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Attorneys for Non-Party Witness Kenneth Birrell

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

UNITED STATES OF AMERICA,

Plaintiff,

v.

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-BCW

**NON-PARTY WITNESS KENNETH
BIRRELL'S RESPONSE TO UNITED
STATES' MOTION TO COMPEL
DEPOSITION TESTIMONY**

Non-party witness Kenneth Birrell does not have a proverbial dog in the fight over his deposition testimony. But as the former attorney for one of the defendants, Mr. Birrell takes seriously his obligation to preserve such attorney-client communications as qualify for the privilege. If the former client waives such privilege, or this Court determines either no privilege

exists or that such has been waived, Mr. Birrell will answer questions on those topics. Until such time, Mr. Birrell maintains the privilege as invoked by the former client.

Mr. Birrell has concerns about the scope of relief sought by the United States – compelling answers to all questions asked of him at his deposition. It is impossible in 500 words to address every question posed and the asserted privileged grounds. The United States appears to contend that all questions are presumed not privileged and should be answered until grounds are provided to this Court as to the basis for the privilege.

The United States contends that the publication by the client of a memorandum from Mr. Birrell to the client constitutes a waiver of privilege, and thereby allows discovery into all circumstances giving rise to the privilege-waived communication. The defendants contend that the memorandum was never intended to be confidential in the first instance, was procured to share with others, and was thus never privileged. Therefore the communications between counsel and client predating the memorandum are not within the scope of a privilege waiver, but rather were independently privileged and not encompassed in a waiver of a communication that was never privileged. Mr. Birrell is not positioned to answer questions on such communications until directed as to the scope of privilege and the contended waiver.

Mr. Birrell also declined to answer several questions because his only knowledge of the subject came solely from communications with his former client. Regardless of the scope of a contended waiver applied to the disclosed documents, answering these categories of questions would necessarily cause Mr. Birrell to disclose the contents of the confidential client communications wherein that information was delivered to Mr. Birrell, and to which no waiver has been identified. Mr. Birrell cannot answer questions on such communications unless the former

client waives its objection or the Court rules that the privilege does not exist to these categories of questions.

Finally, during the deposition the United States asked questions of Mr. Birrell regarding the content of communications that he had with Mr. Ken Olson, in Mr. Olson's capacity as legal counsel for Mr. Birrell and his law firm. Those communications were intended for the purpose of rendering legal advice to Mr. Birrell and his law firm, and questions into these communications were objected to on the basis of Mr. Birrell's and his firm's attorney-client privilege. The United States previously stated that it did not intend to explore questions about Mr. Birrell's own privilege. However, the scope of relief requested in its motion and proposed order would compel answers to these questions as well. Mr. Birrell objects.

DATED this 31st day of March, 2017.

KIRTON McCONKIE

/s/ Christopher S. Hill

Christopher S. Hill

Attorney for Non-Party Kenneth Birrell

CERTIFICATE OF SERVICE

I hereby certify that on this 31st day of March, 2017, a true and correct copy of the foregoing **NON-PARTY KENNETH BIRRELL'S RESPONSE TO UNITED STATES' MOTION TO COMPEL DEPOSITION TESTIMONY** was served on the following by the method indicated below:

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/s/ Teena Sanders

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