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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 the motion is GRANTED IN PART:

1. Defendants have waived attorney-client privilege with respect to all documents produced by Mr. Birrell to the United States.
2. 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.
3. 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

¹ ECF Doc. 140.

² ECF Docs. 22-23, 26.

- 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.
- 4. 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.
- 5. These depositions shall occur no later than May 3, 2017.
- 6. If the parties agree that each Defendant may produce the information and documents required to be disclosed in paragraph 3 without deposition, the production of information and documents shall occur no later than May 3, 2017.
- 7. 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