with that.</p> <p>25 For the record, Plaintiff's Exhibit 367 is</p>	<p style="text-align: right;">125</p> <p>1 A. Correct.</p> <p>2 (EXHIBIT 368 WAS MARKED.)</p> <p>3 Q. I'm handing you what's been marked</p> <p>4 Plaintiff's Exhibit 368.</p> <p>5 For the record, Plaintiff's Exhibit 368 is</p> <p>6 KM00227 through 259.</p> <p>7 A. Correct.</p> <p>8 Q. Do you recognize Plaintiff's Exhibit 368?</p> <p>9 A. I do.</p> <p>10 Q. It is an e-mail from you to Glenda Johnson</p> <p>11 dated Monday, January 14, 2013, correct?</p> <p>12 A. Correct.</p> <p>13 Q. And the subject line is, "Forward:</p> <p>14 Generalized documents," right?</p> <p>15 A. Correct.</p> <p>16 Q. The attachments to this e-mail list a</p> <p>17 number of agreements. Do you see that?</p> <p>18 A. Yes.</p> <p>19 Q. Do the remaining pages of Plaintiff's</p> <p>20 Exhibit 368 look like those attachments mentioned in</p> <p>21 your e-mail?</p> <p>22 A. Yes.</p> <p>23 Q. Mr. Birrell, why did you send the form</p> <p>24 agreements to Miss Johnson?</p> <p>25 MR. HILL: On the basis of the prior</p>

Birrell, Kenneth W.

February 14, 2017

33 (Pages 126 to 129)

<p style="text-align: right;">126</p> <p>1 general objection and the asserted general privilege 2 objection, to the extent that the question calls for 3 disclosure of communication that would have been with 4 the client that is asserted to be privileged, I will 5 instruct the witness not to answer. But he may do so 6 if it does not involve any such communication. 7 THE WITNESS: On advice of counsel, I will 8 not respond. 9 Q. (BY MS. HEALY GALLAGHER) What, if 10 anything, happened with respect to your memo or these 11 form documents after you sent the e-mails to 12 Glenda Johnson in Plaintiff's Exhibit 367 and 368? 13 MR. HILL: On the basis of the general 14 objection, to the extent any such answer would 15 require the disclosure of a communication that has 16 been asserted as being privileged, I will instruct 17 the witness not to answer. However, he may proceed 18 with respect to any portion of his answer that would 19 not involve such a communication. 20 THE WITNESS: On the advice of counsel, I 21 will not respond. 22 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, I'm 23 handing you what's already been marked as Plaintiff's 24 Exhibit 293. Would you take a look through that 25 document, please? Just familiarize yourself with it</p>	<p style="text-align: right;">128</p> <p>1 Q. Let's turn, please, to the last couple of 2 pages. I don't think I -- sorry. For the record, 3 Plaintiff's Exhibit 293 is Bates numbered 4 Gregg_P&R-003225 through 31. 5 If we take a look at page 3230, this 6 document is entitled IRS Audit Info for Tax Preparers 7 and their Clients. 8 Do you see that? 9 A. I do. 10 Q. The date on this document is July 8th, 11 2013, right? 12 A. Correct. 13 Q. Take a look, please, at paragraph number 14 one. The title of that paragraph is, "The Kirton 15 McConkie tax attorney opinion letter." 16 Did I read that correctly? 17 A. Yes. 18 Q. Letter A says, "What the IRS is saying: 19 The letter has been rescinded." 20 Did I read that correctly? 21 A. Yes. 22 Q. Go ahead and take a look, please, and read 23 to yourself paragraph B there. 24 A. Yes. 25 Q. Mr. Birrell, do you have any understanding</p>
<p style="text-align: right;">127</p> <p>1 generally and I'll point you to specific spots. 2 A. Yes. 3 Q. Mr. Birrell, have you ever seen this 4 e-mail and its attachments before? 5 A. I have not. 6 Q. Do you know whose e-mail address 7 pgregg@bfsmail.com is? 8 A. I do not. 9 Q. Have you ever heard the name Peter Gregg? 10 A. Not that I can recall. 11 Q. So do you have any idea whether Peter 12 Gregg is a client of your firm? 13 A. I do not know. 14 Q. And is Peter Gregg, to your knowledge, 15 related in any way to SOLCO? 16 A. I do not know. 17 Q. Is Peter Gregg related to XSun Energy? 18 A. I do not know. 19 Q. Is Peter Gregg related to International 20 Automated Systems? 21 A. I do not know. 22 Q. Do you see here in the attachments list on 23 the cover e-mail here, the last identified attachment 24 is called IRS Appeal Info.doc. Do you see that? 25 A. Yes.</p>	<p style="text-align: right;">129</p> <p>1 of -- of the context for these two paragraphs in this 2 document? 3 MR. AUSTIN: Objection. Privilege. 4 MS. HEALY GALLAGHER: Hang on. Please 5 state the precise basis for your objection. 6 MR. AUSTIN: I've already done so many 7 times. 8 MS. HEALY GALLAGHER: So if this e-mail is 9 going to someone other than a client of 10 Mr. Birrell's, how, if at all, is any understanding 11 of his related to this privileged? 12 MR. AUSTIN: Well, if it's not, then he 13 can answer, but my objection is that it could call 14 for the disclosure of privileged information. 15 MR. HILL: Can you read the question back, 16 please? 17 (Record was read as follows: 18 "Mr. Birrell, do you have any understanding 19 of -- of the context for these two paragraphs in 20 this document?") 21 MR. HILL: On the basis of the objection 22 and to the extent any understanding would derive from 23 a communication with a client or agent of the client, 24 I will instruct the witness not to answer. However, 25 to the extent that you have knowledge or a response</p>

Birrell, Kenneth W.

February 14, 2017

34 (Pages 130 to 133)

<p style="text-align: right;">130</p> <p>1 independent of communications with the client, you 2 may proceed to answer. 3 THE WITNESS: On the advice of counsel, I 4 will not respond. 5 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, to 6 your recollection, is July 8, 2013, before or after 7 you had a visit with Special Agent Lawson? 8 A. I do not recall. 9 (EXHIBIT 369 WAS MARKED.) 10 Q. I'm handing you, Mr. Birrell, what's been 11 marked as Plaintiff's Exhibit 369. Please take a 12 look at that. 13 For the record, Plaintiff's 369 is Bates- 14 marked KM00260 through 272. 15 A. Yes. 16 Q. This is an e-mail from a Bryan Madden to 17 you dated Tuesday, October 15, 2013. Do you see 18 that? 19 A. Yes. 20 Q. The subject is solar lens tax issues, 21 correct? 22 A. Correct. 23 Q. And there's an attachment noted that's 24 identified as tax letter text[1].doc. Do you see 25 that?</p>	<p style="text-align: right;">132</p> <p>1 Plaintiff's Exhibit 143. 2 Plaintiff's 143 is Bates-marked 3 Olsen_P&E-02352 through 355. 4 Take a moment, please, and read this to 5 yourself. I'll tell you the organization of the 6 e-mails. It can be a little challenging, so we'll 7 walk through it. 8 We're off the record for a second. 9 (Discussion off the record.) 10 Q. Back on the record, please. 11 So, Mr. Birrell, I'll do my best to walk 12 you through this. On the first page of Plaintiff's 13 Exhibit 143 do you see the line that says, "On 14 December 7, 2013, at 1:08 p.m."? 15 A. Yes. 16 Q. "Greg Shepard," at his e-mail address, 17 "wrote, colon"? 18 A. Yes. 19 Q. Did you read that e-mail to yourself? 20 A. I did. 21 Q. Okay. I'd like to draw your attention to 22 the spot where it says, "Yesterday I went down to the 23 Kirton McConkie offices without an appointment." 24 Do you see that phrase? 25 A. Yes.</p>
<p style="text-align: right;">131</p> <p>1 A. Uh-huh. Yes. 2 Q. And the remaining pages, KM261 through 3 272, to your best understanding is that that 4 attachment? 5 A. I would assume. 6 Q. Take a look, please, and read Mr. Madden's 7 e-mail to you to yourself. 8 A. Yes. 9 Q. Did you do anything in response to this 10 e-mail? 11 A. I do not recollect responding, no. 12 Q. Would you take a look, please, at page 13 KM261? 14 A. Yes. 15 Q. The header of this page, does that look 16 like the way you would have sent out a memorandum? 17 Do you recognize this header? 18 A. No, it does not. It is different 19 formatting than I would have used. 20 Q. Did you ever send a version -- to your 21 recollection, did you ever send a version of your 22 memorandum to any client in this case with a header 23 that looks like that? 24 A. To my recollection, no. 25 Q. I'm handing you, sir, what's been marked</p>	<p style="text-align: right;">133</p> <p>1 Q. So if this e-mail was written on 2 December 7, I'm guessing "yesterday" was 3 December 6th. Do you have any recollection of any 4 December 6th visit to Kirton McConkie by 5 Greg Shepard? 6 A. I recollect that he visited, but I have no 7 idea what the date was. 8 Q. He mentions a Mr. Ken Olson in this 9 e-mail. And he identifies Ken Olson as the chief 10 operating officer, I'm guessing, and general counsel 11 for Kirton McConkie. Is that an accurate description 12 of Mr. Olson's job at Kirton? 13 A. I don't believe he has either of those 14 exact titles, but he is an office administrator. 15 Q. Okay. What is Mr. Olson's role at Kirton 16 McConkie -- or let me ask this. If you can recall, 17 what was it in 2013? 18 A. As I said, he was an office administrator. 19 I don't know what he does that much. 20 Q. Is Mr. Olson an attorney as well? 21 A. I think he is, but he does not practice in 22 his current position. 23 MR. AUSTIN: Some good cross selling 24 there. 25 Q. (BY MS. HEALY GALLAGHER) Did you ever</p>

Birrell, Kenneth W.

February 14, 2017

35 (Pages 134 to 137)

<p style="text-align: right;">134</p> <p>1 have any conversations with Mr. Olson about</p> <p>2 Mr. Shepard's visit?</p> <p>3 A. Yes.</p> <p>4 Q. What did you talk about with Mr. Olson?</p> <p>5 MR. AUSTIN: Objection. Privilege.</p> <p>6 MR. HILL: I object on the grounds that</p> <p>7 Mr. Olson was retained by the firm to consult with</p> <p>8 Mr. Birrell about a perceived liability question and</p> <p>9 has deemed that conversation to be privileged, and</p> <p>10 would instruct the witness not to answer that</p> <p>11 question.</p> <p>12 THE WITNESS: On the advice of counsel, I</p> <p>13 will not respond.</p> <p>14 MS. HEALY GALLAGHER: Can we go off the</p> <p>15 record for one second?</p> <p>16 (Discussion off the record.)</p> <p>17 MS. HEALY GALLAGHER: Back on the record,</p> <p>18 please.</p> <p>19 Q. Mr. Birrell, did Mr. Olson tell you what</p> <p>20 Greg Shepard had told him on that visit?</p> <p>21 A. I do not recall the details of the</p> <p>22 conversation with Mr. Olson and what level of detail</p> <p>23 he went into. There was some discussion of the --</p> <p>24 MR. HILL: I'm going to object -- before</p> <p>25 you disclose the content of that, as to whether that</p>	<p style="text-align: right;">136</p> <p>1 THE WITNESS: On the advice of counsel, I</p> <p>2 won't respond.</p> <p>3 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, did</p> <p>4 you ever talk to Greg Shepard after his visit to</p> <p>5 Kirton McConkie?</p> <p>6 A. No, I did not.</p> <p>7 Q. Do you see the note towards the end of</p> <p>8 this first page of Plaintiff's Exhibit 143 which</p> <p>9 says, "Mr. Birrell would like me to e-mail him next</p> <p>10 week about what we'd like him to do and then he will</p> <p>11 write us a letter of clarification."</p> <p>12 Did I read that correctly?</p> <p>13 A. Yes.</p> <p>14 Q. Did you ever want Mr. Shepard -- I'm</p> <p>15 sorry. Did you ever want Mr. Shepard to e-mail you</p> <p>16 with information about SOLCO or anything to do with</p> <p>17 this case?</p> <p>18 A. No.</p> <p>19 Q. Did you ever invite that, perhaps through</p> <p>20 Mr. Olson?</p> <p>21 A. No.</p> <p>22 Q. Did you ever plan to write a letter of</p> <p>23 clarification to Mr. Shepard?</p> <p>24 A. No.</p> <p>25 Q. Did you, Mr. Birrell, undertake any</p>
<p style="text-align: right;">135</p> <p>1 was initially a yes or no question, I believe it was,</p> <p>2 did he tell you the content of the communication with</p> <p>3 Mr. Shepard, and I think that was a yes or no. I'll</p> <p>4 object because it sounded like you were going into</p> <p>5 content. I don't want you to disclose privilege.</p> <p>6 But you can continue to answer at least the yes or no</p> <p>7 as to what she said -- or what was asked in the</p> <p>8 question.</p> <p>9 THE WITNESS: I do not recall</p> <p>10 specifically.</p> <p>11 Q. (BY MS. HEALY GALLAGHER) Not interested</p> <p>12 in any information about strategy or Kirton</p> <p>13 McConkie's planned response or anything like that,</p> <p>14 but my question is, what, if anything, did Mr. Olson</p> <p>15 convey to you about what Mr. Shepard said at that</p> <p>16 meeting?</p> <p>17 MR. AUSTIN: Objection. Privilege. It</p> <p>18 involves both -- it really involves both parties and</p> <p>19 I just -- I'll just object on the grounds of</p> <p>20 privilege.</p> <p>21 MR. HILL: And on the basis of that</p> <p>22 objection and independently getting into the content</p> <p>23 of Mr. Olson's communication with Mr. Birrell, I'll</p> <p>24 reassert the privilege and instruct the witness not</p> <p>25 to answer.</p>	<p style="text-align: right;">137</p> <p>1 follow-up with any person at the client for this case</p> <p>2 after Mr. Shepard visited Kirton McConkie in</p> <p>3 December 2013?</p> <p>4 MR. AUSTIN: Objection. Privilege.</p> <p>5 MR. HILL: On the basis of the objection,</p> <p>6 to the extent that any answer would disclose</p> <p>7 communication with the client or an agent of the</p> <p>8 client, I would instruct the witness not to answer</p> <p>9 until the privilege issue can be resolved. Although</p> <p>10 he may answer at least if there is any appropriate</p> <p>11 answer not involving such communications.</p> <p>12 THE WITNESS: On the advice of counsel, I</p> <p>13 will not respond.</p> <p>14 MS. HEALY GALLAGHER: Off the record,</p> <p>15 please.</p> <p>16 (A break was taken from 2:34 p.m. to</p> <p>17 2:45 p.m.)</p> <p>18 MS. HEALY GALLAGHER: All right. Back on</p> <p>19 the record, please.</p> <p>20 Q. Mr. Birrell, you've been handed what's</p> <p>21 previously been marked Plaintiff's Exhibit 231.</p> <p>22 You've had a chance to take a look at that document;</p> <p>23 is that right?</p> <p>24 A. Yes.</p> <p>25 Q. For the record, Plaintiff's 231 is</p>

Birrell, Kenneth W.

February 14, 2017

36 (Pages 138 to 141)

<p style="text-align: right;">138</p> <p>1 Gregg_P&R-003220 through 24.</p> <p>2 Mr. Birrell, I'd like to draw your</p> <p>3 attention, please, to the second paragraph on the</p> <p>4 first page, the last sentence. It reads -- well, I'm</p> <p>5 sorry. Let's take a look real quick.</p> <p>6 This e-mail is from Greg Shepard.</p> <p>7 Do you see that?</p> <p>8 A. Yes.</p> <p>9 Q. Okay. And it was sent -- it says it was</p> <p>10 sent Wednesday, December 11, 2013, correct?</p> <p>11 A. Correct.</p> <p>12 Q. So back down to the second sentence of the</p> <p>13 second paragraph. It reads, "I went down to Kirton</p> <p>14 McConkie and spoke with COO Ken Olson who then talked</p> <p>15 with Ken Birrell, who wrote a tax attorney opinion</p> <p>16 letter for one of our big clients and who also wrote</p> <p>17 a the [sic] memorandum letter to SOLCO I and</p> <p>18 Neldon Johnson."</p> <p>19 Did I read that correctly?</p> <p>20 A. Yes.</p> <p>21 Q. Mr. Birrell, it looks to me like he's</p> <p>22 identified actually two documents in this sentence.</p> <p>23 A. Yes.</p> <p>24 Q. Do you have any understanding of what the</p> <p>25 tax attorney opinion letter for one of our big</p>	<p style="text-align: right;">140</p> <p>1 MS. HEALY GALLAGHER: Sure.</p> <p>2 Q. So as I said a moment ago, it looks to me</p> <p>3 like there are two different writings referred to in</p> <p>4 this sentence. Now I'm just trying to find out</p> <p>5 whether there was, in fact, a second writing from</p> <p>6 Mr. Birrell around the transaction with respect to</p> <p>7 SOLCO I. We've got the memo. We've got that. Was</p> <p>8 there anything else?</p> <p>9 A. Yes.</p> <p>10 Q. And what was that?</p> <p>11 A. It was a letter to a group called Mack</p> <p>12 Molding.</p> <p>13 Q. What is Mack Molding?</p> <p>14 A. It's a company.</p> <p>15 Q. What does Mack Molding do?</p> <p>16 A. It molds products.</p> <p>17 Q. I'm sorry?</p> <p>18 A. It does -- it molds products. I don't</p> <p>19 know exactly what they do.</p> <p>20 Q. What is the relationship between Mack</p> <p>21 Molding and the SOLCO transaction?</p> <p>22 MR. HILL: And I'll object to the extent</p> <p>23 it -- the answer might call for disclosure of</p> <p>24 attorney-client privileged communication.</p> <p>25 If you can answer that without regard to</p>
<p style="text-align: right;">139</p> <p>1 clients is?</p> <p>2 MR. AUSTIN: Objection. Privilege.</p> <p>3 MR. HILL: On the basis of the objection,</p> <p>4 to the extent any answer would disclose communication</p> <p>5 with the client, I'll instruct you not to answer.</p> <p>6 However, you're authorized to answer, to the extent</p> <p>7 you can, without referring to a client communication.</p> <p>8 THE WITNESS: On advice of counsel, I will</p> <p>9 not respond.</p> <p>10 Q. (BY MS. HEALY GALLAGHER) Do you have an</p> <p>11 understanding, Mr. Birrell, of what the memorandum</p> <p>12 letter to SOLCO I and Neldon Johnson might be?</p> <p>13 A. I assume it's the memorandum that has been</p> <p>14 attached in various exhibits.</p> <p>15 Q. For example, the memo that's attached to</p> <p>16 Plaintiff's Exhibit 367 or a version thereof?</p> <p>17 A. Correct.</p> <p>18 Q. So, Mr. Birrell, in fact, did you write</p> <p>19 something different for a client of Greg Shepard's or</p> <p>20 RaPower3's?</p> <p>21 MR. AUSTIN: Objection. Privilege.</p> <p>22 MR. HILL: Objection to the extent it's</p> <p>23 vague and ambiguous. I'm not quite sure I</p> <p>24 understand -- I think I understand, but I'm not sure</p> <p>25 I understand exactly what the question is.</p>	<p style="text-align: right;">141</p> <p>1 such communication, you may answer.</p> <p>2 THE WITNESS: On the advice of counsel, I</p> <p>3 will not respond.</p> <p>4 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, who</p> <p>5 was your contact at Mack Molding?</p> <p>6 A. Don Kendall.</p> <p>7 Q. Would you take a look, please, at</p> <p>8 Plaintiff's Exhibit 364 again? And please take a</p> <p>9 look at page KM00018.</p> <p>10 A. Yes.</p> <p>11 Q. The first entry on that page is dated</p> <p>12 10-8-2012; is that right?</p> <p>13 A. Yes.</p> <p>14 Q. Your initials follow that date?</p> <p>15 A. Yes.</p> <p>16 Q. And the first clause there says, "Draft</p> <p>17 commission agreement with J. Clement and E. Kinsey</p> <p>18 relating to transaction with Mack Group."</p> <p>19 Did I read that correctly?</p> <p>20 A. Yes.</p> <p>21 Q. Is Mack Group, Mack Molding?</p> <p>22 A. Yes.</p> <p>23 Q. Who is E. Kinsey?</p> <p>24 A. He was an associate of Mr. Clement in some</p> <p>25 way. I don't recall.</p>

Birrell, Kenneth W.

February 14, 2017

37 (Pages 142 to 145)

<p style="text-align: right;">142</p> <p>1 Q. How is Mr. Clement related to Mack</p> <p>2 Molding?</p> <p>3 A. I don't believe there is a relationship.</p> <p>4 Q. Do you happen to recall if there's no</p> <p>5 relationship why Mr. Clement was on the phone with</p> <p>6 Mr. Kinsey about Mack Molding?</p> <p>7 MR. AUSTIN: Objection. Privilege.</p> <p>8 MR. HILL: On the basis of the objection,</p> <p>9 to the extent you can answer that question without</p> <p>10 disclosing the content of the communication with the</p> <p>11 client, you may proceed. Otherwise, I would instruct</p> <p>12 you not to answer until the privilege issue can be</p> <p>13 resolved.</p> <p>14 THE WITNESS: On the advice of counsel, I</p> <p>15 will not respond.</p> <p>16 Q. (BY MS. HEALY GALLAGHER) Mr. Birrell, I</p> <p>17 have looked through the documents produced by Kirton</p> <p>18 McConkie and I did not see the tax attorney opinion</p> <p>19 letter from Mack Molding. Do you believe you</p> <p>20 produced that document?</p> <p>21 A. No, I did not.</p> <p>22 Q. Is there a reason you did not?</p> <p>23 A. It was --</p> <p>24 MR. AUSTIN: Objection. Privilege.</p> <p>25 THE WITNESS: It was not responsive to any</p>	<p style="text-align: right;">144</p> <p>1 Q. (BY MS. HEALY GALLAGHER) Taking a look</p> <p>2 back at page KM18 in Plaintiff's Exhibit 364, what,</p> <p>3 if anything, did the commission agreement have to do</p> <p>4 with the transaction identified in your memorandum to</p> <p>5 SOLCO?</p> <p>6 MR. AUSTIN: Objection. Privilege.</p> <p>7 MR. HILL: On the basis of the objection,</p> <p>8 to the extent you can provide an answer to the</p> <p>9 question without disclosing the communication or the</p> <p>10 content of communication with the client, you may do</p> <p>11 so. Otherwise, I'm going to instruct the witness not</p> <p>12 to answer the question.</p> <p>13 THE WITNESS: On the advice of counsel, I</p> <p>14 will not respond.</p> <p>15 Q. (BY MS. HEALY GALLAGHER) All right.</p> <p>16 Let's turn back, please, to Plaintiff's Exhibit 231.</p> <p>17 Of course, just to revisit, this is an e-mail from</p> <p>18 Mr. Shepard of December 11, 2013. On the -- on</p> <p>19 page 321, would you take a look, please, at the first</p> <p>20 sentence on that page. It says, "This morning I</p> <p>21 wrote Ken Birrell and Ken Olson a detailed letter</p> <p>22 about the situation and asked Mr. Birrell to write a</p> <p>23 letter of clarification."</p> <p>24 Did I read that correctly?</p> <p>25 A. Yes.</p>
<p style="text-align: right;">143</p> <p>1 of the document requests.</p> <p>2 Q. (BY MS. HEALY GALLAGHER) Was your letter</p> <p>3 to Mack Molding in fact an opinion letter or was it a</p> <p>4 generalized memo of the kind you provided SOLCO?</p> <p>5 MR. AUSTIN: Objection. Privilege.</p> <p>6 MR. HILL: To the extent you can disclose</p> <p>7 the -- answer the question without disclosure of the</p> <p>8 communication with the client of a privileged</p> <p>9 communication, you may proceed. Otherwise, I would</p> <p>10 instruct you not to answer until the privilege issue</p> <p>11 can be resolved.</p> <p>12 THE WITNESS: On the advice of counsel, I</p> <p>13 will not respond.</p> <p>14 Q. (BY MS. HEALY GALLAGHER) Do you have any</p> <p>15 understanding, Mr. Birrell, why Mr. Shepard might be</p> <p>16 linking the tax attorney opinion letter from Mack</p> <p>17 Molding with the memorandum you wrote for SOLCO?</p> <p>18 MR. AUSTIN: Objection. Privilege.</p> <p>19 MR. HILL: To the extent you have an</p> <p>20 understanding based on a communication with your</p> <p>21 client, on the basis of the objection I will instruct</p> <p>22 you not to answer, otherwise, you may proceed to</p> <p>23 answer.</p> <p>24 THE WITNESS: On the advice of counsel, I</p> <p>25 will not respond.</p>	<p style="text-align: right;">145</p> <p>1 Q. Did you ever receive a letter such as the</p> <p>2 one described from Mr. Shepard?</p> <p>3 MR. AUSTIN: Objection. Privilege.</p> <p>4 MR. HILL: Did you ever receive a letter</p> <p>5 such as the one described. If you had received such</p> <p>6 a communication, the content of the communication</p> <p>7 with be asserted to be privileged, in which case I</p> <p>8 would instruct you not to answer. However, if you</p> <p>9 can answer the question without disclosing a client</p> <p>10 communication, you may proceed.</p> <p>11 THE WITNESS: I do not recall receiving</p> <p>12 such a letter.</p> <p>13 Q. (BY MS. HEALY GALLAGHER) Did you ever</p> <p>14 receive any letter from Greg Shepard?</p> <p>15 MR. AUSTIN: Objection. Privilege.</p> <p>16 MR. HILL: On the same basis, if you can</p> <p>17 answer the question without disclosing a</p> <p>18 communication with a client -- if you received any</p> <p>19 such communication in response to that question that</p> <p>20 would disclose a client communication, I would</p> <p>21 instruct you not to answer. However, if you can</p> <p>22 answer the question without disclosing a client</p> <p>23 communication, you may proceed.</p> <p>24 THE WITNESS: Not that I can recall.</p> <p>25 Q. (BY MS. HEALY GALLAGHER) Did Mr. Olson</p>

Birrell, Kenneth W.

February 14, 2017

38 (Pages 146 to 149)

<p style="text-align: right;">146</p> <p>1 ever tell you that he had received a letter from</p> <p>2 Mr. Shepard?</p> <p>3 MR. HILL: And I will object to that on</p> <p>4 the grounds that that is privileged as between -- the</p> <p>5 attorney-client relationship between Mr. Olson and</p> <p>6 Mr. Birrell.</p> <p>7 THE WITNESS: On the advice of counsel, I</p> <p>8 will not respond.</p> <p>9 Q. (BY MS. HEALY GALLAGHER) Has Mr. Shepard</p> <p>10 ever asked you to write a letter of clarification?</p> <p>11 MR. HILL: On the basis of the generalized</p> <p>12 objection that has been raised as to privilege, I</p> <p>13 will say that if such -- if in answering the question</p> <p>14 you must disclose the content of communication with a</p> <p>15 client that's asserted to be privileged, I instruct</p> <p>16 you not to answer. However, if you can answer the</p> <p>17 question without such disclosure, you may proceed.</p> <p>18 THE WITNESS: No.</p> <p>19 (EXHIBIT 370 WAS MARKED.)</p> <p>20 Q. Mr. Birrell, I'm handing you what's been</p> <p>21 marked Plaintiff's Exhibit 370. Please take a look</p> <p>22 at that, and let me know when you're done.</p> <p>23 For the record, Plaintiff's 370 is Bates-</p> <p>24 marked KM00274 through 322.</p> <p>25 A. Yes.</p>	<p style="text-align: right;">148</p> <p>1 solar lenses are purchased on the terms and</p> <p>2 conditions set forth in the 'transaction documents'</p> <p>3 referenced on page 3 of the memorandum and attached</p> <p>4 as exhibits thereto."</p> <p>5 Do you see the transaction documents</p> <p>6 referenced in there in Plaintiff's Exhibit 370?</p> <p>7 A. Yes. They commence on KM290.</p> <p>8 Q. KM290 is Solar Lenses Purchase Agreement,</p> <p>9 right?</p> <p>10 A. Correct.</p> <p>11 Q. And at KM302 is the Secured Promissory</p> <p>12 Note, right?</p> <p>13 A. Correct.</p> <p>14 Q. Then at KM00306 is the Operation and</p> <p>15 Maintenance Agreement?</p> <p>16 A. Correct.</p> <p>17 Q. On page KM275, the second page of the</p> <p>18 letter, about a third of the way down the page the</p> <p>19 letter identifies certain conduct, that you demand</p> <p>20 XSun Energy, SOLCO I and RaPower3 immediately cease</p> <p>21 and desist from doing.</p> <p>22 Do you see that?</p> <p>23 A. I do.</p> <p>24 Q. Do you know, Mr. Birrell, if these</p> <p>25 entities have stopped -- have agreed to your request?</p>
<p style="text-align: right;">147</p> <p>1 Q. What is Plaintiff's Exhibit 370?</p> <p>2 A. It is a letter from me to Neldon Johnson</p> <p>3 and Greg Shepard.</p> <p>4 Q. Dated January 10, 2014, correct?</p> <p>5 A. Correct.</p> <p>6 Q. The re line is, "Use of Kirton McConkie</p> <p>7 memorandum dated October 31, 2012," correct?</p> <p>8 A. Correct.</p> <p>9 Q. On KM00275 your signature appears,</p> <p>10 correct?</p> <p>11 A. Correct.</p> <p>12 Q. And you have a cc there to Michael Lawson.</p> <p>13 Who is that?</p> <p>14 A. That is Special Agent Lawson with the IRS.</p> <p>15 Q. In the first paragraph of the letter,</p> <p>16 Mr. Birrell, you refer to the memorandum dated</p> <p>17 October 31, 2012, from Kirton McConkie to SOLCO, Inc.</p> <p>18 And you say a copy is attached to the letter for</p> <p>19 their reference.</p> <p>20 And then do you see the memo attached to</p> <p>21 this letter in Plaintiff's Exhibit 370?</p> <p>22 A. I do.</p> <p>23 Q. Then on the next page, the first full</p> <p>24 paragraph says, "Third, the analysis within the</p> <p>25 memorandum only applies if, among other factors, the</p>	<p style="text-align: right;">149</p> <p>1 A. It is my understanding they have not.</p> <p>2 Q. I'm handing you what's been previously</p> <p>3 marked Plaintiff's Exhibit 89. Please take a moment</p> <p>4 and familiarize yourself with this.</p> <p>5 For the record, Plaintiff's Exhibit 89 is</p> <p>6 Bates-marked ZELEZ_B&A001093 through 97.</p> <p>7 A. Okay.</p> <p>8 Q. All right. Plaintiff's Exhibit 89 appears</p> <p>9 to be an e-mail from Greg Shepard, greg@raPower3.com.</p> <p>10 Do you see that?</p> <p>11 A. Yes.</p> <p>12 Q. It looks like it was sent on January 17,</p> <p>13 2014, correct?</p> <p>14 A. Correct.</p> <p>15 Q. And that's about seven days after the</p> <p>16 letter in Plaintiff's Exhibit 370.</p> <p>17 A. Correct.</p> <p>18 Q. I'd like to draw your attention, please,</p> <p>19 to item number six in the cover e-mail, the first</p> <p>20 sentence of which says, "Kirton McConkie has just</p> <p>21 written another tax attorney opinion letter."</p> <p>22 Did I read that correctly?</p> <p>23 A. Yes.</p> <p>24 Q. So, Mr. Birrell, other than the October 31</p> <p>25 memo to SOLCO, the writing to Mack Molding and the</p>

Birrell, Kenneth W.

February 14, 2017

39 (Pages 150 to 153)

<p style="text-align: right;">150</p> <p>1 January 10, 2014, letter to Neldon Johnson and 2 Greg Shepard, did you write anything additional with 3 respect to this transaction?</p> <p>4 MR. AUSTIN: Objection. Privilege.</p> <p>5 MR. HILL: On the basis of the objection, 6 to the extent your answer requires you to disclose 7 communication with a client, I will instruct the 8 witness not to answer, unless he can do so without 9 disclosing such a communication.</p> <p>10 THE WITNESS: No.</p> <p>11 Q. (BY MS. HEALY GALLAGHER) So do you have 12 any idea what Greg Shepard might be talking about in 13 that sentence?</p> <p>14 MR. HILL: Objection. Foundation.</p> <p>15 THE WITNESS: I do not.</p> <p>16 Q. (BY MS. HEALY GALLAGHER) Actually, 17 Mr. Birrell, I'd like to revisit Plaintiff's 18 Exhibit 370 for one quick second.</p> <p>19 What, if any, subsequent communications 20 did you have with Neldon Johnson or Greg Shepard 21 after you sent this letter?</p> <p>22 MR. AUSTIN: Objection. Privilege.</p> <p>23 MR. HILL: On the basis of the objection, 24 to the extent an answer to the question requires the 25 disclosure of a communication with a client or agent,</p>	<p style="text-align: right;">152</p> <p>1 Q. All right, Mr. Birrell. A couple 2 questions to wrap up.</p> <p>3 For the questions that you did answer 4 today, are there any answers that you wish to change, 5 amplify, supplement before we wrap up for the day?</p> <p>6 A. No.</p> <p>7 Q. Is there any information I asked you about 8 that you might have remembered in the course of the 9 day but that you didn't remember when I was asking 10 you about it?</p> <p>11 A. No.</p> <p>12 Q. Is there anything you would like to add to 13 what you've already told us today --</p> <p>14 A. No.</p> <p>15 Q. -- to help us understand things more 16 clearly? No.</p> <p>17 A. No.</p> <p>18 Q. Have you ever been convicted of any 19 crimes?</p> <p>20 A. No.</p> <p>21 Q. Have you ever been found liable in any 22 civil lawsuit?</p> <p>23 A. No.</p> <p>24 Q. Has there been any public discipline 25 against you for any state licensing entity?</p>
<p style="text-align: right;">151</p> <p>1 I would instruct the witness not to answer. However, 2 you may answer to the extent it does not involve such 3 a disclosure.</p> <p>4 THE WITNESS: I do not recall having any.</p> <p>5 Q. (BY MS. HEALY GALLAGHER) After you sent 6 the January 10, 2014, letter, did you have any 7 communication with anyone else connected to SOLCO 8 about this client matter?</p> <p>9 MR. AUSTIN: Objection. Privilege.</p> <p>10 MS. HEALY GALLAGHER: Yeah, I'll just 11 leave it at that.</p> <p>12 MR. HILL: On the basis of the objection, 13 to the extent answering the question requires the 14 disclosure of the contents of a communication with a 15 client or an agent of the client, I would instruct 16 the witness not to answer. However, you may do so to 17 the extent he may without disclosing any such 18 communication.</p> <p>19 THE WITNESS: Not that I can recall.</p> <p>20 MS. HEALY GALLAGHER: If we could take 21 a -- off the record, please.</p> <p>22 (A break was taken from 3:15 p.m. to 23 3:20 p.m.)</p> <p>24 MS. HEALY GALLAGHER: Back on the record, 25 please.</p>	<p style="text-align: right;">153</p> <p>1 A. No.</p> <p>2 MS. HEALY GALLAGHER: In light of the 3 privilege objections made today, we'll certainly 4 address those at a later time with the court. In 5 light of those objections, we'll hold the deposition 6 open for follow-up.</p> <p>7 MR. AUSTIN: I'll object to that.</p> <p>8 MS. HEALY GALLAGHER: And as for today, 9 for everything that's happened today, I have no 10 further questions at this time, and I will pass the 11 witness.</p> <p>12 MR. AUSTIN: Okay. Let me just state on 13 the record my objection to bringing this witness 14 back. We've been here today, by my calculation, for 15 at least seven hours, and counsel was certainly aware 16 of the position of the parties as it relates to 17 privilege in this case. And while we all certainly 18 could have adjourned and sought guidance from the 19 court with regard to the appropriate scope of the 20 questioning in this case, she insisted on continuing 21 with seven hours of deposition, which, you know, may 22 be her right, but I'm just going to object to 23 bringing the witness back and subjecting the parties 24 to the additional time and expense to take his 25 deposition again.</p>

Birrell, Kenneth W.

February 14, 2017

40 (Pages 154 to 156)

<p style="text-align: right;">154</p> <p>1 I don't have any questions.</p> <p>2 MS. HEALY GALLAGHER: Mr. Hill, any</p> <p>3 questions?</p> <p>4 MR. HILL: I have no questions.</p> <p>5 MR. AUSTIN: I presume that he'll read and</p> <p>6 sign.</p> <p>7 MR. HILL: Yeah, I just -- before we get</p> <p>8 there -- no, I don't have anything else to add to the</p> <p>9 record.</p> <p>10 MR. AUSTIN: Aside from --</p> <p>11 MR. HILL: Yeah, the procedure would be to</p> <p>12 request that the witness be afforded the opportunity</p> <p>13 to read and sign before the deposition goes final.</p> <p>14 MS. HEALY GALLAGHER: Certainly. And we</p> <p>15 would ask that Mr. Birrell read and sign as well.</p> <p>16 And we'll also ask for an expedited</p> <p>17 transcript.</p> <p>18 With that, we are off the record for</p> <p>19 today.</p> <p>20 (Deposition suspended at 3:23 p.m.)</p> <p>21 * * *</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	<p style="text-align: right;">156</p> <p>1 Case: UNITED STATES OF AMERICA vs. RAPOWER3, LLC,</p> <p>2 INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R.</p> <p>3 GREGORY SHEPARD, NELDON JOHNSON and ROGER FREEBORN</p> <p>4 Case No.: 2:15-cv-00828 DN</p> <p>5 Reporter: Dawn M. Perry, CSR</p> <p>6 Date taken: February 14, 2017</p> <p>7</p> <p>8</p> <p>9 ACKNOWLEDGMENT OF DEPONENT</p> <p>10</p> <p>11 I, _____, do hereby</p> <p>12 acknowledge that I have read and examined the</p> <p>13 foregoing testimony, and the same is a true, correct</p> <p>14 and complete transcription of the testimony given by</p> <p>15 me, and any corrections appear on the attached Errata</p> <p>16 Sheet signed by me.</p> <p>17</p> <p>18</p> <p>19</p> <p>20 _____</p> <p>21 (DATE) KENNETH W. BIRRELL</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>
<p style="text-align: right;">155</p> <p>1 REPORTER'S CERTIFICATE</p> <p>2 STATE OF UTAH)</p> <p>3) ss.</p> <p>4 COUNTY OF SALT LAKE)</p> <p>5 I, Dawn M. Perry, Certified Shorthand</p> <p>6 Reporter and Notary Public in and for the State of</p> <p>7 Utah, do hereby certify:</p> <p>8</p> <p>9 That prior to being examined, the witness,</p> <p>10 KENNETH W. BIRRELL, was by me duly sworn to tell the</p> <p>11 truth, the whole truth, and nothing but the truth;</p> <p>12</p> <p>13 That said deposition was taken down by me</p> <p>14 in stenotype on February 14, 2017, at the place</p> <p>15 therein named, and was thereafter transcribed and</p> <p>16 that a true and correct transcription of said</p> <p>17 testimony is set forth in the preceding pages.</p> <p>18</p> <p>19 I further certify that, in accordance with</p> <p>20 Rule 30(e), a request having been made to review the</p> <p>21 transcript, a reading copy was sent to the witness,</p> <p>22 for the witness to read and sign under penalty of</p> <p>23 perjury and then return to me for filing with Erin</p> <p>24 Healy Gallagher, Attorney at Law.</p> <p>25 I further certify that I am not kin or</p> <p>otherwise associated with any of the parties to said</p> <p>cause of action and that I am not interested in the</p> <p>outcome thereof.</p> <p>WITNESS MY HAND this 21st day of February,</p> <p>2017.</p> <p style="text-align: right;">Dawn M. Perry, CSR</p>	

Henderson Legal Services, Inc.

202-220-4158

www.hendersonlegalservices.com