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

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UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, INTERNATIONAL  
AUTOMATED SYSTEMS, INC., LTB1,  
LLC, R. GREGORY SHEPARD,  
NELDON JOHNSON, and ROGER  
FREEBORN,

Defendants.

Civil No. 2:15-cv-00828 DN

**UNITED STATES' MOTION TO  
COMPEL DEPOSITION TESTIMONY  
OF KENNETH BIRRELL**

Judge David Nuffer  
Magistrate Judge Brooke C. Wells

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Kenneth Birrell is an attorney at Kirton McConkie. He has relevant information in this case that is not protected from discovery by any privilege or other protection. The United States

subpoenaed documents from Birrell.<sup>1</sup> He produced responsive documents and did not withhold any documents on the basis of attorney-client privilege or any other similar protection.<sup>2</sup>

On December 12, 2016, the United States subpoenaed Birrell for a deposition.<sup>3</sup> No party or third-party moved to quash the subpoena or for a protective order preventing or limiting the topics for deposition. But at his deposition, Birrell declined to answer questions because attorney-client privilege was asserted by counsel for Defendants Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC. The United States now moves to compel Birrell to answer the questions it asked at his deposition but which he declined to answer, plus reasonable follow-up questions.<sup>4</sup>

The United States alleges (among other things) that Defendants made statements about tax benefits that they knew, or had reason to know, were false or fraudulent.<sup>5</sup> Birrell wrote a memorandum of law, dated October 12, 2012, which is currently posted on the RaPower-3, LLC, website (“the Kirton McConkie memorandum”).<sup>6</sup> RaPower-3 posts the memorandum to convince customers that the statements Defendants make in support of the solar energy scheme are true.<sup>7</sup> Defendant Gregory Shepard tells RaPower-3 customers to use the Kirton McConkie

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<sup>1</sup> ECF Doc. 87-1. Certain Defendants moved to quash this subpoena, but only because of the then-unsettled protective order issue. ECF Doc. 87. They made no argument in support of quashing the subpoena based on attorney-client privilege. *See generally id.*

<sup>2</sup> Pl. Ex. 409, Deposition of Kenneth Birrell, Feb. 14, 2017, 15:9-18:18.

<sup>3</sup> Pl. Ex. 410.

<sup>4</sup> Fed. R. Civ. P. 37(a)(3)(B)(i); DUCivR 37-1; ECF Doc. 115.

<sup>5</sup> Compl. ¶¶ 1, 107, 108, 122, 162.

<sup>6</sup> Birrell Dep. 27:5-29:1; ECF Doc. 126-2 at 3-4.

<sup>7</sup> ECF Doc. 126-2 at 3-4.

memorandum in IRS audits.<sup>8</sup> All Defendants claim that their reliance on an attorney's advice is a defense to the United States' claims against them.<sup>9</sup> Two defendants identified the Kirton McConkie memorandum as tax advice upon which they relied.<sup>10</sup> Yet Birrell wrote a "cease and desist" letter in January 2014 instructing that Johnson and Shepard (among others) cease misrepresenting the memorandum and its contents.<sup>11</sup> The United States questioned Birrell on these topics at his deposition, in part by using the documents he had produced.<sup>12</sup>

The burden of establishing a privilege is on the one who asserts it; "[i]t is not the Government's responsibility to sort out what is privileged from what is not."<sup>13</sup> Defendants cannot meet their burden of demonstrating why the facts and circumstances of the communications to and from Kenneth Birrell, which resulted in the memorandum posted on RaPower-3's website, is protected by the attorney-client privilege.<sup>14</sup> Birrell should be compelled to answer the United States' deposition questions, and reasonable follow-up questions, because the attorney-client privilege, and any related protection, has been waived as to the memorandum itself, the disclosed and undisclosed facts and circumstances surrounding it, and the documents

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<sup>8</sup> Pl. Ex. 231 at 2.

<sup>9</sup> ECF Docs. 22 & 23, Sixth Defense.

<sup>10</sup> Excerpts from Pl. Ex. 411, Shepard's First Supplemental Response to United States' First Interrogatories to R. Gregory Shepard, No. 16, May 17, 2016; Excerpts from Pl. Ex. 412, Freeborn's First Supplemental Response to United States' First Interrogatories to Roger Freeborn, No. 16, May 17, 2016.

<sup>11</sup> Pl. Ex. 370. The "cease and desist letter" demonstrates that the defendants knew or had "reason to know" their statements inconsistent with its terms were false or fraudulent as to a material matter. 26 U.S.C. § 6700(a)(2)(A).

<sup>12</sup> See generally Birrell Dep. 64:5-131:24.

<sup>13</sup> *Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records*, 697 F.2d 277, 280 (10th Cir. 1983)

<sup>14</sup> *In re Grand Jury Subpoenas*, 144 F.3d 653, 658 (10th Cir. 1998).

he produced.<sup>15</sup> All of these topics, “ought in fairness to be considered together”<sup>16</sup> when evaluating Defendants’ scienter when they made statements to customers about tax benefits. “Defendants[’] own actions have put [Birrell’s] advice at issue here and any potential privilege as it relates to the advice has been waived.”<sup>17</sup>

Defendants’ objections should be overruled and Birrell should be compelled to appear and answer the questions posed by the United States in the transcript attached to this motion, and reasonable follow-up questions.

**CERTIFICATION IN ACCORDANCE WITH FED. R. CIV. P. 37(a)(1) & THE SHORT FORM DISCOVERY MOTION PROCEDURE (Doc. No. 115)**

The United States made reasonable efforts to reach agreement on the matters set forth in this motion, including:

1. Counsel for all parties discussed the applicability of the attorney-client privilege at the February 14 deposition itself, both on and off the record.
2. After the deposition and entry of the Court’s order denying the motions to quash the deposition of Todd Anderson, on March 1, 2017, counsel for the United States emailed all counsel for Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC, and counsel for Birrell asking to meet and confer on the objections raised during Birrell’s deposition in light of the reasoning and conclusions stated in the Court’s order regarding the Anderson deposition. Included

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<sup>15</sup> Fed. R. Evid. 502(a); *United States v. Evanson*, 584 F.3d 904, 914 (10th Cir. 2009); *In re Qwest Commc’ns Int’l Inc.*, 450 F.3d 1179, 1199–201, (10th Cir. 2006); *United States v. Bernard*, 877 F.2d 1463, 1465 (10th Cir. 1989); ECF Doc. 132; *see generally* ECF Doc. 126-1 at 5-9.

<sup>16</sup> Fed. R. Evid. 502(a).

<sup>17</sup> *See* ECF Doc. 132 at 3.

in the email were specific dates and times that counsel for the United States was available by telephone for discussion. Counsel for Birrell responded via email. Counsel for the named Defendants did not respond.

Dated: March 28, 2017

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 28, 2017, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to the following:

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I further certify that I emailed a PDF copy of the foregoing document, and all attachments, and sent a hard copy of the same by U.S. Mail, to:

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