

JOHN W. HUBER, United States Attorney (#7226)
JOHN K. MANGUM, Assistant United States Attorney (#2072)
111 South Main Street, Suite 1800
Salt Lake City, UT, 84111-2176
Telephone: (801) 524-5682
Email: john.mangum@usdoj.gov

ERIN HEALY GALLAGHER, *pro hac vice*
DC Bar No. 985670, erin.healygallagher@usdoj.gov
ERIN R. HINES, *pro hac vice*
FL Bar No. 44175, erin.r.hines@usdoj.gov
CHRISTOPHER R. MORAN, *pro hac vice*
NY Bar No. 5033832, christopher.r.moran@usdoj.gov
Trial Attorneys, Tax Division
U.S. Department of Justice
P.O. Box 7238
Ben Franklin Station
Washington, D.C. 20044
Telephone: (202) 353-2452

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

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

Judge David Nuffer
Magistrate Judge Evelyn J. Furse

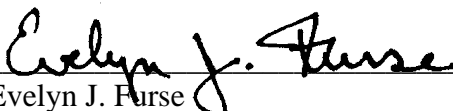
Upon consideration of the United States' motion to compel the deposition testimony of Kenneth Birrell, submissions by counsel at the hearing held on June 23, 2017, and the parties' agreement, IT IS HEREBY ORDERED THAT the motion is GRANTED:

1. Defendants have waived attorney-client privilege with respect the subject matter of the "Kirton McConkie memorandum"¹ and its contents. All documents on topics related to the Kirton McConkie memorandum and its contents are discoverable, including all documents produced by Mr. Birrell to the United States. All communications between any Defendant and attorneys at Kirton McConkie on topics related to the Kirton McConkie memorandum and its contents are discoverable.
2. Defendants have not waived attorney-client privilege with respect to topics unrelated to the Kirton McConkie memorandum and its contents. The United States shall not take discovery on topics unrelated to the Kirton McConkie memorandum and its contents.
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 Mr. 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.

¹ Pl. Ex. 370 at KM00276 through KM00288.

4. Objections made by counsel for Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC, on the basis of attorney-client privilege during the deposition of Mr. Birrell on February 14, 2017, are withdrawn by stipulation in open court.
5. Mr. Birrell shall answer the questions he declined to answer at his deposition on February 14, 2017, if he declined to answer because of any Defendant's attorney-client privilege objection identified in paragraph 4;
6. Mr. Birrell shall also answer questions that arise out of his answers to the questions identified in paragraph 5;
7. The only time that shall be counted toward the 7-hour time limitation on Mr. Birrell's deposition is that time during which he answered questions during his appearance on February 14, 2017;
8. The deposition of Mr. Birrell shall resume on August 2, 2017, at 8:00 a.m., at the U.S. Attorney's Office at 111 South Main Street, Ste. 1800, Salt Lake City, Utah 84111; and
9. The parties shall call the Court during the deposition if an issue related to this order arises and cannot be resolved among the parties.²

DATED this 29th Day of June, 2017.


Evelyn J. Furse
United States Magistrate Judge

² Docket no. 115 ¶ 10.