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

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| UNITED STATES OF AMERICA,<br><br>Plaintiff,<br><br>vs.<br><br>RAPOWER-3, LLC, INTERNATIONAL<br>AUTOMATED SYSTEMS, INC., LTB1,<br>LLC, R. GREGORY SHEPARD,<br>NELDON JOHNSON, and ROGER<br>FREEBORN,<br><br>Defendants. | Civil No. 2:15-cv-00828 DN<br><br><b>UNITED STATES' RESPONSE IN<br/>OPPOSITION TO DEFENDANTS'<br/>OBJECTION TO UNITED STATES'<br/>PROPOSED ORDER ON MOTION TO<br/>COMPEL DEPOSITION TESTIMONY<br/>OF KENNETH BIRRELL</b><br><br>Judge David Nuffer<br>Magistrate Judge Brooke C. Wells |
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In response to Defendants Neldon Johnson's, RaPower-3, LLC's, International  
Automated Systems, Inc.'s, and LTB1, LLC's objection to the United States' proposed order on

its motion to compel the deposition testimony of Kenneth Birrell, the United States submits the following:

All parties agree on the form and content of paragraphs 2-7 of the United States' proposed order and paragraphs 3-8 of Defendants' proposed order.<sup>1</sup> This dispute centers on paragraph 1 of the United States' proposed order and paragraphs 1-2 of Defendants' proposed order.

Paragraph 1 of the United States' proposed order, submitted to this Court on April 20, 2017, is consistent with case law cited in the United States' motion;<sup>2</sup> Judge Wells' order denying the motions to quash the subpoena for deposition of Todd Anderson;<sup>3</sup> and this Court's order from the bench at the April 12 hearing. The United States' proposed order should be granted as it was submitted.

Paragraphs 1 and 2 of Defendants' proposed order should not be included in the final order. Paragraph 1 of Defendants' proposed order is inconsistent with the law regarding attorney-client privilege and waiver of that privilege. Further, the limitations Defendants assert in paragraph 1 go beyond this Court's rulings to date. They presume that this Court has already determined the scope of Defendants' waiver of attorney-client privilege with respect to the claims and defenses in this case. But, consistent with this Court's orders from the bench on April 12, that decision will not be made until after the United States submits to the Court information it collects regarding extent of each Defendant's respective Sixth Affirmative Defense: that the

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<sup>1</sup> Compare Ex. A., United States' proposed order, emailed to the Court on April 20, 2017, with ECF Doc. 157-1.

<sup>2</sup> ECF Doc. 140.

<sup>3</sup> ECF Doc. 132 at 3-4.

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.”<sup>4</sup>

The suggestion that Defendants “*inadvertently* disclosed privileged information” in Defendants’ paragraph 2<sup>5</sup> is simply inaccurate. As this Court heard on April 12, Mr. Birrell’s production of documents was an intentional disclosure of privileged documents. Counsel for Mr. Birrell and counsel for the United States recited numerous times that Defendants were given notice of the subpoena for the production of documents to Mr. Birrell *and* Mr. Birrell’s intention to produce those documents if Defendants did not take preventative measures. Defendants repeatedly failed to take action to preserve attorney-client privilege and prevent Mr. Birrell from producing documents to the United States. Defendants did not preserve the confidentiality of those documents. Defendants should not be permitted to file a “claw back” motion for any documents produced by Mr. Birrell because they were not “inadvertently” produced.<sup>6</sup>

For all of these reasons, the reasons stated in the United States’ motion to compel Mr. Birrell’s deposition testimony, and the reasons stated at the April 12 hearing, the United States’ proposed order should be granted and Defendants’ proposed order should be denied.

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<sup>4</sup> ECF Doc. 22; *e.g.*, Ex. A ¶¶ 3-7 and ECF Doc. 157 ¶¶ 4-8.

<sup>5</sup> ECF Doc. 157 ¶ 2 (emphasis added).

<sup>6</sup> *See, e.g., Transonic Sys., Inc. v. Non-Invasive Med. Tech.*, 192 F.R.D. 710, 715–16 (D. Utah 2000) (“Poorly judged disclosure is not inadvertent.”) (Boyce, M.J.).

Dated: April 24, 2017

Respectfully submitted,

/s/ Erin Healy Gallagher

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***ATTORNEYS FOR THE  
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**CERTIFICATE OF SERVICE**

I hereby certify that on April 24, 2017, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record pursuant to D. Utah CM/ECF and E-filing Administrative Procedures Manual ¶ II.H.

/s/ Erin Healy Gallagher  
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