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

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, *et al*,

Defendants.

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

Case No. 2:15-CV-0828 DN

Judge: Honorable David Nuffer
Magistrate Judge Brooke Wells

Defendants RaPower-3, Johnson, IAS, and LTB1 hereby submit their Objection to Plaintiff's Motion.

Defendants retained Kenneth Birrell to provide them with certain tax advice regarding potential transactions which are more fully described in a memorandum, which RaPower-3 published on its website (the "Kirton Memorandum"). Plaintiff erroneously claims that none of the conversations pertaining to the creation of the Kirton Memorandum are privileged or

otherwise protected.¹

Plaintiff asserts that Fed. R. Evid. 502(a) and associated case law obviate any privilege that the Defendants had with relation to not only the memorandum, but even the “undisclosed facts and circumstances surrounding” creation of the memorandum, and documents produced by Mr. Birrell relating to the creation of the memo. Plaintiff also cites the previous decision of this Court in an Order denying a Motion to Quash Mr. Birrell’s deposition, suggesting that Defendants have waived any and all rights to privilege regarding the creation of the Kirton Memorandum.

Plaintiff argues for too narrow a scope on the doctrine of attorney-client privilege. First, Rule 502(a) does not apply because the disclosure of the Kirton Memorandum was not made during the scope of a federal proceeding. Second, Plaintiff mischaracterizes case law. In *United States v. Evanson*², a party invoked advice-of-counsel as a defense, and that party’s attorney was actually disqualified as a witness.³ *In re Qwest Commc'ns Int'l Inc.*⁴ involved a purported agreement to maintain the confidentiality of documents which were covered by a privilege but were produced to a third party.⁵ The Government, in a separate proceeding, requested production

¹ Doc. 140, p.1

² 584 F.3d 904 (10th Cir. 2009).

³ *See Id.*, at 914.

⁴ 450 F.3d 1179, (10th Cir. 2006).

⁵ *See Id.*, at 1182.

of the same documents.⁶ The Court found that privilege had been waived with respect to those documents. By contrast, in the instant case, the Defendant has made the Kirton Memorandum public, and the Plaintiff has requested completely separate discussions between Defendants and their attorney. Making the same error on analysis, Plaintiff also relies on *United States v. Bernard*.⁷ In that case, the Defendant relied on an advice-of-counsel defense, but attempted to prevent the advice itself from coming into evidence. However, in the case at bar Defendants have actually provided the advice they rely on: the Kirton Memorandum.

Further, even if one were to interpret *Qwest* to apply to this case, *Qwest* has been abrogated by Rule 502's limited application. "Rule 502 clearly abrogates [*Qwest*] concerning subject matter waivers on disclosed documents otherwise protected by attorney-client privilege and work-product protection."⁸

While acknowledging that Plaintiff was allowed to conduct a deposition, Defendants have not and will not waive any privilege with respect to the specific questions giving rise to Plaintiff's Motion to Compel, and Plaintiff should not be granted their requested relief.

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⁶ 450 F.3d at 1182.

⁷ 877 F.2d 1463 (10th Cir. 1989).

⁸ *Silverstein v. Fed. Bureau of Prisons*, 2009 U.S. Dist. LEXIS 121753, p.26, 2009 WL 4949959 (D. Colo. Dec. 14, 2009)

The Motion should be denied.

SIGNED and DATED this 4th day of April, 2017.

HEIDEMAN & ASSOCIATES

/s/ Justin D. Heideman

JUSTIN D. HEIDEMAN

*Attorney for RAPower-3, LLC, International Automated
Systems, Inc., LTBI, and Neldon Johnson*

CERTIFICATE OF SERVICE

On this 4th day of April, 2017, I hereby certify a true and correct copy of the forgoing
OBJECTION TO UNITED STATES' MOTION TO COMPEL DEPOSITION
TESTIMONY OF KENNETH BIRRELL was served on the following:

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