

JUSTIN D. HEIDEMAN (USB #8897)
CHRISTIAN D. AUSTIN (USB #9121)
HEIDEMAN & ASSOCIATES
2696 North University Avenue, Suite 180
Provo, Utah 84604
Telephone: (801) 472-7742
Fax: (801)374-1724
Email: jheideman@heidlaw.com
Attorney for RaPower-3, LLC,
International Automated Systems, Inc.,
LTB1, and Neldon Johnson

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

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-EJF

**ORDER ON MOTION TO COMPEL
DEPOSITION TESTIMONY OF
KENNETH BIRRELL**

Judge David Nuffer
Magistrate Judge Evelyn Furse

Upon consideration of the United States' motion to compel the deposition testimony of Kenneth Birrell,¹ other papers related to that motion, and submissions by counsel at the hearing on April 12, 2017, IT IS HEREBY ORDERED THAT:

¹ ECF Doc. 140.

1. Mr. Birrell's production of documents to the United States operates as a waiver of the attorney-client privilege with respect to the contents of the documents. This waiver is limited to the information contained on the face of the document itself. The United States may therefore question Mr. Birrell regarding the authenticity of the documents and his understanding regarding the meaning of the statements contained therein. The United States may not inquire into any privileged communications that may have been had regarding the subject matter of the documents. The attorney-client privilege existing between Mr. Birrell and Defendants has not been waived in any other respect, and all communications between Mr. Birrell and Defendants remain protected by the attorney-client privilege. Apart as set forth in this paragraph 1, there shall be no further inquiry into communications between Mr. Birrell and Defendants.

2. Defendants may submit a motion to "claw back" inadvertently disclosed privileged information. If Defendants submit such a motion, the Order in Paragraph 1 is open to redetermination by this Court.

3. Mr. Birrell has not waived attorney-client privilege with respect to his communications with his own counsel, Ken Olson. Objections made during the deposition of Kenneth Birrell on February 14, 2017, by counsel for Mr. Birrell on the basis of attorney-client privilege regarding communications between Mr. Birrell and Mr. Olson, are sustained. There shall be no further inquiry into communications between Mr. Birrell and Mr. Olson.

4. The United States shall take depositions of each Defendant to determine the scope of each Defendant's respective Sixth Affirmative Defense, that the United States' "claims are barred to the extent that Defendants diligently and reasonably investigated the facts and relied

upon the tax advice provided by Defendants' attorneys."² Each Defendant shall disclose to the United States at least the following information:

- a. the name of every attorney upon whose advice they rely; and
 - b. the specific tax advice upon which they rely. If the tax advice was rendered in writing, each Defendant shall disclose to the United States the writing itself and any versions of the writing in that Defendant's possession, custody, or control.
5. These depositions will not count against the United States' allotted number of depositions or time to depose any or all Defendants on other topics in this case.
6. These depositions shall occur no later than May 3, 2017.
7. If the parties agree that each Defendant may produce the information and documents required to be disclosed in paragraph 4 without deposition, the production of information and documents shall occur no later than May 3, 2017.
8. Once the United States has collected information regarding the scope of each Defendant's Sixth Affirmative Defense, the United States shall provide that information to the Court. The Court will then decide the remaining issues raised by the United States' motion to compel Mr. Birrell's deposition testimony.

DATED this _____, 2017.

Evelyn J. Furse
United States Magistrate Judge

² ECF Docs. 22-23, 26.