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

Defendants.

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

Case No. 2:15-CV-00828 DN

Judge: Honorable David Nuffer
Magistrate Judge Evelyn Furse

COMES NOW, Defendants RaPower-3, International Automated Systems ("IAS"), LTB1, and Neldon Johnson ("Defendants"), by and through counsel of record, to submit this *Objection to United States' Proposed Order on Motion to Compel Deposition Testimony of Kenneth Birrell*. The reasons for the objection are set forth below:

1. On April 19, 2017, Counsel for Plaintiff and Defendants met and conferred telephonically to discuss the form of the Proposed Order.

2. The parties were unable to come to an agreement regarding certain language in the Proposed Order.
3. On April 20, 2017, Plaintiff submitted its Proposed Order.
4. The Proposed Order contains the following statement, made without any qualifications or clarifiers: “Defendants have waived attorney-client privilege with respect to all documents produced by Mr. Birrell to the United States.”
5. The Plaintiff’s characterization of the Court’s order is overbroad.
6. The Court’s actual statement was more limited in scope, and explained that the waiver of privilege is limited to the information contained on the face of the document itself. This naturally *does not operate as a waiver* of any privileged communications that may have been had regarding the subject matter of the documents.
7. The Court also explained that it would be willing to consider a motion to “claw back” inadvertently disclosed privileged information.
8. Given the history of this case, it is important that the limitations on the Court’s Order are included in the Order, in order to avoid unnecessary future disputes.
9. As such, Defendants have submitted a Proposed Order, attached hereto as Exhibit 1.
10. For the reasons set forth herein, this Court should deny Plaintiff’s Proposed Order and instead grant Defendants’ Proposed Order.

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11. Defendants request a hearing on this matter.

RESPECTFULLY SUBMITTED.

SIGNED and DATED this April 21, 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 April 21, 2017, I hereby certify a true and correct copy of the forgoing
**OBJECTION TO UNITED STATES' PROPOSED ORDER ON MOTION TO COMPEL
DEPOSITION TESTIMONY OF KENNETH BIRRELL** was served on the following:

Party/Attorney	Method
<i>Attorney for Defendants</i> R. Gregory Shepard Roger Freeborn Donald S. Reay Reay Law PLLC 43 W 9000 S Ste B Sandy, Utah 84070 Tele: (801) 999-8529 Email: donald@reaylaw.com	Hand Delivery U.S. Mail, postage prepaid Overnight Mail Fax Transmission <u>X</u> Electronic Filing Notice
<i>Pro Hac Vice Attorney for Plaintiff</i> Erin Healy Gallagher US Department of Justice (TAX) Tax Division P.O. Box 7238 Washington, DC 20044 Phone: (202) 353-2452 Email: erin.healygallagher@usdoj.gov	Hand Delivery U.S. Mail, postage prepaid Overnight Mail Fax Transmission <u>X</u> Electronic Filing Notice
<i>Pro Hac Vice Attorney for Plaintiff</i> Erin R. Hines Christopher Moran US Department Justice Central Civil Trial Section RM 8921 555 4 th St NW Washington, DC 20001 Tele: (202) 514-6619 Email: erin.r.hines@usdoj.gov Email: christopher.r.moran@usdoj.gov	Hand Delivery U.S. Mail, postage prepaid Overnight Mail Fax Transmission <u>X</u> Electronic Filing Notice
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HEIDEMAN & ASSOCIATES

/s/ Samantha Fowlks

Samantha Fowlks

Legal Assistant