

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

UNITED STATES OF AMERICA,	)	
	)	Deposition of:
Plaintiff,	)	
	)	KENNETH W. BIRRELL
	)	
vs.	)	Volume 2
	)	
RAPOWER3, LLC,	)	Time on record: 2 Hours,
INTERNATIONAL	)	39 Minutes
AUTOMATED SYSTEMS,	)	
	)	
INC., LTb1, LLC, R.	)	Case No. 2:15-cv-00828 DN
	)	
GREGORY SHEPARD,	)	
	)	Judge David Nuffer
NELDON JOHNSON and	)	
	)	
ROGER FREEBORN,	)	
	)	
Defendants.	)	

August 2, 2017 \* 8:15 a.m.

Location: United States Attorney's Office  
111 South Main Street, Suite 1800  
Salt Lake City, Utah



Reporter: Dawn M. Perry, CSR

Notary Public in and for the State of Utah

158

1 APPEARANCES  
 2 FOR THE PLAINTIFF:  
 3 Christopher R. Moran  
 4 Erin Healy Gallagher  
 5 Erin R. Hines (Telephonically)  
 UNITED STATES DEPARTMENT OF JUSTICE  
 Trial Attorneys, Tax Division  
 P.O. Box 7328  
 6 Washington, D.C. 20044  
 (202) 307-0834 (Moran)  
 7 (202) 353-2452 (Healy Gallagher)  
 (202) 514-6770 (fax)  
 8 christopher.r.moran@usdoj.gov  
 erin.healygallagher@usdoj.gov  
 9

FOR THE DEFENDANTS, RAPOWER3, LLC, INTERNATIONAL  
 10 AUTOMATED SYSTEMS, INC., LTB1, LLC, AND NELDON  
 JOHNSON:  
 11

Steven R. Paul  
 12 Attorney at Law  
 Nelson, Snuffer, Dahle & Poulsen  
 13 10885 South State Street  
 Sandy, Utah 84070  
 14 (801) 576-1400  
 (801) 576-1960 (fax)  
 spaul@nsdplaw.com  
 15

FOR THE WITNESS:  
 16 Christopher S. Hill  
 17 Attorney at Law  
 Kirton McConkie  
 18 50 East South Temple  
 Suite 400  
 19 Salt Lake City, Utah 84111  
 (801) 328-3600  
 20 (801) 212-2019 (fax)  
 chill@kmclaw.com  
 21  
 22  
 23  
 24  
 25

159

1 I N D E X  
 2 KENNETH W. BIRRELL PAGE  
 3 Cont. Examination by Ms. Healy Gallagher 160  
 4 Examination by Mr. Paul 235  
 5 Further Examination by Ms. Healy Gallagher 244  
 6 \* \* \*

7  
 8  
 9  
 10  
 11  
 12  
 13  
 14  
 15  
 16  
 17  
 18  
 19  
 20  
 21  
 22  
 23  
 24  
 25

160

1 P R O C E E D I N G S  
 2  
 3 KENNETH W. BIRRELL,  
 4 called as a witness, being first sworn,  
 5 was examined and testified as follows:  
 6  
 7 CONTINUED EXAMINATION  
 BY MS. HEALY GALLAGHER:  
 8 Q. Good morning.  
 9 A. **Good morning.**  
 10 Q. We are on the record in the case of United  
 11 States versus RaPower3, et al., on August 2, 2017.  
 12 My name is Erin Healy Gallagher of the  
 13 United States Department of Justice from the Tax  
 14 Division, and I'm appearing on behalf of the United  
 15 States.  
 16 Counsel, would you please make your  
 17 appearances?  
 18 MR. MORAN: Chris Moran for the United  
 19 States.  
 20 MR. PAUL: Steven Paul on behalf of Neldon  
 21 Johnson and RaPower3.  
 22 MR. HILL: Christopher Hill of Kirton  
 23 McConkie representing the witness, Ken Birrell.  
 24 MS. HEALY GALLAGHER: Erin Hines, also of  
 25 the Department of Justice, is on the phone with us.

161

1 And not present today is Donald Reay, who  
 2 represents R. Gregory Shepard and Roger Freeborn.  
 3 This deposition will be governed by the  
 4 Federal Rules of Civil Procedure and the local rules  
 5 of the District of Utah.  
 6 As for exhibits today, I think we'll be  
 7 able to hand them off at the end of the day --  
 8 MR. MORAN: Yeah.  
 9 MS. HEALY GALLAGHER: Okay.  
 10 -- to the court reporter. And we'll take  
 11 care any other stipulations as the need arises.  
 12 Q. Mr. Birrell, you've been sworn in today,  
 13 correct?  
 14 A. **Yes.**  
 15 Q. And we are back today after a  
 16 deposition -- your deposition began February 14th of  
 17 this year, correct?  
 18 A. **I don't remember the date, but yes, it**  
 19 **began before.**  
 20 Q. Sure. Okay. So just to cover a few of  
 21 the things that we talked about at the beginning of  
 22 the deposition last time, just to make sure we're on  
 23 the same page, my job today is to ask you  
 24 understandable questions. So if at any time you  
 25 don't understand a question, will you let me know?

162

1 **A. I will.**  
 2 Q. And, of course, it's your job today to  
 3 answer those questions as truthfully as possible,  
 4 consistent with your recollection.  
 5 Do you understand that?  
 6 **A. Yes.**  
 7 Q. Sometimes it will happen that you may give  
 8 an answer as completely as you can, but later you may  
 9 remember something that could amplify or change the  
 10 answer. If that happens, will you let me know?  
 11 **A. Yes.**  
 12 Q. Mr. Birrell, is there anything that would  
 13 prevent you from listening to and understanding my  
 14 questions today to the best of your ability?  
 15 **A. No.**  
 16 Q. Are you taking medications or drugs of any  
 17 kind that might interfere with your memory?  
 18 **A. No.**  
 19 Q. Are you feeling at all sick or unwell  
 20 today?  
 21 **A. No.**  
 22 Q. Mr. Birrell, did you have the opportunity  
 23 to review the transcript from your -- the first part  
 24 of your deposition?  
 25 **A. I did.**

163

1 Q. Did you look at that fairly recently?  
 2 **A. When it was received, whenever that was.**  
 3 Q. Okay. Because one of my ideas for today  
 4 is to save time and obviously, you know, the -- we  
 5 want to keep you here as short a time as we can, so  
 6 I'm probably going to jump to a couple of things that  
 7 we talked about in the course of the deposition  
 8 before.  
 9 **A. That's fine.**  
 10 Q. So if at all you need some context or, you  
 11 know, if we need to clarify anything, please  
 12 certainly let me know.  
 13 **A. Okay.**  
 14 Q. Last time we were here we talked about a  
 15 Kirton McConkie client matter related to a company  
 16 call SOLCO.  
 17 Do you remember that?  
 18 **A. Yes.**  
 19 Q. And we started to discuss how it is you  
 20 first came to be affiliated with that client matter.  
 21 Could you go ahead and refresh my recollection on  
 22 that?  
 23 **A. So I was contacted by Jason Clement**  
 24 **requesting some assistance with providing guidance on**  
 25 **claiming energy tax credits in connection with solar**

164

1 **panels.**  
 2 Q. To your knowledge, who is Mr. Clements?  
 3 What was his role?  
 4 **A. As best I understood it, he was kind of a**  
 5 **marketing representative or sales agents for SOLCO**  
 6 **and related entities.**  
 7 Q. Any recollection on what those related  
 8 entities were?  
 9 **A. SOLCO was the entity that we dealt with.**  
 10 **I don't -- I mean, I've heard the name RaPower3 now,**  
 11 **but I don't remember hearing that as part of the**  
 12 **engagement at the time. But I don't remember what**  
 13 **other entities were involved there. There were some**  
 14 **others, but SOLCO was the one that -- that was the**  
 15 **name we used and who we dealt with primarily.**  
 16 Q. Sure.  
 17 Let's just talk a little bit about your  
 18 first interaction with Mr. Clements. What exactly  
 19 was he looking for?  
 20 **A. So he was looking for -- my understanding**  
 21 **was they had previously been marketing their solar**  
 22 **panels in the individual market, and were looking to**  
 23 **begin marketing them to more of the corporate market**  
 24 **and wanted to be able to have some explanation they**  
 25 **could provide to potential corporate buyers of -- I'm**

165

1 **sure it's just kind of the general rules of how**  
 2 **energy credit works when you buy solar panels.**  
 3 Q. And when you say "they," do you mean  
 4 SOLCO?  
 5 **A. Yeah, I mean -- he was speaking on behalf**  
 6 **of, you know, SOLCO and Neldon Johnson and whomever,**  
 7 **so, yeah.**  
 8 Q. Okay. So he was also a representative, to  
 9 your understanding, of Neldon Johnson?  
 10 **A. As far as I knew, yes.**  
 11 Q. And what was your understanding of  
 12 Mr. Clements' authority or role or relationship with  
 13 Neldon Johnson?  
 14 **A. Like I said, he -- he was the one that**  
 15 **I -- most of my interaction was with him. I never**  
 16 **asked him whether he was, you know, kind of an**  
 17 **employee or independent contractor, the scope of his**  
 18 **authority. We never really dug into that, so -- I**  
 19 **mean, I understood that he represented them, but I**  
 20 **didn't know in exactly what capacity.**  
 21 Q. Do you recall when you first started  
 22 talking with Mr. Clements?  
 23 **A. I do not recall the date right now, no.**  
 24 Q. Did Mr. Clements tell you where he was  
 25 getting his information from that he conveyed to you?

166

1           **A. Not specifically. I mean, he -- he would**  
 2 **send me information that came from -- you know, had**  
 3 **SOLCO and stuff on it, and so I assume that's where**  
 4 **it was coming from. But he didn't specifically**  
 5 **state, "I got this from this person," or anything**  
 6 **like that.**

7           Q. Did Mr. Clements come to you with a  
 8 request for a specific customer?

9           **A. So he introduced us to Mack Molding. Then**  
 10 **the conversations we had with Mack Molding were kind**  
 11 **of separate from him and kind of ran in parallel to**  
 12 **the stuff we were doing more for SOLCO.**

13          Q. Do you have any idea what his relationship  
 14 was with Mack Molding?

15          **A. I don't believe he had any prior**  
 16 **relationship with them, but I don't know.**

17          Q. So was Mack Molding a customer of --

18          **A. Potential customer.**

19          Q. Potential customer of SOLCO?

20          **A. (Witness nods head.)**

21          Q. Yes?

22          **A. Yes. Sorry.**

23          Q. So did you write a memorandum or any other  
 24 document for Mack Molding?

25          **A. Yes.**

167

1           Q. And that's different than the memo you  
 2 ultimately provided to SOLCO?

3           **A. Yes.**

4           Q. When Mr. Clements came to you, you said he  
 5 was interested in information for potential corporate  
 6 customers in the future, right?

7           **A. Yes.**

8           Q. Did he have an understanding of what he  
 9 was asking for? And I ask you that as a tax  
 10 attorney, knowing that there are many different kinds  
 11 of documents, opinion letters that an attorney can  
 12 provide.

13           MR. HILL: Objection as to form.  
 14 You can answer.

15           THE WITNESS: I don't know how  
 16 sophisticated he was in terms of understanding the  
 17 differences. I don't remember there being a detailed  
 18 discussion of kind of the differences between opinion  
 19 letters and memorandums and e-mails and stuff like  
 20 that. But I thought it was -- I thought it was clear  
 21 that it was a memorandum and not an opinion letter  
 22 that was being provided. It says "memorandum" on the  
 23 top.

24           Q. (BY MS. HEALY GALLAGHER) Sure.  
 25 And, Mr. Birrell, what's the -- to your

168

1           mind, what's the distinction between an opinion  
 2 letter and a memorandum?

3           **A. So in an opinion letter you set forth an**  
 4 **opinion where you expressly state, you know, based**  
 5 **upon the following facts and circumstances or subject**  
 6 **to the following qualifications, here is the opinion**  
 7 **that is being set forth. It's typically a much more**  
 8 **formal arrangement than a memorandum, and typically**  
 9 **the price for it is very different than a memorandum,**  
 10 **in terms of what the law firm charges in terms of**  
 11 **what it -- what it charges for providing that**  
 12 **service. There is usually a -- for lack of a better**  
 13 **term, a risk premium as part of the arrangement.**

14          Q. And an opinion letter also discusses facts  
 15 of a specific proposed transaction, correct?

16          **A. Correct.**

17          Q. And so how does that differ from a  
 18 memorandum, in your mind?

19          **A. So -- I mean, it depends upon the**  
 20 **memorandum. A memorandum can address a specific**  
 21 **situation. But in this scenario, the memorandum was**  
 22 **more of a general summary of the requirements to be**  
 23 **able to claim an energy tax credit, how the energy**  
 24 **tax credit was calculated and so forth. And it --**  
 25 **there were some form transaction documents, and so**

169

1           **the memorandum said, you know, if -- if the**  
 2 **transaction is based upon these form transaction**  
 3 **documents in substantially similar form, then this is**  
 4 **kind of how the calculations work, and this is**  
 5 **whether it would qualify, type of stuff. But there**  
 6 **wasn't -- there wasn't any specific taxpayer that was**  
 7 **being addressed within the memorandum or any specific**  
 8 **fact pattern in the memorandum.**

9           Q. And was there ever a time that you  
 10 explained what a memorandum is to Mr. Clements?

11          **A. Like I said, I don't remember, you know,**  
 12 **the extent to which we had discussions on, you know,**  
 13 **what a memorandum was as opposed to an opinion**  
 14 **letter. I don't -- I don't remember kind of -- the**  
 15 **extent to which we had specific discussions on that**  
 16 **topic.**

17          Q. Okay. Did you ever talk to anyone else  
 18 related to SOLCO about what a memorandum is versus an  
 19 opinion letter?

20          **A. Not that I recall, no.**

21          Q. Okay. Do you recall -- well, actually,  
 22 let me ask you this first: Who besides Mr. Clements  
 23 did you speak to with respect to the SOLCO client  
 24 matter?

25          **A. Neldon Johnson and his wife,**

170

1 **Glenda Johnson. I think that's her name.**  
 2 Q. About how many in-person -- well, not  
 3 in-person, but vocal conversations did you have with  
 4 Mr. Clements?  
 5 **A. With Mr. Clements, several. There was --**  
 6 **there were quite a few calls back and forth.**  
 7 Q. And how about with Neldon Johnson?  
 8 **A. Maybe one or two.**  
 9 Q. And about how many with Glenda Johnson?  
 10 **A. I don't remember if I spoke with her**  
 11 **directly or whether she spoke -- I know that she --**  
 12 **we had sent some documents, you know, the memorandum**  
 13 **and the other stuff, and she wanted some changes**  
 14 **made. And she spoke with my assistant once. I can't**  
 15 **remember whether I ever spoke with her directly or**  
 16 **just -- it was through my assistant. But there was**  
 17 **limited communication with her as well.**  
 18 Q. And you said that Mr. Clements sent you  
 19 documents?  
 20 **A. Yes.**  
 21 Q. Did anyone else send you documents with  
 22 respect to the SOLCO client matter?  
 23 **A. My recollection is everything that I**  
 24 **received came through Mr. Clements.**  
 25 Q. And I believe, Mr. Birrell, you produced

171

1 all of the documents that you received from  
 2 Mr. Clements.  
 3 **A. I believe so, yes.**  
 4 Q. Other than the documents that he sent you,  
 5 did Mr. Clements provide you other facts and  
 6 information about SOLCO and the transaction proposed?  
 7 **A. Yeah. I mean, our -- some of the earlier**  
 8 **telephone calls he was giving me some background**  
 9 **information and said there would be documents to --**  
 10 **relating to that and so forth.**  
 11 Q. Uh-huh.  
 12 **A. So, yeah, there were oral discussions as**  
 13 **well.**  
 14 Q. To the best of your recollection, what  
 15 sort of things did Mr. Clements tell you in  
 16 conversation?  
 17 **A. The initial background discussions were**  
 18 **that they're this company that produces solar lenses.**  
 19 **And he said -- he was a marketer. He was telling me**  
 20 **they were the greatest solar lenses ever. Talked**  
 21 **about them and the idea that they wanted to be**  
 22 **marketing to the -- you know, kind of more the**  
 23 **corporate. We talked about clients like Walmart and**  
 24 **so forth that would be -- would potentially be**  
 25 **interested in these -- these types of products. And**

172

1 **not a -- not a ton of the detail relating to them,**  
 2 **because he said that would be laid out in the**  
 3 **documents that he provided. But I don't remember**  
 4 **exactly what details came from the documents and what**  
 5 **details came from the conversations, at this point.**  
 6 Q. And in drafting your memorandum, did you  
 7 rely on things that Mr. Clements told you?  
 8 **A. What he told me and the documents that he**  
 9 **had provided, yes.**  
 10 Q. Did you get any of the facts that you  
 11 relied on from a source other than Mr. Clements?  
 12 **A. Not that I -- other than the documents**  
 13 **that he provided to me, yes. I mean, it was either**  
 14 **him or the documents that he provided for factual**  
 15 **background, yes.**  
 16 Q. Okay. We've touched on the fact that  
 17 solar lenses are an issue here.  
 18 **A. Yes.**  
 19 Q. Did you ever see any solar lenses  
 20 yourself?  
 21 **A. I did not. Other than pictures and videos**  
 22 **and the stuff that was provided. But I did not**  
 23 **physically view any of the solar lenses.**  
 24 Q. So did you ever visit any sites at which  
 25 one or more solar lenses were installed on towers or

173

1 anything like that?  
 2 **A. I did not.**  
 3 Q. Once you wrote your memo, Mr. Birrell, who  
 4 did you send it to?  
 5 **A. I think initially it was sent to**  
 6 **Mr. Clements, because that's who I sent -- that's who**  
 7 **the communications had been through. Now, like I**  
 8 **said, my recollection is Glenda Johnson contacted,**  
 9 **saying that they hadn't received a copy of it, and so**  
 10 **we sent one to her e-mail address as well.**  
 11 Q. Other than Mr. Clements and Ms. Johnson,  
 12 did you send the memo to anyone else?  
 13 **A. No.**  
 14 Q. Did you ever otherwise make the memorandum  
 15 available to anyone else besides Mr. Clements and  
 16 Ms. Johnson?  
 17 **A. No.**  
 18 Q. And, Mr. Birrell, in February you said  
 19 that you were familiar with the name R. Gregory  
 20 Shepard?  
 21 **A. Yes.**  
 22 Q. How, if at all, to your knowledge, is he  
 23 connected with the SOLCO client matter or  
 24 Mr. Johnson?  
 25 **A. I'm not sure what his position was. When**

174

1 our firm was contacted by -- it was Agent Lawson,  
 2 with the IRS, kind of raising concerns with this  
 3 issue, that's when we sent the cease and desist  
 4 letter saying this is -- that the memorandum was a  
 5 memorandum rather than opinion letter. And  
 6 Mr. Shepard contacted our firm wanting to discuss  
 7 that. I never had any personal conversations with  
 8 him, but I know that Ken Olson of our office did.

9 Q. Okay. So during the time of the SOLCO  
 10 client matter, while that was sort of in progress and  
 11 underway, you didn't have any contact with  
 12 Mr. Shepard at that time?

13 A. No.

14 Q. Are you familiar with an entity called  
 15 XSun Energy, LLC?

16 A. The name is familiar, yes.

17 Q. How is it familiar to you?

18 A. I don't remember whether I had heard it  
 19 before in connection with this -- this matter, but I  
 20 know that it's in some way related to SOLCO and  
 21 RaPower and so forth.

22 Q. You said in February that you recognized  
 23 the name Bryan Bolander?

24 A. Yes.

25 Q. What, if anything, did you get -- or talk

175

1 to anyone about with respect to Bryan Bolander?

2 A. My recollection is he was a CPA, and some  
 3 of the written materials that I received from  
 4 Mr. Clements included some documents prepared by  
 5 CPAs. I can't remember whether Mr. Bolander had  
 6 prepared them or not, but that was my recollect -- he  
 7 had been involved before with the -- again, the sales  
 8 in the individual market.

9 Q. And did you ever speak with him?

10 A. I do not remember speaking to him  
 11 directly, no.

12 Q. And you said in February that towards the  
 13 end of the SOLCO representation -- or the client  
 14 matter time there was a meeting at which you were  
 15 present, along with Glenda Johnson and  
 16 Neldon Johnson.

17 A. Yes.

18 Q. So what did you talk about at that  
 19 meeting?

20 A. So they were meeting with a representative  
 21 of Mack Molding, again, the potential customer. And  
 22 I don't remember too many specifics of the meeting.  
 23 It was kind of a -- the -- from Mack Molding's  
 24 perspective, it was part of their due diligence  
 25 wanting to meet Neldon and get his take on the -- the

176

1 solar lenses. And so he talked about the solar  
 2 lenses and the science behind them, which was over my  
 3 head, so...

4 Q. Where was that meeting?

5 A. It was at our -- Kirton McConkie offices.

6 Q. And who else was there?

7 A. Mr. Clements was there and -- I think it  
 8 was Neldon and Glenda's son -- I do not remember his  
 9 name -- was there. And then a representative of Mack  
 10 Molding. I don't remember her name.

11 Q. Anyone else?

12 A. Not that I recall.

13 Q. So during this meeting did you all talk  
 14 about the memorandum you drafted for SOLCO or the  
 15 documents you wrote for Mack Molding?

16 A. It was -- the discussion was more about  
 17 the potential transaction documents between SOLCO and  
 18 Mack Molding. But, again, it was more of a  
 19 opportunity for the Mack Molding people to meet  
 20 Neldon and get -- we didn't get too -- it wasn't too  
 21 detailed in terms of transaction terms or anything  
 22 else like that. It was discussing just, in general,  
 23 with Neldon, his operation.

24 Q. The form contracts that you prepared in  
 25 connection with the SOLCO memo...

177

1 A. Yes.

2 Q. Did you propose those for use for Mack  
 3 Molding as well?

4 A. Mack Molding had -- I don't remember  
 5 exactly how different they were, but they were --  
 6 they were different contracts. What had initially  
 7 started, Mr. Clements provided form contracts that I  
 8 don't know if they used before or not, and then  
 9 discussed ways in which they thought they should be  
 10 different. And so I did not draft those form  
 11 contracts from whole cloth. It was starting with the  
 12 forms that had been provided and then making the  
 13 adjustments that they described -- requested -- that  
 14 Mr. Clements requested.

15 Q. Do you remember about when this meeting  
 16 was?

17 A. I do not remember the date.

18 Q. Was it before or after you had finished  
 19 the memorandum for SOLCO?

20 A. I assume it was before, but I'm not  
 21 certain.

22 Q. And do you remember if it was before or  
 23 after you finished the writing for Mack Molding?

24 A. I assume that it was before.

25 Q. Why do you assume that?

178

1           **A.** I think that the -- I mean, especially the  
 2 memorandum for SOLCO basically ended my interaction  
 3 with them. I didn't really hear anything -- after  
 4 Glenda contacted us, asking for an updated copy  
 5 correcting some typos and stuff in there, I don't  
 6 remember any further contact with them. And so I  
 7 don't know how big of a spread there was between the  
 8 time of that meeting and when the memo was provided,  
 9 but my recollection was the memo was the last thing.

10           **Q.** So, to your recollection, what, if  
 11 anything, was discussed about the actual transaction  
 12 during this meeting with Mack Molding and  
 13 Neldon Johnson?

14           **A.** I don't remember any discussion of  
 15 specific transaction terms, as much as a discussion  
 16 about the -- the solar lenses, their plans for where  
 17 they would be installed, the potential kind of  
 18 utilities that they were going to be selling the  
 19 energy to and so forth, and where those various  
 20 negotiations stood that, technically, weren't part of  
 21 the transaction but were, you know, part -- again,  
 22 part of Mack Molding's due diligence of wanting to  
 23 understand how the whole process would work on  
 24 Neldon's side of things with the installation and the  
 25 selling of the energy and so forth.

179

1           **Q.** Who talked about those things for SOLCO?

2           **A.** Primarily Neldon. I'm sure Mr. Clements  
 3 did somewhat as well, but...

4           **Q.** Where did Mr. Johnson say these lenses  
 5 were going to be installed?

6           **A.** He had a couple different sites that he  
 7 was -- he owned some land, I can't remember where,  
 8 kind of in central or southern Utah, and was  
 9 considering some sites I think in Texas. But I don't  
 10 remember the specific details of the locations.

11           **Q.** Did he say anything about the status of  
 12 construction or installation at those particular  
 13 sites?

14           **A.** There was some discussion. I don't  
 15 remember the specifics. There was also a discussion  
 16 of where he stood in negotiations with different  
 17 utility companies in Texas and California that  
 18 were -- he was negotiating with to sell the energy  
 19 from those sites, but I don't remember the specific  
 20 of which utility company or what prices or anything  
 21 like that.

22           **Q.** Well, just on the installations real  
 23 quick, did it sound to you -- how did it sound to  
 24 you, like, where these installations were in  
 25 progress?

180

1           **A.** That there were -- that there were some of  
 2 the trees with the lenses installed and that they  
 3 were in the process of building it out and installing  
 4 other ones.

5           **Q.** Do you remember anything else about what  
 6 Mr. Johnson said about the status of installation of  
 7 these lenses anywhere?

8           **A.** Not specifically, no.

9           **Q.** Do you recall whether Mr. Johnson said he  
 10 was actually producing electricity at the time of  
 11 this meeting?

12           **A.** I don't remember whether he said he was  
 13 actually producing, but he was talking about the  
 14 electric utilities that he was negotiating with to  
 15 provide electricity to. Whether he was producing yet  
 16 or not, I can't recollect what he spoke about that.

17           **Q.** So let's talk about those utility  
 18 companies. Can you give me a rundown on --

19           **A.** He talked a lot about, you know, the  
 20 California utility companies, that because of a state  
 21 law, they were required to purchase a certain  
 22 percentage of their electricity from clean energy  
 23 sources. And so there was a demand there for solar  
 24 or other types of clean sources, and he was  
 25 discussing with -- with a couple of those utilities.

181

1           I think he was also -- said he was talking  
 2 with utilities based out of Texas. I can't remember  
 3 the exact locations or the names of any of the  
 4 utility companies that he said he was discussing  
 5 with. But he did discuss kind of that general  
 6 concept of who he was talking with and the different  
 7 prices that they were willing to pay for the  
 8 electricity.

9           **Q.** And you said that Mr. Johnson said that he  
 10 was in discussions with these utility companies.

11           **A.** I don't know if he used that exact term,  
 12 but, yes. I mean, that -- that's how it was  
 13 presented, that he was in discussions or negotiations  
 14 or some ongoing conversations with the utilities.

15           **Q.** Did he say that any utility company had  
 16 actually agreed to purchase his energy?

17           **A.** I don't remember him specifically saying  
 18 that he had an existing agreement in place, no.

19           **Q.** And correct me if I'm wrong, but I -- I  
 20 believe you said that he did not claim to be  
 21 producing energy at that time?

22           **A.** I don't remember any specific claim.

23           **Q.** So other than the status of installation,  
 24 the status of negotiations with utility companies  
 25 and, you know, any comment on whether he was

182

1 producing energy at this time, did Mr. Johnson talk  
 2 about any other aspect of the -- any potential system  
 3 in which the lenses would produce energy?  
 4 **A. Not that I recall.**  
 5 Q. Was there any other time, Mr. Birrell, in  
 6 this meeting that you heard from Mr. Johnson on any  
 7 of these topics?  
 8 **A. Not that I recall.**  
 9 Q. Did Mr. Clements make statements to you  
 10 about the status of any equipment installation?  
 11 **A. I don't remember asking about -- I don't**  
 12 **remember any conversations about -- specifically**  
 13 **relating to equipment installation.**  
 14 Q. Did Mr. Clements make any statements to  
 15 you about the status of negotiations with utility  
 16 companies to purchase power?  
 17 **A. I don't remember having conversations with**  
 18 **him about it. My recollection is those -- those**  
 19 **meetings were primarily during that -- that those**  
 20 **discussions were during that meeting with**  
 21 **Mr. Johnson, but there may have been some discussion,**  
 22 **but I don't specifically remember that.**  
 23 Q. And did Mr. Clements ever make any  
 24 statements to you regarding whether any lenses were  
 25 producing useable energy?

183

1 **A. Not that I re -- not that I recall.**  
 2 Q. Did anyone else make any representations  
 3 to you about these particular topics?  
 4 **A. Not that I recall.**  
 5 Q. You mentioned earlier a visit from Special  
 6 Agent Lawson.  
 7 **A. Yes.**  
 8 Q. When you visited with Special Agent  
 9 Lawson, did he show you pictures of towers with  
 10 lenses on them?  
 11 **A. He showed me pictures. I don't remember**  
 12 **whether there were any towers with lenses on them or**  
 13 **towers without lenses. Yeah, there were pictures**  
 14 **of -- of a site.**  
 15 Q. Okay. Yeah. What did you see in the  
 16 pictures of the site?  
 17 **A. I don't remember specifically, but it did**  
 18 **not look like a fully up-and-running solar field.**  
 19 Q. Had you ever seen such photos before?  
 20 **A. No.**  
 21 Q. What, if any, impact did those photos have  
 22 on your understanding of the facts of this  
 23 transaction?  
 24 **A. It made me think that the representations**  
 25 **that had been made in terms of the build-out of**

184

1 **the -- of the installation and the negotiations with**  
 2 **the utility companies probably had not come to**  
 3 **fruition the way they had hoped.**  
 4 Q. And those were Neldon Johnson's  
 5 representations?  
 6 **A. Yes.**  
 7 Q. Why did you draw that conclusion?  
 8 **A. Well, based upon the pictures, there was**  
 9 **not -- like I said, it was not a -- it did not appear**  
 10 **to be a functioning solar field that would be**  
 11 **generating electricity. And so if that was the only**  
 12 **installation site that they had, it looked -- based**  
 13 **upon those pictures, it looked as if no electricity**  
 14 **was being generated yet.**  
 15 Q. Do you remember about how long after you  
 16 had written your memo you saw those photos from  
 17 Agent Lawson?  
 18 **A. I do not. It was some time after.**  
 19 Q. More or less than a year?  
 20 **A. Yes. Probably more than a year.**  
 21 Q. Mr. Birrell, I'm showing you what we  
 22 marked in your -- in February as Plaintiff's  
 23 Exhibit 355. Would you just take a look at that,  
 24 please?  
 25 **A. Yes.**

185

1 Q. Mr. Birrell, what's the context for your  
 2 having received this e-mail from Mr. Clements?  
 3 **A. This was some of the background**  
 4 **information that Mr. Clements provided to me in**  
 5 **connection with the lenses and what they were**  
 6 **currently doing with the marketing of those lenses in**  
 7 **the individual market.**  
 8 Q. And this e-mail is dated Wednesday,  
 9 August 15, 2012.  
 10 Do you see that?  
 11 **A. Yes.**  
 12 Q. Does that refresh your recollection as to  
 13 about when your interaction with SOLCO would have  
 14 started?  
 15 **A. It would have been fairly close to that**  
 16 **date, is the initial time.**  
 17 Q. In the body of the e-mail on the first  
 18 page, it says, "Ken, we send out the attached  
 19 document to clients to help their accountants quickly  
 20 understand what the program is and how to take care  
 21 of the accounting for it."  
 22 Did I read that correctly?  
 23 **A. Yes.**  
 24 Q. Do you have an understanding of who "we"  
 25 is at the beginning of that sentence?



186

1 **A. My understanding, it was SOLCO and**  
 2 **related-type entities.**  
 3 Q. Then if you would take a look at the  
 4 attachment. Well, for the record for this  
 5 deposition, Plaintiff's 355 is Bates-marked KM83  
 6 through 90. Take a look, if you would, please, at  
 7 the information for accountants that's attached to  
 8 the cover e-mail.  
 9 Do you know who wrote this document?  
 10 **A. I do not.**  
 11 Q. What, if anything, did you do with  
 12 Plaintiff's 355 or the information in it?  
 13 **A. I read it. I don't remember doing**  
 14 **anything specifically with it other than reading it.**  
 15 Q. If you'd take a look, please, at KM84.  
 16 There are a couple of numbered paragraphs there on  
 17 that page.  
 18 Do you see that?  
 19 **A. Yes.**  
 20 Q. And paragraph number one says, "Equipment  
 21 qualifies for a 30-percent energy credit. This  
 22 equipment qualifies for the energy credit under  
 23 IRC Sec 48 Energy Credit filed on IRS Form 3868, line  
 24 12b."  
 25 Did I read that correctly?

187

1 **A. Yes.**  
 2 Q. Do you have any information on what the  
 3 basis for that statement is?  
 4 **A. I do not.**  
 5 Q. It's a little hard to read, but the header  
 6 on this document and then the signature block says  
 7 "XSun Energy."  
 8 Do you see that?  
 9 **A. Yes.**  
 10 Q. Do you have -- does that refresh your  
 11 recollection as to what XSun Energy may have had to  
 12 do with this?  
 13 **A. My recollection was it was related to**  
 14 **SOLCO, but a parent subsidiary or sister. I --**  
 15 **Neldon Johnson was involved with both SOLCO and XSun**  
 16 **Energy, but I don't remember the exact relationships.**  
 17 Q. Do you recall what -- or, if you know,  
 18 what XSun Energy -- its purpose was?  
 19 **A. I do not recall specifically, no.**  
 20 Q. Did you use any of the information from  
 21 Plaintiff's Exhibit 355 as part of the factual basis  
 22 for your memorandum?  
 23 **A. I do not remember specifically using this**  
 24 **for factual basis, no.**  
 25 Q. Take a look, please, at page KM86. Once

188

1 again, there are some numbered paragraphs around the  
 2 middle of the page. Well -- and the intro to that  
 3 starts by saying, "To qualify for the energy credit,  
 4 the following basic requirements must be met  
 5 according to IRC Sec 48: Number one. It must be  
 6 equipment which uses solar energy to generate  
 7 electricity, heat or cool a structure, or provide  
 8 solar process heat. We qualify because we provide  
 9 solar process heat, as evidenced by the video."  
 10 Did I read that correctly?  
 11 **A. Yes.**  
 12 Q. Did you see any support for the statement  
 13 that some entity was providing solar process heat?  
 14 **A. I saw the video that showed that they**  
 15 **were -- that the lenses produced that. And so I saw**  
 16 **that -- I think probably the same video they are**  
 17 **referencing, but I'm not certain what video they're**  
 18 **referencing.**  
 19 Q. What -- I'll ask you, what video -- what  
 20 did you see in the video that you watched?  
 21 **A. So the video that was provided by**  
 22 **Mr. Clements was a -- it was a news story, I believe**  
 23 **it was KSL television, that was a demonstration of**  
 24 **the solar panels and the -- the process heat that**  
 25 **they generated, presumably to then connect to a**

189

1 **utility, but it didn't show an actual connection to a**  
 2 **utility.**  
 3 Q. And exactly how, on this video, were they  
 4 demonstrating generating heat?  
 5 **A. I don't remember the specific details of**  
 6 **the video, but it was produced as part of my**  
 7 **production.**  
 8 Q. And do you, Mr. Birrell, have an  
 9 understanding of what the phrase "solar process heat"  
 10 means?  
 11 **A. So my basic understanding is that the**  
 12 **solar lens converts energy from the sun, generates**  
 13 **heat similar to, you know, heating from other**  
 14 **sources. That heat is then somehow captured through**  
 15 **a system that connects to a utility or something**  
 16 **else, and then generates electricity using that --**  
 17 **the energy from that heat.**  
 18 Q. So in the video you watched, did you see  
 19 any heat being captured for any use?  
 20 **A. No, not that I recall.**  
 21 Q. I'm handing you what's been marked  
 22 Plaintiff's Exhibit 356. Would you please take a  
 23 look at that? And while you do, Plaintiff's 356 is  
 24 marked KM57 through 82.  
 25 **A. Yes.**

190	<p>1 Q. So, Mr. Birrell, this Plaintiff's Exhibit</p> <p>2 356 is an e-mail from Mr. Clements to you, correct?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. And it covers the solar program contracts</p> <p>5 that are attached; is that right?</p> <p>6 <b>A. Yes.</b></p> <p>7 Q. First off, do you know who wrote these</p> <p>8 form contracts that are attached to Plaintiff's 356?</p> <p>9 <b>A. I do not.</b></p> <p>10 Q. Did you ask?</p> <p>11 <b>A. I did not.</b></p> <p>12 Q. In the file names of the attachments, the</p> <p>13 first attachment says, "Equipment purchase agreement</p> <p>14 Don," and then the number one. Who is Don?</p> <p>15 <b>A. I do not know.</b></p> <p>16 Q. These form contracts are -- apparently</p> <p>17 are -- if you take a look at KM59, the entity is XSun</p> <p>18 Energy.</p> <p>19 Do you see that?</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. So I'm just curious, did SOLCO itself have</p> <p>22 any form contracts?</p> <p>23 <b>A. Not that I recall, no.</b></p> <p>24 Q. Okay. And in these form contracts, if we</p> <p>25 take a look at the signature pages, for example, on</p>	192	<p>1 <b>A. Yes.</b></p> <p>2 Q. Was that Mr. Clements' offer to put you in</p> <p>3 touch with Mr. Johnson?</p> <p>4 <b>A. I believe so, yes.</b></p> <p>5 Q. So, to your knowledge, had you talked to</p> <p>6 Mr. Johnson before Mr. Clements wrote you this</p> <p>7 e-mail?</p> <p>8 <b>A. No.</b></p> <p>9 Q. Did Mr. Clements ever tell you whether</p> <p>10 they had actually used the form contracts in</p> <p>11 Plaintiff's Exhibit 356 for transactions before?</p> <p>12 <b>A. Not that I recall.</b></p> <p>13 Q. Are the form contracts in Plaintiff's 356</p> <p>14 the contracts that you used to start the contracts</p> <p>15 that you ended up writing for SOLCO?</p> <p>16 <b>A. Yes.</b></p> <p>17 Q. Did you do anything else with the</p> <p>18 documents or information in Plaintiff's Exhibit 356?</p> <p>19 <b>A. Anything else besides what?</b></p> <p>20 Q. Besides using them as the basis for your</p> <p>21 transaction contracts.</p> <p>22 <b>A. I mean, I -- I reviewed them and revised</b></p> <p>23 <b>them. Not all of them were incorporated into the</b></p> <p>24 <b>form documents we prepared, no.</b></p> <p>25 Q. What, if any, conversations did you have</p>
191	<p>1 KM64, Mr. Neldon Johnson's signature already appears</p> <p>2 on behalf of XSun Energy, seller, correct?</p> <p>3 <b>A. I do not recognize that signature, and I</b></p> <p>4 <b>can't read it, so -- there is a signature.</b></p> <p>5 Q. Okay. The same signature appears on KM75,</p> <p>6 correct?</p> <p>7 <b>A. It appears so, yes.</b></p> <p>8 Q. And on KM77?</p> <p>9 <b>A. It appears so, yes.</b></p> <p>10 Q. In the cover e-mail for Plaintiff's 356,</p> <p>11 Mr. Clements offers you Bryan Bolander's contact</p> <p>12 information.</p> <p>13 Do you see that?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. Do you have any idea why he was</p> <p>16 recommending you speak with Mr. Bolander?</p> <p>17 <b>A. He was offering him as a source if I had</b></p> <p>18 <b>questions about the documents or how they'd treated</b></p> <p>19 <b>the program before.</b></p> <p>20 Q. And did you ever contact Mr. Bolander?</p> <p>21 <b>A. Not that I recall, no.</b></p> <p>22 Q. Down below it also looks like Mr. Clements</p> <p>23 is making you the offer to speak with the founder/  24 CEO of the engineering firm that owns the technology.</p> <p>25 Do you see that?</p>	193	<p>1 with Mr. Clements after he sent you these two e-mails</p> <p>2 in Plaintiff's 355 and 356?</p> <p>3 <b>A. I remember there were multiple telephone</b></p> <p>4 <b>conversations. I can't remember if there were</b></p> <p>5 <b>additional e-mails with additional documents, but</b></p> <p>6 <b>there were other conversations, but I don't remember</b></p> <p>7 <b>the substance of each conversation.</b></p> <p>8 Q. Were you asking Mr. Clements for more</p> <p>9 information or clarifying things? Did he offer you</p> <p>10 any more information?</p> <p>11 <b>A. I was asking to get -- for him to get me</b></p> <p>12 <b>all the information that he could get me.</b></p> <p>13 Q. I'm handing you what's been marked</p> <p>14 Plaintiff's Exhibit 357.</p> <p>15 (Discussion off the record.)</p> <p>16 Q. Plaintiff's 357 is Bates-marked KM91</p> <p>17 through 101. Mr. Birrell, 357 is an e-mail also from</p> <p>18 Mr. Clements to you, correct?</p> <p>19 <b>A. Correct.</b></p> <p>20 Q. And this one covers the technical specs</p> <p>21 for solar designs, right?</p> <p>22 <b>A. Correct.</b></p> <p>23 Q. I'd like to draw your attention to the</p> <p>24 second sentence.</p> <p>25 <b>A. Yes.</b></p>

<p style="text-align: right;">194</p> <p>1 Q. It says, "These are the same drawings that 2 were submitted to the feds for the 1603 grant program 3 that they were approved for." 4 Did I read that correctly? 5 <b>A. Yes.</b> 6 Q. Do you have an understanding of who "they" 7 is in that sentence, "that they were approved for"? 8 <b>A. I assume that's referring to the solar 9 lenses.</b> 10 Q. Do you have any understanding of the 1603 11 grant program? 12 <b>A. So the 1603 grant program is a federal 13 program that provides incentives for manufacturers of 14 various types of energy systems. You have to apply 15 for it and -- I don't remember the -- the details. I 16 looked into it back at the time, but I don't remember 17 all the details.</b> 18 Q. Were you familiar with the 1603 grant 19 program before the SOLCO client matter began? 20 <b>A. No.</b> 21 Q. Did you have an understanding of who 22 submitted drawings to the feds for the 1603 grant 23 program? 24 <b>A. I don't know who, specifically. I assumed 25 it was somebody associated with SOLCO or XSun Energy</b></p>	<p style="text-align: right;">196</p> <p>1 Q. Did anyone other than Mr. Clements tell 2 you that any technology related to SOLCO had been 3 approved for the 1603 grant program? 4 <b>A. Not that I recall.</b> 5 Q. Did Neldon Johnson say anything about that 6 in that meeting? 7 <b>A. Not that I recall.</b> 8 Q. What, if anything, Mr. Birrell, did you do 9 with the information and documents in Plaintiff's 10 Exhibit 357? 11 <b>A. I reviewed them.</b> 12 Q. Did you rely on any of this information in 13 drafting your memo? 14 <b>A. Yes, I -- I relied upon the representation 15 that they had been approved for a 1603 grant.</b> 16 Q. Did these technical drawings attached to 17 the e-mail -- did those mean anything to you or have 18 any impact on your analysis? 19 <b>A. Not significantly, no.</b> 20 Q. I'm showing you what's been marked 21 Plaintiff's Exhibit 358. For the record, that's KM1 22 through 4. 23 Mr. Birrell, we've talked about the client 24 matter at Kirton McConkie having been a SOLCO 25 representation, but I see at the top here XSun</p>
<p style="text-align: right;">195</p> <p>1 <b>or the producers of the solar lenses.</b> 2 Q. Did you ever ask? 3 <b>A. Not that I recall.</b> 4 Q. Did you ever ask for any documentation 5 reflecting that these lenses had somehow been 6 approved for the 1603 grant program? 7 <b>A. I remember requesting everything that he 8 had that would include that, but I don't know if 9 there was a specific request related to 1603.</b> 10 Q. Did you ever receive any documentation 11 showing that they had been approved for a 1603 grant? 12 <b>A. Not that I recall.</b> 13 Q. The following sentence in the e-mail says, 14 "These documents are in response to my request of the 15 Section 2 documents IAS/XSun Energy promised to 16 supply upon request." 17 Do you have any understand of what that 18 sentence means? 19 <b>A. No.</b> 20 Q. Had you made any sort of written requests 21 to Mr. Clements for information or documents? 22 <b>A. I may have. I don't specifically recall 23 any written requests.</b> 24 Q. Any idea what Section 2 documents are? 25 <b>A. No.</b></p>	<p style="text-align: right;">197</p> <p>1 Energy, LLC, is the addressee on this retainer 2 letter. 3 Do you see that? 4 <b>A. Yes.</b> 5 Q. Do you know why that is? 6 <b>A. I assume it was the name that Mr. Clements 7 gave to me to use for the engagement letter, but we 8 always referred to it as SOLCO in our discussions.</b> 9 Q. And do you have any understanding of the 10 relationship between Neldon Johnson and XSun Energy? 11 <b>A. My understanding is he was a or the owner 12 of XSun Energy.</b> 13 Q. And do you have any understanding of the 14 relationship between SOLCO and Neldon Johnson? 15 <b>A. He was a or the owner of SOLCO as well.</b> 16 Q. If you take a look at the last page, 17 please, KM4. Does that appear to be Neldon Johnson's 18 signature under the acknowledgment of client? 19 <b>A. It does.</b> 20 Q. Next to his name is written "International 21 Automated Systems, Inc." 22 Do you see that? 23 <b>A. Yes.</b> 24 Q. Do you have any idea why that company name 25 is on there when XSun is on the "to" field?</p>

198	200
<p>1 <b>A. I do not know why he wrote that in there.</b>  2 <b>It's my understanding it's a related company, another</b>  3 <b>one that Neldon is a or the owner of, but...</b>  4 Q. I'm showing you what's been marked  5 Plaintiff's Exhibit 359. For the record, Plaintiff's  6 Exhibit 359 is Bates-marked KM50 through 53. And  7 Plaintiff's 359 appears to be a letter from Anderson  8 Law Center, PC.  9 Do you see that?  10 <b>A. Yes.</b>  11 Q. The handwriting on the first page says,  12 "Written 11-15-10."  13 Do you see that?  14 <b>A. Yes.</b>  15 Q. Do you know whose handwriting this is?  16 <b>A. I do not.</b>  17 Q. Do you have any independent understanding  18 of when this letter was written?  19 <b>A. I do not.</b>  20 Q. When did you get a copy of this document?  21 <b>A. I don't remember exactly, but I received</b>  22 <b>it from Mr. Clements.</b>  23 Q. Did Mr. Clements say anything about this  24 letter?  25 <b>A. I don't remember any specific discussions</b></p>	<p>1 <b>memorandum.</b>  2 Q. Did you ask Mr. Clements any questions  3 about this letter?  4 <b>A. Not that I recall, no.</b>  5 Q. Do you believe you got Plaintiff's Exhibit  6 359 before or after you wrote your memorandum?  7 <b>A. Before.</b>  8 Q. I'm handing you what's been marked  9 Plaintiff's Exhibit 360, Bates-marked KM54 through  10 56. Mr. Birrell, how did you get Plaintiff's  11 Exhibit 360?  12 <b>A. I believe I received it from Mr. Clements.</b>  13 Q. Do you remember about when he gave it to  14 you?  15 <b>A. About the same time he was providing me</b>  16 <b>with the other documents and background information.</b>  17 Q. So before you wrote your memorandum?  18 <b>A. Yes.</b>  19 Q. Did Mr. Clements say anything about this  20 letter?  21 <b>A. Not that I remember specifically, no.</b>  22 Q. Are you familiar at all with Cloward &amp;  23 Sorensen, LLC?  24 <b>A. I am not.</b>  25 Q. Are you familiar with Bryan S. Sorenson,</p>
199	201
<p>1 <b>about this letter.</b>  2 Q. Do you remember any unspecific discussions  3 about this letter?  4 <b>A. No.</b>  5 Q. So you don't recall talking to  6 Mr. Clements about this?  7 <b>A. No.</b>  8 Q. And here we see this is addressed to  9 "Potential RaPower3 customer."  10 Do you see that?  11 <b>A. Yes.</b>  12 Q. Did that mean anything to you at the time  13 that you received this letter?  14 <b>A. My understanding, that RaPower3 was</b>  15 <b>another one of the related entities to SOLCO and</b>  16 <b>everything else. But beyond that, no.</b>  17 Q. What, if anything, did you do with this  18 letter?  19 <b>A. I reviewed it. I don't remember doing</b>  20 <b>anything else with it.</b>  21 Q. Did anything about this letter inform your  22 memorandum?  23 <b>A. I don't remember anything, specifically.</b>  24 <b>I mean, it addresses similar issues, but I don't</b>  25 <b>remember using this letter specifically with my</b></p>	<p>1 CPA?  2 <b>A. I am not.</b>  3 Q. What, if anything, did you do with  4 Plaintiff's Exhibit 360?  5 <b>A. I read it.</b>  6 Q. Did anything about Plaintiff's Exhibit 360  7 inform the analysis in your memorandum?  8 <b>A. I do not remember relying upon it</b>  9 <b>specifically, no.</b>  10 Q. I'm handing you what's been marked  11 Plaintiff's Exhibit 361, which is Bates-marked KM112  12 through 143. Would you please take a second and take  13 a look at that document?  14 <b>A. Yes.</b>  15 Q. Plaintiff's Exhibit 361 starts off with an  16 e-mail from to you Mr. Clements, correct?  17 <b>A. Correct.</b>  18 Q. And you're attaching generalized versions  19 of contract documents, right?  20 <b>A. Yes.</b>  21 Q. And, in fact, those generalized versions  22 are attached in Plaintiff's Exhibit 361?  23 <b>A. Yes.</b>  24 Q. And you said before that Mr. Clements  25 asked for certain changes from the form contracts</p>

202	<p>1 that he sent you.</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. What were those changes that he asked for?</p> <p>4 <b>A. I do not remember the specific changes,</b></p> <p>5 <b>but it related to pricing and other deal points.</b></p> <p>6 Q. When you say "other deal points," what</p> <p>7 does that mean?</p> <p>8 <b>A. I don't remember the terms of the original</b></p> <p>9 <b>contracts that he sent over that well, but he --</b></p> <p>10 <b>we -- we had discussions of how they wanted the --</b></p> <p>11 <b>the program to work going forward, and the goal was</b></p> <p>12 <b>to make sure that the -- the new contracts reflected</b></p> <p>13 <b>how they wanted it to work. I don't remember exactly</b></p> <p>14 <b>how that differed from how the previous contracts</b></p> <p>15 <b>worked.</b></p> <p>16 Q. Do you remember generally what those goals</p> <p>17 were?</p> <p>18 <b>A. So we would -- would sell the -- the solar</b></p> <p>19 <b>lenses to the purchaser. The purchaser would then</b></p> <p>20 <b>enter into a lease agreement with the -- with the</b></p> <p>21 <b>operator that would install, maintain and -- I mean,</b></p> <p>22 <b>typically a person that buys solar lenses by</b></p> <p>23 <b>themselves can't connect them to a utility, and so it</b></p> <p>24 <b>was to put in place the people that they needed to be</b></p> <p>25 <b>able to generate the energy and sell that energy and</b></p>
203	<p>1 <b>share in the income that was generated by the sale of</b></p> <p>2 <b>that energy.</b></p> <p>3 Q. Any other goals?</p> <p>4 <b>A. That was primarily the -- those were it,</b></p> <p>5 <b>yeah.</b></p> <p>6 Q. Did you talk with Mr. Clements at all</p> <p>7 about why they might have thought the form documents</p> <p>8 they sent you didn't accomplish that?</p> <p>9 <b>A. We didn't have any -- no. Like I say, I</b></p> <p>10 <b>mean, I think that -- I know that the pricing was</b></p> <p>11 <b>different. I know that was one piece of what was</b></p> <p>12 <b>different, but I don't remember all the specifics of</b></p> <p>13 <b>what they were changing from how it was before.</b></p> <p>14 Q. If there are changes between the contracts</p> <p>15 that Mr. Clements sent you and the contracts that you</p> <p>16 sent back to him, were those changes only as the</p> <p>17 result of what -- things that they asked for?</p> <p>18 <b>A. There may have been also, as part of my</b></p> <p>19 <b>review, provisions that I thought would be</b></p> <p>20 <b>appropriate to include in a contract that they didn't</b></p> <p>21 <b>specifically ask for. But, again, I don't remember</b></p> <p>22 <b>all the differences at this point.</b></p> <p>23 Q. And if you made changes that were, to your</p> <p>24 mind, appropriate but that the client had not asked</p> <p>25 for, did you explain those changes?</p>
204	<p>1 <b>A. I don't remember having to explain any</b></p> <p>2 <b>specific provisions or changes, but I may have.</b></p> <p>3 Q. Would you take a look, please, at KM141</p> <p>4 through 144?</p> <p>5 <b>A. Yes.</b></p> <p>6 Q. That portion of Plaintiff's Exhibit 361 is</p> <p>7 a secured promissory note, right?</p> <p>8 <b>A. Yes.</b></p> <p>9 Q. Did Mr. Clements ask you to add a</p> <p>10 promissory note to the transaction documents?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. Did he say why?</p> <p>13 <b>A. The documents anticipated that there --</b></p> <p>14 <b>the purchase price would not be paid entirely up</b></p> <p>15 <b>front, and so there would be a promissory note for</b></p> <p>16 <b>the balance.</b></p> <p>17 Q. I'm looking back, Mr. Birrell, at</p> <p>18 Plaintiff's Exhibit 356 and I'm not seeing a</p> <p>19 promissory note in those documents.</p> <p>20 <b>A. Correct.</b></p> <p>21 Q. So is the promissory note something that</p> <p>22 you wrote?</p> <p>23 <b>A. Presumably, yes.</b></p> <p>24 Q. Now I'd like to turn your attention to</p> <p>25 page KM124 in Plaintiff's Exhibit 361. This is the</p>
205	<p>1 sample operation and maintenance agreement, correct?</p> <p>2 <b>A. Correct.</b></p> <p>3 Q. The entity that would purportedly be bound</p> <p>4 by this agreement is LTB, LLC, correct?</p> <p>5 <b>A. Correct.</b></p> <p>6 Q. Do you have any understanding about what</p> <p>7 LTB, LLC, is?</p> <p>8 <b>A. My understanding is that it was -- it was</b></p> <p>9 <b>not a related company to SOLCO and all the rest, that</b></p> <p>10 <b>it was an unrelated third-party operator that would</b></p> <p>11 <b>operate and maintain the solar lenses as they were</b></p> <p>12 <b>installed.</b></p> <p>13 Q. Do you know who the owner of LTB, LLC, was</p> <p>14 at this time?</p> <p>15 <b>A. I do not.</b></p> <p>16 Q. Did you ever -- I should say this. How</p> <p>17 did you get the information about LTB, LLC?</p> <p>18 <b>A. I believe Mr. Clements provided that to</b></p> <p>19 <b>me.</b></p> <p>20 Q. Did you do any independent research about</p> <p>21 LTB, LLC?</p> <p>22 <b>A. I did not.</b></p> <p>23 Q. Would you take a look, please, at</p> <p>24 paragraph 2.1 entitled Appointment?</p> <p>25 <b>A. Yes.</b></p>

206	<p>1 Q. It reads, "The owner appoints the operator 2 and the operator accepts the appointment to perform 3 routine O&amp;M services, additional services and 4 transition services (as such terms are defined in the 5 operating and safety guidelines ('the guidelines') 6 provided by SOLCO to operator, a copy of which is 7 attached hereto as Exhibit B and incorporated herein 8 by this reference)." 9 Did I read that correctly? 10 <b>A. Yes.</b> 11 Q. Did you ever receive operating and safety 12 guidelines? 13 <b>A. Not that I recall. My understanding is 14 there were still discussions between SOLCO and LTB as 15 to what would be included in those.</b> 16 Q. If you look back to your cover e-mail, 17 Mr. Birrell, sort of the second half of that says, 18 "As before, the operation and maintenance agreement 19 basically states that the operator is required to 20 provide the services detailed in the operation and 21 maintenance guidelines. If we don't actually have 22 such guidelines to attach, then we will need to 23 instead explain the services to be provided in the 24 operation and maintenance agreement itself." 25 Did I read that correctly?</p>	208	<p>1 Q. Who told you that Neldon Johnson was the 2 appropriate contact for LTB? 3 <b>A. I believe that was Mr. Clements.</b> 4 Q. And why, Mr. Birrell, did you believe LTB, 5 LLC, was unrelated to any other party to this 6 transaction? 7 <b>A. That's what Mr. Clements told me, is my 8 recollection.</b> 9 Q. Let's take a look, please, at the solar 10 lenses purchase agreement which starts at KM113. 11 This solar lens purchase agreement at paragraph five, 12 which is on KM114 -- would you just go ahead and read 13 that paragraph to yourself? The title is Operating 14 Site and Guidelines. 15 <b>A. Yes.</b> 16 Q. This paragraph also references the safety 17 and operating guidelines that we talked about a 18 moment ago. 19 Do you see that? 20 <b>A. Yes.</b> 21 Q. So if the safety and operating guidelines 22 are not attached, ultimately, to the solar lens 23 purchase agreement, what does that mean? 24 <b>A. Likewise means that agreement is 25 incomplete.</b></p>
207	<p>1 <b>A. Yes.</b> 2 Q. So why, if you didn't have the guidelines 3 themselves, would you need to explain the services to 4 be provided in the agreement itself? 5 <b>A. Because that's the -- in terms of what LTB 6 was committing to do, we had to say someplace, Here 7 is what the expectations are of the services that you 8 are going to provide. Those services were -- this 9 initial draft assumed that those services would be 10 summarized in those guidelines, which would be 11 attached as an exhibit. If we didn't have that 12 exhibit to attach, I was saying that we needed to 13 summarize those services in the agreement itself.</b> 14 Q. And if those guidelines are not attached 15 and those services are not described in the agreement 16 itself, what then? 17 <b>A. Then the agreement is incomplete.</b> 18 Q. If you take a look, please -- sorry for 19 jumping around here. We're back in the operation and 20 maintenance agreement on page KM137. At the top of 21 that page it's basically saying any notices to the 22 operator are to go to LTB, LLC, with attention to 23 Neldon Johnson. 24 Do you see that? 25 <b>A. Yes.</b></p>	209	<p>1 Q. Would you take a look, please, at 2 paragraph two of the solar lens purchase agreement, 3 which starts on KM113 and goes on to 114? 4 <b>A. Yes.</b> 5 Q. Correct me if I'm wrong, but I'm going to 6 try to summarize quickly. The purchase agreement 7 anticipates a down payment being made at the time the 8 purchase agreement is executed, correct? 9 <b>A. Yes.</b> 10 Q. And then it anticipates that 30 11 substantially equal annual payments will be made on 12 the anniversary date of the purchase agreement. 13 <b>A. Correct.</b> 14 Q. Did Mr. Clements tell you to structure the 15 payments like that? 16 <b>A. I was -- I do not specifically recall that 17 discussion, but I don't think I would have come up 18 with the payment terms on my own, so I assume that I 19 got them from him.</b> 20 Q. Mr. Birrell, do you know what, if 21 anything, Mr. Clements did with these generalized 22 contracts in Plaintiff's 361 after you sent them to 23 him? 24 <b>A. I do not.</b> 25 Q. So the last e-mail that we took a look at</p>

210	<p>1 was around August 2012, and then you're sending the</p> <p>2 generalized contracts in October 2012. Do you recall</p> <p>3 having received any information from Mr. Clements</p> <p>4 during that period, or were you just working on the</p> <p>5 docs and the memo?</p> <p>6 <b>A. I don't remember the dates of any</b></p> <p>7 <b>communications back and forth. In my production I,</b></p> <p>8 <b>you know, indicate e-mails that I received from him</b></p> <p>9 <b>were part of that production. I don't remember the</b></p> <p>10 <b>dates of all of those.</b></p> <p>11 MS. HEALY GALLAGHER: Off the record,</p> <p>12 please.</p> <p>13 (A break was taken from 9:45 a.m. to</p> <p>14 9:50 a.m.)</p> <p>15 MS. HEALY GALLAGHER: We're back on the</p> <p>16 record, Mr. Birrell, after a brief break.</p> <p>17 Q. Did you talk to anyone about the facts of</p> <p>18 this case during the break?</p> <p>19 <b>A. No.</b></p> <p>20 Q. All right. I've handed you what's been</p> <p>21 marked Plaintiff's Exhibit 362. Have you had a</p> <p>22 chance to take a look at that?</p> <p>23 <b>A. Yes.</b></p> <p>24 Q. And, Mr. Birrell, Plaintiff's Exhibit 362</p> <p>25 is an e-mail, plus a document that contains the SOLCO</p>	212	<p>1 <b>underlying fact.</b></p> <p>2 Q. Where did you get that fact?</p> <p>3 <b>A. It was my understanding that they would.</b></p> <p>4 <b>Maybe I didn't do as much diligence as I should have</b></p> <p>5 <b>in terms of following up on the actual installation</b></p> <p>6 <b>agreements with the utility companies, but it was my</b></p> <p>7 <b>assumption that the solar lenses worked to capture</b></p> <p>8 <b>solar energy, worked to convert it to the solar</b></p> <p>9 <b>processing, and that could then be transmitted to a</b></p> <p>10 <b>utility to generate electricity.</b></p> <p>11 Q. And where did you get the facts that</p> <p>12 supported those assumptions?</p> <p>13 <b>A. From the materials that I received from</b></p> <p>14 <b>Mr. Clements.</b></p> <p>15 Q. And the conversation from Mr. Johnson?</p> <p>16 <b>A. And the conversations with Mr. Johnson,</b></p> <p>17 <b>yes.</b></p> <p>18 Q. And just to clarify, I believe you said --</p> <p>19 and correct me if I'm wrong -- that you thought that</p> <p>20 the solar lenses would work or that they did work?</p> <p>21 <b>A. My understanding was that they did work,</b></p> <p>22 <b>and that they would be attached to the overall system</b></p> <p>23 <b>that they needed to transfer the energy that they</b></p> <p>24 <b>captured to a utility provider that converted it to</b></p> <p>25 <b>energy.</b></p>
211	<p>1 memorandum we've been discussing, correct?</p> <p>2 <b>A. Correct.</b></p> <p>3 Q. And this is the first version of the</p> <p>4 memorandum that you sent to anybody, right?</p> <p>5 <b>A. I believe so, yes.</b></p> <p>6 Q. Okay. Plaintiff's Exhibit 362 is</p> <p>7 Bates-marked KM148 through 163.</p> <p>8 Let's take a look, please, at the</p> <p>9 memorandum starting on KM150. The first sentence of</p> <p>10 the executive summary says, "The solar lenses that</p> <p>11 buyers purchase from seller ('the solar lenses') will</p> <p>12 qualify as 'energy property' that is eligible for the</p> <p>13 energy tax credit under Code Section 48."</p> <p>14 Did I read that correctly?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. Where did you get the information to</p> <p>17 support that sentence?</p> <p>18 <b>A. Based upon the research and analysis that</b></p> <p>19 <b>I had performed, the factual information that had</b></p> <p>20 <b>been provided by Mr. Clement, and my review of</b></p> <p>21 <b>applicable laws and authorities.</b></p> <p>22 Q. So what are the facts that support that</p> <p>23 statement?</p> <p>24 <b>A. So the key fact is that the solar lens</b></p> <p>25 <b>works and generates electricity. That's the key</b></p>	213	<p>1 Q. And if the solar lenses were not part of</p> <p>2 the system that worked, what would happen?</p> <p>3 <b>A. Then they would not be eligible for the</b></p> <p>4 <b>credit because there would not be any electricity</b></p> <p>5 <b>being generated by the lenses.</b></p> <p>6 Q. If you had known, at the time you wrote</p> <p>7 this memorandum, that there was no system that would</p> <p>8 work using the lenses to convert solar radiation to</p> <p>9 any sort of energy, would you have written that</p> <p>10 sentence?</p> <p>11 <b>A. I would not have written the memorandum.</b></p> <p>12 Q. Turn to the next page, KM151, under</p> <p>13 Factual Background.</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. The first sentence says, "The solar lenses</p> <p>16 will be purchased by buyers that are (i) corporations</p> <p>17 or limited liability companies organized in the</p> <p>18 United States, (ii) neither tax-exempt nor</p> <p>19 governmental entities and (iii) taxed as subchapter C</p> <p>20 corporation for federal income tax purposes."</p> <p>21 Did I read that correctly?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. Where did you get the information to</p> <p>24 support that sentence?</p> <p>25 <b>A. Again, based upon my discussions with</b></p>

<p style="text-align: right;">214</p> <p>1 <b>Mr. Clements, they wanted to be -- start marketing</b></p> <p>2 <b>the lenses to the -- the corporate market. And so</b></p> <p>3 <b>the analysis was what it takes for an entity taxed as</b></p> <p>4 <b>a C corporation -- a U.S. C corporation to qualify</b></p> <p>5 <b>for the energy tax credit. So it didn't address</b></p> <p>6 <b>individuals or partnerships that are passthrough</b></p> <p>7 <b>entities or foreign entities or other things like</b></p> <p>8 <b>that.</b></p> <p>9 Q. The next sentence says, "The solar lenses</p> <p>10 will be purchased pursuant to a solar lenses purchase</p> <p>11 agreement that is substantially similar to the</p> <p>12 agreement set forth in Exhibit A hereto ('the</p> <p>13 purchase agreement')."</p> <p>14 Did I read that correctly?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. And was that the solar lenses purchase</p> <p>17 agreement identified in Plaintiff's Exhibit 361?</p> <p>18 <b>A. Yes.</b></p> <p>19 Q. If the purchase agreement used to</p> <p>20 consummate this transaction was not substantially</p> <p>21 similar to the purchase agreement that you drafted,</p> <p>22 what happens to the analysis in your memo?</p> <p>23 <b>A. Depends upon what the differences were in</b></p> <p>24 <b>the purchase agreement, but it could change the</b></p> <p>25 <b>analysis in the memo.</b></p>	<p style="text-align: right;">216</p> <p>1 documents that Mr. Clements sent to you were your</p> <p>2 source of information for that sentence?</p> <p>3 <b>A. Correct.</b></p> <p>4 Q. The next sentence says, "The Treasury</p> <p>5 Department has made a grant under Section 1603 of the</p> <p>6 American Recovery and Reinvestment Act of 2009 with</p> <p>7 respect to the same model of solar lenses as the</p> <p>8 solar lenses and related equipment."</p> <p>9 Did I read that first part of the sentence</p> <p>10 correctly?</p> <p>11 <b>A. Yes.</b></p> <p>12 Q. Where did you get that information?</p> <p>13 <b>A. That was the representation from</b></p> <p>14 <b>Mr. Clement.</b></p> <p>15 Q. And if the Treasury Department had not</p> <p>16 made a 1603 grant with respect to the solar lenses,</p> <p>17 how, if at all, might that change your analysis?</p> <p>18 <b>A. The analysis would still be the same. You</b></p> <p>19 <b>do not have to have received the 1603 grant in order</b></p> <p>20 <b>to qualify for an energy tax credit.</b></p> <p>21 Q. Would you take a look, please, at the</p> <p>22 third paragraph on KM151 starting, "All of the solar</p> <p>23 lenses."</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Just go ahead and read that to yourself,</p>
<p style="text-align: right;">215</p> <p>1 Q. The next sentence in the Factual</p> <p>2 Background reads, "The solar lenses were manufactured</p> <p>3 by International Automated Systems or one of its</p> <p>4 affiliates, and consist of thin-film solar lenses</p> <p>5 that focus the sun's energy, which energy is</p> <p>6 collected and transmitted to produce heated steam for</p> <p>7 power generation and other uses."</p> <p>8 Did I read that correctly?</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. Where did you get the information that the</p> <p>11 focused energy is collected and transmitted to</p> <p>12 produce heated steam for power generation and other</p> <p>13 uses?</p> <p>14 <b>A. I do not recall a specific source for that</b></p> <p>15 <b>information.</b></p> <p>16 Q. Would it have been anyone other than</p> <p>17 Mr. Clements or Mr. Johnson?</p> <p>18 <b>A. No. Or the documents.</b></p> <p>19 Q. So either Mr. Clements, Mr. Johnson or the</p> <p>20 documents --</p> <p>21 <b>A. Documents that I received from</b></p> <p>22 <b>Mr. Clements, yes.</b></p> <p>23 Q. Sorry. Let me just finish the question</p> <p>24 for the record.</p> <p>25 So either Mr. Clements, Mr. Johnson or the</p>	<p style="text-align: right;">217</p> <p>1 please, and let me know when you are done.</p> <p>2 <b>A. Yes.</b></p> <p>3 Q. Where did you get the information set</p> <p>4 forth in that paragraph?</p> <p>5 <b>A. Based upon discussions with Mr. Clements.</b></p> <p>6 <b>I can't remember if I specifically confirmed with him</b></p> <p>7 <b>that these were new solar lenses, not resold solar</b></p> <p>8 <b>lenses, but that was my understanding.</b></p> <p>9 Q. The second sentence of the subsequent</p> <p>10 paragraph -- well, let me start with this: The next</p> <p>11 paragraph addresses the operation and maintenance</p> <p>12 agreement.</p> <p>13 Do you see that?</p> <p>14 <b>A. Yes.</b></p> <p>15 Q. And the next paragraph identifies LTB,</p> <p>16 LLC, as the operator for the operation and</p> <p>17 maintenance agreement, right?</p> <p>18 <b>A. Correct.</b></p> <p>19 Q. And then the paragraph states, "The</p> <p>20 operator is a for-profit commercial enterprise that</p> <p>21 is not related to either buyer or seller through</p> <p>22 common ownership."</p> <p>23 Did I read that correctly?</p> <p>24 <b>A. Correct.</b></p> <p>25 Q. Where did you get that information?</p>



218	<p>1 <b>A. So the part related to seller is, again,</b></p> <p>2 <b>based upon the representations of Mr. Clements.</b></p> <p>3 <b>With respect to buyer, since we didn't</b></p> <p>4 <b>know who buyer would be at that time, that was just a</b></p> <p>5 <b>required assumption.</b></p> <p>6 Q. How, if at all, would your analysis in</p> <p>7 this memorandum change if the seller and the operator</p> <p>8 were related through common ownership?</p> <p>9 <b>A. It made a difference, but I do not</b></p> <p>10 <b>remember at this point what the impact would be. But</b></p> <p>11 <b>the analysis did depend upon that separation.</b></p> <p>12 Q. Take a look, please, at page KM153, the</p> <p>13 third paragraph down which discusses cash flow.</p> <p>14 Do you see that?</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. The second sentence of that paragraph</p> <p>17 says, "Here, it is anticipated that the annual</p> <p>18 revenue stream (from the rental payments) will be</p> <p>19 substantially greater than the annual debt payments</p> <p>20 (the installment payments), which means that the</p> <p>21 buyers should have substantial positive cash flows."</p> <p>22 Did I read that correctly?</p> <p>23 <b>A. Yes.</b></p> <p>24 Q. Where did you get the information that the</p> <p>25 annual revenue stream was anticipated to be</p>	220	<p>1 <b>five-year property.</b></p> <p>2 Q. So, Mr. Birrell, Plaintiff's Exhibit 362,</p> <p>3 the e-mail, was sent Wednesday, October 31st, 2012.</p> <p>4 What, if any, follow-up do you recall after this?</p> <p>5 <b>A. So after this, again, Glenda Johnson</b></p> <p>6 <b>contacted either me or my assistant, requesting some</b></p> <p>7 <b>typographical errors be corrected. We made those</b></p> <p>8 <b>changes and re-provided them. I do not remember any</b></p> <p>9 <b>further contact from anyone associated with SOLCO.</b></p> <p>10 Q. I'm handing you what's been marked</p> <p>11 Plaintiff's Exhibit 363. Would you take a look at</p> <p>12 that, please, and let me know when you're done?</p> <p>13 <b>A. Uh-huh (affirmative).</b></p> <p>14 Q. That's Bates numbers KM164 through 208.</p> <p>15 Mr. Birrell, this is an e-mail from you to</p> <p>16 Mr. Clements on November 9, 2012.</p> <p>17 Do you see that?</p> <p>18 <b>A. Yeah.</b></p> <p>19 Q. Okay.</p> <p>20 <b>A. Yes.</b></p> <p>21 Q. And you are sending a new set of documents</p> <p>22 to Mr. Clements, right?</p> <p>23 <b>A. Correct.</b></p> <p>24 Q. Do you recall what prompted this e-mail</p> <p>25 and the changes?</p>
219	<p>1 substantially greater than the annual debt payments?</p> <p>2 <b>A. That was from Mr. Clements and</b></p> <p>3 <b>Mr. Johnson, based upon the rates that they expected</b></p> <p>4 <b>to be able to sell the energy for.</b></p> <p>5 Q. Did you have any other source for that</p> <p>6 piece of information?</p> <p>7 <b>A. Not that I recall, no.</b></p> <p>8 Q. Actually, could you take a look back,</p> <p>9 please, at page KM150? The first sentence of the</p> <p>10 last paragraph says, "The solar lenses will be</p> <p>11 eligible for depreciation under Code Section 168(a)</p> <p>12 as five-year property."</p> <p>13 Where did you get the facts to support</p> <p>14 that statement?</p> <p>15 <b>A. The facts were based upon the materials</b></p> <p>16 <b>and information provided by Mr. Clements and</b></p> <p>17 <b>Mr. Johnson.</b></p> <p>18 Q. And what -- which of those facts were</p> <p>19 important to your statement here?</p> <p>20 <b>A. The -- what the lenses were themselves.</b></p> <p>21 <b>And I can't remember the exact language used in 168</b></p> <p>22 <b>for that category of five-year property, but based</b></p> <p>23 <b>upon my understanding of what the solar lenses were</b></p> <p>24 <b>and the description of the categories, I believe it</b></p> <p>25 <b>qualified as five-year prop -- they qualified as</b></p>	221	<p>1 <b>A. I don't recall if this was in response to</b></p> <p>2 <b>when Glenda requested some changes or whether</b></p> <p>3 <b>Mr. Clements had requested some changes. I don't</b></p> <p>4 <b>recall.</b></p> <p>5 Q. Do you recall what those changes were?</p> <p>6 <b>A. I do not.</b></p> <p>7 Q. Do you recall what, if any, communications</p> <p>8 you had with Mr. Clements between October 31st and</p> <p>9 November 8th?</p> <p>10 <b>A. I do not.</b></p> <p>11 Q. I'm handing you what's been marked</p> <p>12 Plaintiff's Exhibit 364, Bates numbers KM14 through</p> <p>13 25. Take a look, please, at page KM15, specifically</p> <p>14 at the line item for September 25, 2012.</p> <p>15 <b>A. Uh-huh (affirmative).</b></p> <p>16 Q. Do you see that?</p> <p>17 <b>A. Yes.</b></p> <p>18 Q. The description says, "Conference with</p> <p>19 N. Johnson and J. Clement re: revisions to documents</p> <p>20 for standard transactions."</p> <p>21 Did I read that correctly?</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. Do you recall, was this the meeting that</p> <p>24 you remembered?</p> <p>25 <b>A. I do not recall if that was a telephone</b></p>

<p style="text-align: right;">222</p> <p>1 conference or an in-person meeting. There was only  2 one in-person meeting that Mr. Johnson was there.  3 But I don't recall, specifically.  4 Q. And, actually -- never mind.  5 Do you remember what you discussed with  6 Mr. Johnson and Mr. Clement during the  7 September meeting?  8 <b>A. Not specifically, no.</b>  9 Q. So this conversation is after Mr. Clements  10 had sent you at least some documents and before you  11 finalized your memorandum. Does that at all ring a  12 bell about what you all might have been talking  13 about?  14 <b>A. I assume, based upon the description, that</b>  15 <b>it was talking about the terms of the -- for what</b>  16 <b>the -- you know, the purchase price and the other</b>  17 <b>terms for those agreements, but I don't remember what</b>  18 <b>specific details were -- were discussed.</b>  19 Q. Would you take a look, please, at KM21?  20 The line items on this page are from early  21 November 2012.  22 Do you see that?  23 <b>A. Yes.</b>  24 Q. And they describe questions, comments, and  25 then a telephone conference with J. Clement about the</p>	<p style="text-align: right;">224</p> <p>1 Christensen?  2 <b>A. No.</b>  3 Q. Did you have any other correspondence with  4 Mr. Johnson about Mr. Alba or Snow Christensen?  5 <b>A. I did not.</b>  6 Q. And did you ever provide Mr. Alba or Snow  7 Christensen with any documents related to the SOLCO  8 matter?  9 <b>A. I did not.</b>  10 Q. I'm showing you what's been marked  11 Plaintiff's Exhibit 366. Take a look at that,  12 please, and let me know when you're done.  13 <b>A. Yes.</b>  14 Q. And, Mr. Birrell, this is an e-mail from  15 your assistant, Jill Cottam, correct?  16 <b>A. Yes.</b>  17 Q. And it contains a trailing e-mail from  18 Glenda Johnson, right?  19 <b>A. Yes.</b>  20 Q. Mr. Birrell, is this the first  21 communication that you had from Glenda Johnson?  22 <b>A. So Glenda was at the meeting that we</b>  23 <b>discussed before, and so there was nonsubstantive</b>  24 <b>discussions with her there, just pleasantries. But</b>  25 <b>this is the first -- this is the only e-mail I recall</b></p>
<p style="text-align: right;">223</p> <p>1 transaction documents and the recent analysis  2 relating to same.  3 Do you see that?  4 <b>A. Yes.</b>  5 Q. So this is after you had sent the  6 memorandum and your transaction documents, right?  7 <b>A. The initial drafts of them, yes.</b>  8 Q. Great. Does this jog your memory at all  9 about what Mr. Clements' comments and questions were?  10 <b>A. It does not.</b>  11 Q. Did Mr. Clements ever say that comments or  12 questions were coming from someone other than him?  13 <b>A. Not that I recall.</b>  14 Q. Do you remember any information about  15 these conversations?  16 <b>A. I do not.</b>  17 Q. I'm showing you what's been marked  18 Plaintiff's Exhibit 365, Bates number KM211. Just  19 take a look at this e-mail, Mr. Birrell, and let me  20 know when you're done reading it.  21 <b>A. Yes.</b>  22 Q. Did you ever speak with Neldon Johnson  23 about anything to do with this e-mail?  24 <b>A. I did not.</b>  25 Q. Nothing to do with Sam Alba, Snow</p>	<p style="text-align: right;">225</p> <p>1 ever receiving from her, and I don't recall ever  2 speaking to her on the phone.  3 Q. Okay. And right. I was just going to  4 ask, do you know how she got your assistant's e-mail  5 address?  6 <b>A. I do not. I -- I would assume -- I mean,</b>  7 <b>my assistant must have given it to her, that she</b>  8 <b>called asking -- saying that she wanted to send some</b>  9 <b>stuff, and my assistant must have given her e-mail</b>  10 <b>address instead of my e-mail address, for some</b>  11 <b>reason. I don't know.</b>  12 Q. Sorry if you've already said this, but  13 just to be clear, is this the only information  14 that -- substantive information that you received  15 from Glenda Johnson about the SOLCO matter?  16 <b>A. Yes.</b>  17 Q. And you made the corrections that  18 Miss Johnson requested?  19 <b>A. Yes.</b>  20 Q. I'm showing you what's been marked  21 Plaintiff's Exhibit 367. Take a look at that and let  22 me know when you are done. Plaintiff's Exhibit 367  23 is KM213 through 226.  24 <b>A. Yes.</b>  25 Q. And in Plaintiff's Exhibit 367,</p>

226	<p>1 Mr. Birrell, you're sending the corrected version of</p> <p>2 the memo to Ms. Johnson?</p> <p>3 <b>A. Yes.</b></p> <p>4 Q. Did you ever question whether Ms. Johnson</p> <p>5 had authority to communicate with you on behalf of</p> <p>6 the client in this matter?</p> <p>7 <b>A. No.</b></p> <p>8 Q. Do you recall whether you changed anything</p> <p>9 other than what Ms. Johnson specifically asked you to</p> <p>10 change?</p> <p>11 <b>A. I do not recall making any other changes.</b></p> <p>12 Q. I'm showing you what has been marked as</p> <p>13 Plaintiff's Exhibit 368. Please take a look at that</p> <p>14 and let me know when you're done.</p> <p>15 <b>A. Yes.</b></p> <p>16 Q. With this e-mail in Plaintiff's 368,</p> <p>17 Mr. Birrell, you're, in part, apologizing to</p> <p>18 Ms. Johnson that she had not received a copy yet,</p> <p>19 because it was your understanding that Mr. Clements</p> <p>20 was going to send them to her. Right?</p> <p>21 <b>A. Correct.</b></p> <p>22 Q. Where did you get that understanding?</p> <p>23 <b>A. My understanding was that Mr. Clements</b></p> <p>24 <b>wasn't going to provide them to her specifically, but</b></p> <p>25 <b>to Neldon, and I thought that that had happened when</b></p>
227	<p>1 <b>I provided them to him. I provided them to</b></p> <p>2 <b>Mr. Clements.</b></p> <p>3 Q. Sure.</p> <p>4 Where did you get that understanding -- or</p> <p>5 the assumption that Mr. Clements would send the</p> <p>6 documents to Mr. Johnson?</p> <p>7 <b>A. Based upon his representation and the</b></p> <p>8 <b>nature of his relationship with -- between he and</b></p> <p>9 <b>Mr. Johnson and SOLCO, that the documents were going</b></p> <p>10 <b>to be used by SOLCO. So I thought he would -- I</b></p> <p>11 <b>mean, he was kind of the intermediary between me and</b></p> <p>12 <b>Mr. Johnson, and so I assumed that the information</b></p> <p>13 <b>that I provided to him would go along to Mr. Johnson.</b></p> <p>14 Q. Mr. Birrell, it looks like in this e-mail</p> <p>15 in Plaintiff's 368 you're simply forwarding the exact</p> <p>16 same form agreements that you had sent to</p> <p>17 Mr. Clements in the first place. Is that right?</p> <p>18 <b>A. Correct.</b></p> <p>19 Q. I'm handing you what's been marked</p> <p>20 Plaintiff's Exhibit 293. Please take a look at that</p> <p>21 and let me know when you're done. I will tell you,</p> <p>22 I'm specifically interested in your attention on the</p> <p>23 page Gregg_P&amp;R-003230.</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. Okay. At this page there is a document</p>
228	<p>1 entitled IRS Audit Info for Tax Preparers and Their</p> <p>2 Clients.</p> <p>3 Do you see that?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. Numbered paragraph one, the title is, The</p> <p>6 Kirton McConkie Tax Attorney Opinion Letter.</p> <p>7 Would you please take a look at those</p> <p>8 subparagraphs there, read them to yourself and let me</p> <p>9 know when you're done?</p> <p>10 <b>A. Yes.</b></p> <p>11 Q. Do you have any understanding of the</p> <p>12 context of these two paragraphs? Oh, I'll start with</p> <p>13 one. Paragraph 1A. "What the IRS is saying: The</p> <p>14 letter has been 'rescinded.'"</p> <p>15 Do you have any understanding of the</p> <p>16 context for that?</p> <p>17 <b>A. My assumption is that's based upon our</b></p> <p>18 <b>discussions with Mr. Law -- Agent Lawson, with the</b></p> <p>19 <b>IRS, where, in connection with those discussions, we</b></p> <p>20 <b>sent a cease-and-desist letter. I don't remember</b></p> <p>21 <b>ever using the term "rescinded,"but there was a</b></p> <p>22 <b>cease-and-desist letter that the memo should not be</b></p> <p>23 <b>used as a marketing tool to -- for promoting the sale</b></p> <p>24 <b>of the lenses to individuals.</b></p> <p>25 Q. Uh-huh.</p>
229	<p>1 Mr. Birrell, you recall we talked in</p> <p>2 February about a visit that Mr. Greg Shepard made to</p> <p>3 Kirton McConkie in December 2013?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. Did you, Mr. Birrell, speak with</p> <p>6 Mr. Shepard at that time?</p> <p>7 <b>A. I did not.</b></p> <p>8 Q. Did you undertake any follow-up with any</p> <p>9 person at your clients for this case after</p> <p>10 Mr. Shepard visited Kirton McConkie in December 2013?</p> <p>11 <b>A. I don't remember that -- not that I</b></p> <p>12 <b>recall, no. The last contact for me to SOLCO and</b></p> <p>13 <b>Neldon Johnson and stuff was the sending of the</b></p> <p>14 <b>cease-and-desist letter. I don't remember the exact</b></p> <p>15 <b>date that it was sent, but it was my recollection</b></p> <p>16 <b>that was prior to that meeting with Mr. Shepard,</b></p> <p>17 <b>because that's what's precipitated him coming to the</b></p> <p>18 <b>firm.</b></p> <p>19 Q. When you draft Word documents,</p> <p>20 Mr. Birrell, do you use an auto update feature for</p> <p>21 the date?</p> <p>22 <b>A. I do not. It is sometimes built into some</b></p> <p>23 <b>form documents, but I do not, as a practice -- as a</b></p> <p>24 <b>normal practice, do not insert those, no.</b></p> <p>25 Q. Okay. I'm handing you, Mr. Birrell,</p>

<p style="text-align: right;">230</p> <p>1 what's been marked as Plaintiff's Exhibit 370.  2 Please take a look at that and let me know when you  3 are ready.  4 <b>A. Yes.</b>  5 Q. Plaintiff's Exhibit 370 is Bates-marked  6 KM274 through 233. Mr. Birrell, is Plaintiff's 370  7 cease-and-desist letter that we've been discussing?  8 <b>A. Yes.</b>  9 Q. So one of the things I'm curious about --  10 and that's why I asked about the auto update for the  11 dates, is because I'm just trying to get an  12 understanding of the timeline here, and I'm not  13 100 percent clear. So the date on Plaintiff's  14 Exhibit 370 is January 10, 2014.  15 <b>A. Uh-huh (affirmative).</b>  16 Q. Now, that date is after December 2013,  17 when Mr. Shepard came to visit.  18 <b>A. Correct.</b>  19 Q. But you thought his visit might have been  20 precipitated by this letter.  21 <b>A. So I thought it had been. It may have</b>  22 <b>been just based upon our discussions with Mr. Lawson</b>  23 <b>that had been communicated over to them, and then we</b>  24 <b>wrote that in response to that. I remember that we</b>  25 <b>wrote the letter. I didn't remember the exact</b></p>	<p style="text-align: right;">232</p> <p>1 contact you would have had with SOLCO as a client  2 matter?  3 <b>A. So this call was not from a SOLCO person,</b>  4 <b>it was somebody that was thinking about purchasing</b>  5 <b>from SOLCO. I had the discussion with them briefly</b>  6 <b>and had this time entry, but I did not have any</b>  7 <b>discussions with SOLCO specific to that client -- or</b>  8 <b>the potential purchase.</b>  9 Q. Sure. I guess I'm just trying to  10 understand.  11 So can you recall, before Mr. Shepard came  12 in in December of 2013, what your last contact was  13 with anyone with respect to SOLCO?  14 <b>A. Providing the updated drafts of the</b>  15 <b>documents. And I do think that Ms. Johnson reached</b>  16 <b>out to my assistant to say that there should be no</b>  17 <b>more billing without our -- without running it past</b>  18 <b>their -- for their approval first. But I did not</b>  19 <b>have that conversation with her.</b>  20 <b>And so that -- I don't remember what the</b>  21 <b>date of that was, but it was probably sometime after</b>  22 <b>that last billing entry.</b>  23 Q. So do you think Special Agent Lawson  24 contacted you after your last contact with SOLCO?  25 <b>A. Yes.</b></p>
<p style="text-align: right;">231</p> <p>1 <b>timeline.</b>  2 Q. Sure. No. And this is years ago. I'm  3 just trying to get a clearer picture.  4 <b>A. We -- we had multiple discussions with</b>  5 <b>Agent Lawson. I mean, I talked to him on the phone</b>  6 <b>once. He came to the -- to the office in person.</b>  7 <b>And I don't remember the exact dates of those -- of</b>  8 <b>those calls or those meetings with him --</b>  9 Q. Sure.  10 <b>A. -- and how they would relate, but I -- I</b>  11 <b>assume that one or more of those meetings with</b>  12 <b>Elder [sic] Lawson happened before; then Mr. Shepard</b>  13 <b>showed up and Mr. Olson from our office said that we</b>  14 <b>would respond to this letter. This is the response.</b>  15 Q. Okay. So, to your recollection,  16 nonetheless, you spoke with Special Agent Lawson  17 before January 10, 2014?  18 <b>A. Yes.</b>  19 Q. If we take a look back at Plaintiff's  20 Exhibit 364, the billing records...  21 <b>A. Yes.</b>  22 Q. The last entry that I see is December 27,  23 2012, on page KM24.  24 <b>A. Yes.</b>  25 Q. Is that consistent with the last sort of</p>	<p style="text-align: right;">233</p> <p>1 Q. So judging from the dates, it seems like  2 that would have been about sometime in 2013 that you  3 talked to Agent Lawson.  4 <b>A. Presumably.</b>  5 Q. After Special Agent Lawson contacted you  6 about your memorandum -- well, I'll start with this:  7 What did he tell you when he first contacted you?  8 <b>A. That the memorandum had been loaded on a</b>  9 <b>website and that there had been a number of claims by</b>  10 <b>individual taxpayers in reliance upon the memorandum,</b>  11 <b>treating it as an opinion letter, that they qualified</b>  12 <b>for the -- for the energy tax credit, and was asking</b>  13 <b>me if that had been the intended use of the</b>  14 <b>memorandum and whether I considered it to be an</b>  15 <b>opinion letter.</b>  16 Q. So did you reach out to anyone at SOLCO or  17 at the client?  18 <b>A. Not that I recall, no.</b>  19 Q. So, as far as you can recall, after  20 Special Agent Lawson contacted you, your next contact  21 with SOLCO, or anyone related to SOLCO, was the  22 cease-and-desist letter in Plaintiff's Exhibit 370?  23 <b>A. My contact, yes. Mr. Shepard came to the</b>  24 <b>firm. I didn't speak with him. So my next contact</b>  25 <b>was the letter, yes.</b></p>

234

1 Q. Okay. So let's take a look back at that  
 2 letter in Plaintiff's 370. Over to the upper  
 3 right-hand side of the page the letter -- letter  
 4 says, "Via certified mail."  
 5 What does that mean to you?  
 6 **A. That it was sent with a return receipt  
 7 requested.**  
 8 Q. Is it your typical practice, if a letter  
 9 says "via certified mail," to actually have it sent  
 10 by certified mail?  
 11 **A. Yes.**  
 12 Q. Do you have any reason to believe that's  
 13 not what happened here?  
 14 **A. No.**  
 15 Q. Do you have a copy of the return receipt  
 16 or receipts for this letter?  
 17 **A. It was not in my hard-copy file for this  
 18 matter.**  
 19 Q. Mr. Birrell, before I pass you to  
 20 Mr. Paul, are there any answers to my questions that  
 21 you gave today that you wish to amplify, change,  
 22 remembered any information additional?  
 23 **A. Not that I can think of at this time.**  
 24 Q. Since your February sitting and today,  
 25 have you been convicted of any crimes?

235

1 **A. No.**  
 2 Q. Have you been found liable in any civil  
 3 lawsuit?  
 4 **A. No.**  
 5 Q. Has there been any public discipline  
 6 against you by any state licensing entity?  
 7 **A. No.**  
 8 Q. Since your February sitting, have you been  
 9 contacted by the defendants or anyone acting on their  
 10 behalf?  
 11 **A. No.**  
 12 MS. HEALY GALLAGHER: All right. I will  
 13 pass the witness to Mr. Paul.  
 14 MR. PAUL: Thank you.  
 15 EXAMINATION  
 16 BY MR. PAUL:  
 17 Q. Mr. Birrell, my name is Steven Paul. I  
 18 represent RaPower3, International Automated Systems,  
 19 Inc., LTB1, LLC, and Neldon Johnson in this matter.  
 20 I just have a few questions in follow-up that I would  
 21 like to ask.  
 22 What research do you recall doing to  
 23 produce the memorandum?  
 24 **A. So I reviewed the -- what I considered to  
 25 be the applicable provisions in the Internal Revenue**

236

1 **code, the Treasury regulations. I did research on  
 2 case law and IRS rulings. I also reviewed materials  
 3 available through our electronic research system, BNA  
 4 Tax Management Portfolios and CCH descriptions of the  
 5 energy tax credit and so forth. I don't remember  
 6 it's exactly everything that I wrote.**  
 7 Q. Did you have a research assistant or  
 8 anyone help you with the research?  
 9 **A. No, I did the research.**  
 10 Q. And who wrote the memorandum?  
 11 **A. I did.**  
 12 Q. And did you have anybody assist you in  
 13 drafting the memorandum?  
 14 **A. No.**  
 15 Q. And so you reviewed appropriate provisions  
 16 of the tax code?  
 17 **A. Yes.**  
 18 Q. And appropriate statutory laws?  
 19 **A. I don't think I reviewed anything outside  
 20 of the tax code, in terms of statutes.**  
 21 Q. And you reviewed certain case law?  
 22 **A. Yes.**  
 23 Q. And that's reflected in your memorandum?  
 24 **A. In part, yes.**  
 25 Q. And you researched relative tax opinions

237

1 from the IRS?  
 2 **A. Yes.**  
 3 Q. Was the memorandum accurate when you wrote  
 4 it?  
 5 **A. I believed so.**  
 6 Q. Was it honest and complete?  
 7 **A. I believed so.**  
 8 Q. Has anything changed, to your knowledge,  
 9 between the time that you drafted the memorandum in  
 10 2012 to the present related to the law applicable to  
 11 the solar energy credit?  
 12 **A. I do not know if there have been any  
 13 specific changes. There -- I mean, at the time  
 14 the -- there was a 30-percent credit for things  
 15 claimed before January 1st, 2017. I do not remember  
 16 if that due date has been extended or if there have  
 17 been other changes.**  
 18 Q. You're not aware of anything else that  
 19 would affect the analysis in the memorandum?  
 20 **A. I am now aware of different factual  
 21 assumptions and representations upon which I relied  
 22 that I no longer believe are accurate, but in terms  
 23 of the legal analysis, I'm not aware of any changes.**  
 24 Q. At the time you submitted the memorandum  
 25 to SOLCO, did you expect the client to rely on it?

<p style="text-align: right;">238</p> <p>1 <b>A. Yes.</b></p> <p>2 Q. Were you paid for -- well, was Kirton</p> <p>3 McConkie paid for the work that was done?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. And do you know how much, total, the</p> <p>6 Kirton McConkie billed for the work?</p> <p>7 <b>A. It's in the billing statement. It was</b></p> <p>8 <b>almost 5 or \$6,000.</b></p> <p>9 Q. And was that paid by the client?</p> <p>10 <b>A. I believe so, yes.</b></p> <p>11 Q. Do you believe that at the time that you</p> <p>12 drafted the memorandum you had a sufficient</p> <p>13 understanding of the consumer transactions relating</p> <p>14 to the purchase of the solar lenses to make the</p> <p>15 conclusions and analysis in the memorandum?</p> <p>16 MS. HEALY GALLAGHER: Object to form.</p> <p>17 MR. HILL: You can answer.</p> <p>18 THE WITNESS: I had an understanding of</p> <p>19 the proposed transactions based upon the standardized</p> <p>20 documents. Whether actual transactions follow that</p> <p>21 form or not, I wouldn't know.</p> <p>22 Q. (BY MR. PAUL) Do you feel that you had</p> <p>23 sufficient opportunity to ask questions and obtain</p> <p>24 clarification of any of the factual issues related to</p> <p>25 the sale transactions of the solar lenses before you</p>	<p style="text-align: right;">240</p> <p>1 information to draft the memorandum.</p> <p>2 Q. (BY MR. PAUL) And the memorandum was</p> <p>3 meant to be a general overview of the tax benefits</p> <p>4 associated with the solar business that was described</p> <p>5 therein, correct?</p> <p>6 <b>A. Correct.</b></p> <p>7 Q. And that you recommended that each</p> <p>8 taxpayer should seek advice from its own tax advisor?</p> <p>9 <b>A. I don't believe that's stated in the</b></p> <p>10 <b>memorandum, but, yes. It might be.</b></p> <p>11 Q. Is it generally your practice to sort of</p> <p>12 disclaim --</p> <p>13 <b>A. The understanding was that the memorandum</b></p> <p>14 <b>would be shown to people. Whether they wanted to</b></p> <p>15 <b>obtain their own independent tax advice or not would</b></p> <p>16 <b>be up to them to decide. But the memorandum</b></p> <p>17 <b>expressly says that it cannot be relied upon to avoid</b></p> <p>18 <b>penalties, which is part of saying it's not an</b></p> <p>19 <b>opinion letter.</b></p> <p>20 Q. Okay. And if you still have the exhibits</p> <p>21 in front of you, Exhibit 370.</p> <p>22 <b>A. Yes.</b></p> <p>23 Q. If you'll turn to page KM288.</p> <p>24 <b>A. Yes.</b></p> <p>25 Q. And that is what you just mentioned, the</p>
<p style="text-align: right;">239</p> <p>1 wrote your memorandum?</p> <p>2 <b>A. You mean kind of the proposed</b></p> <p>3 <b>transaction -- the structure that was reflected in</b></p> <p>4 <b>the transaction documents?</b></p> <p>5 Q. Yes.</p> <p>6 <b>A. Yes, I was able to discuss that with</b></p> <p>7 <b>Mr. Clements.</b></p> <p>8 Q. Do you feel that at the time you drafted</p> <p>9 the memorandum you had been fully apprised of the</p> <p>10 solar business, as described in the memorandum and</p> <p>11 the transaction documents?</p> <p>12 MS. HEALY GALLAGHER: Objection.</p> <p>13 Misstates earlier testimony.</p> <p>14 THE WITNESS: I thought that the</p> <p>15 memorandum didn't accurately describe what had been</p> <p>16 represented to me, yes.</p> <p>17 Q. (BY MR. PAUL) And I suppose my question</p> <p>18 is, do you feel that at the time you drafted the</p> <p>19 memorandum you had a sufficient understanding of the</p> <p>20 transactions to be able to offer the opinions that</p> <p>21 are in the memorandum?</p> <p>22 MS. HEALY GALLAGHER: I'm going to object</p> <p>23 to mischaracterization of things that Mr. Birrell has</p> <p>24 testified to or said.</p> <p>25 THE WITNESS: Yes, I felt I had enough</p>	<p style="text-align: right;">241</p> <p>1 circular 230 disclosure says that it can't be used at</p> <p>2 all to avoid appropriate taxes. Is that what I</p> <p>3 understand that first sentence to be?</p> <p>4 <b>A. Yes.</b></p> <p>5 Q. And then the second sentence -- or, excuse</p> <p>6 me, the third sentence says, "Each taxpayer should</p> <p>7 seek advice based on the taxpayer's particular</p> <p>8 circumstances from an independent tax advisor."</p> <p>9 <b>A. Yes.</b></p> <p>10 Q. What's the purpose of including that</p> <p>11 circular 230 disclosure?</p> <p>12 <b>A. So circular 230, as it existed at that</b></p> <p>13 <b>time, treated almost anything that was put in writing</b></p> <p>14 <b>as a tax opinion unless you disclaimed it from being</b></p> <p>15 <b>a tax opinion letter. And so this was to disclaim</b></p> <p>16 <b>this from being -- I mean, you quite often saw it on</b></p> <p>17 <b>everybody's e-mails and so forth to clarify that</b></p> <p>18 <b>anything that was put in writing was not a tax</b></p> <p>19 <b>opinion that could be relied upon to avoid penalties</b></p> <p>20 <b>unless you expressly intended to do that and stated</b></p> <p>21 <b>that in the written document.</b></p> <p>22 Q. Together with the recommendation that any</p> <p>23 taxpayer that does seek to rely on it, obtain</p> <p>24 independent tax advice?</p> <p>25 <b>A. Well, you have to include that piece there</b></p>

242	<p>1 as optional, I guess. But, yes.</p> <p>2 Q. To your knowledge, does the tax code</p> <p>3 require solar technology to be operational to qualify</p> <p>4 for the tax credit?</p> <p>5 MS. HEALY GALLAGHER: Objection. Calls</p> <p>6 for a legal conclusion.</p> <p>7 THE WITNESS: That is my understanding,</p> <p>8 yes, that it's -- the tax credit is there to provide</p> <p>9 an incentive for the creation of alternative forms of</p> <p>10 energy, and so it needs to actually create that</p> <p>11 energy to be useful.</p> <p>12 Q. (BY MR. PAUL) Okay, but does it cover</p> <p>13 research and development of the solar energy?</p> <p>14 <b>A. Certain aspects of the credit could be,</b></p> <p>15 <b>but not the ones that I was addressing in the</b></p> <p>16 <b>memorandum, no.</b></p> <p>17 Q. Is there anything in your memorandum that</p> <p>18 specifically states that the solar technology has to</p> <p>19 be operational before a taxpayer can apply for or</p> <p>20 receive the solar tax credit or depreciation?</p> <p>21 <b>A. I don't remember that being -- well, I</b></p> <p>22 <b>mean, it says it has to be placed in service. And</b></p> <p>23 <b>the normal understanding of "placed in service" is</b></p> <p>24 <b>it's being used in its normal -- for its normal use,</b></p> <p>25 <b>and the use of a solar lens would be to generate</b></p>	244	<p>1 depreciation the asset has to be placed in service.</p> <p>2 If the use of that asset is in research and</p> <p>3 development, it would be being used in that and it</p> <p>4 potentially could qualify for depreciation, yes.</p> <p>5 Q. (BY MR. PAUL) And the same for marketing,</p> <p>6 depreciation could be taken for an asset that exists</p> <p>7 that is being used for marketing purposes?</p> <p>8 <b>A. Yes.</b></p> <p>9 MS. HEALY GALLAGHER: Objection. Calls</p> <p>10 for a legal conclusion.</p> <p>11 THE WITNESS: Yes, assets used in</p> <p>12 marketing can qualify for depreciation.</p> <p>13 MR. PAUL: Okay. Thank you. Those are</p> <p>14 all my questions.</p> <p>15 FURTHER EXAMINATION</p> <p>16 BY MS. HEALY GALLAGHER:</p> <p>17 Q. Mr. Birrell, what are the facts that you</p> <p>18 assumed or believed to be true that you no longer</p> <p>19 believe are true?</p> <p>20 <b>A. That the solar lenses would be</b></p> <p>21 <b>incorporated into a larger system that would be able</b></p> <p>22 <b>to transmit the heat collected by the solar lenses</b></p> <p>23 <b>and convert that into some form of power, whether</b></p> <p>24 <b>electric or something else.</b></p> <p>25 Q. Anything other facts?</p>
243	<p>1 energy.</p> <p>2 Q. Okay. Can it be used for marketing</p> <p>3 purposes?</p> <p>4 MS. HEALY GALLAGHER: Objection. Calls</p> <p>5 for a legal conclusion on the spur of the moment.</p> <p>6 THE WITNESS: I do not believe that using</p> <p>7 it simply for marketing purposes would qualify for</p> <p>8 the energy tax credit, no.</p> <p>9 Q. (BY MR. PAUL) So, in your opinion, you</p> <p>10 don't think that the solar energy credit or</p> <p>11 depreciation is available for conceptual energy</p> <p>12 programs?</p> <p>13 <b>A. It could be available. I mean, things</b></p> <p>14 <b>produced and conceptual things available for</b></p> <p>15 <b>depreciation, yes. Whether something is eligible for</b></p> <p>16 <b>depreciation is a completely separate issue than</b></p> <p>17 <b>whether something is eligible for an energy tax</b></p> <p>18 <b>credit.</b></p> <p>19 Q. Okay. So would depreciation be available</p> <p>20 to an individual under the strategy that's outlined</p> <p>21 in your memorandum if the solar lenses are used for</p> <p>22 research and development?</p> <p>23 MS. HEALY GALLAGHER: Objection. Calls</p> <p>24 for a legal conclusion.</p> <p>25 THE WITNESS: Again, to qualify for</p>	245	<p>1 <b>A. And that the 1603 grant had actually been</b></p> <p>2 <b>received.</b></p> <p>3 MS. HEALY GALLAGHER: Pass the witness.</p> <p>4 MR. PAUL: I have no further questions. I</p> <p>5 don't know if Chris has any questions.</p> <p>6 MR. HILL: I do not, but thank you for</p> <p>7 asking.</p> <p>8 MR. PAUL: I didn't mean you, Chris.</p> <p>9 THE WITNESS: Didn't want to leave you</p> <p>10 out.</p> <p>11 MS. HEALY GALLAGHER: All right. Well,</p> <p>12 then, I think we are ready to go off the record.</p> <p>13 Before we do that, we'll ask that you read and sign</p> <p>14 this volume of your deposition as well.</p> <p>15 THE WITNESS: I can -- I will.</p> <p>16 MS. HEALY GALLAGHER: Okay. Anything</p> <p>17 further before we close?</p> <p>18 MR. PAUL: I don't think so. What about</p> <p>19 Friday? Same time, 8:00?</p> <p>20 MS. HEALY GALLAGHER: We'll talk about</p> <p>21 that.</p> <p>22 MR. MORAN: We'll go off the record.</p> <p>23 MS. HEALY GALLAGHER: We are off the</p> <p>24 record.</p> <p>25 (Deposition concluded at 10:59 a.m.)</p>

<p style="text-align: right;">246</p> <p>1                   REPORTER'S CERTIFICATE 2   STATE OF UTAH        )                           ) ss. 3   COUNTY OF SALT LAKE    ) 4</p> <p>5           I, Dawn M. Perry, Certified Shorthand 6   Reporter and Notary Public in and for the State of 7   Utah, do hereby certify: 8</p> <p>9           That prior to being examined, the witness, 10   KENNETH W. BIRRELL, was by me duly sworn to tell the 11   truth, the whole truth, and nothing but the truth; 12</p> <p>13           That said deposition was taken down by me 14   in stenotype on August 2, 2017, at the place therein 15   named, and was thereafter transcribed and that a true 16   and correct transcription of said testimony is set 17   forth in the preceding pages. 18</p> <p>19           I further certify that, in accordance with 20   Rule 30(e), a request having been made to review the 21   transcript, a reading copy was sent to the witness, 22   for the witness to read and sign under penalty of 23   perjury and then return to me for filing with Erin 24   Healy Gallagher, Attorney at Law. 25</p> <p>          I further certify that I am not kin or otherwise associated with any of the parties to said cause of action and that I am not interested in the outcome thereof.</p> <p>          WITNESS MY HAND this 7th day of August, 2017.</p> <p style="text-align: center;">Dawn M. Perry, CSR</p>	
<p style="text-align: right;">247</p> <p>1                   ACKNOWLEDGMENT OF DEPONENT 2</p> <p>3           I, _____, do hereby 4   acknowledge that I have read and examined the 5   foregoing testimony, and the same is a true, correct 6   and complete transcription of the testimony given by 7   me, and any corrections appear on the attached Errata 8   Sheet signed by me. 9</p> <p>10</p> <p>11           _____</p> <p>12           (DATE)           (SIGNATURE)</p> <p>13</p> <p>14</p> <p>15</p> <p>16</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p> <p>23</p> <p>24</p> <p>25</p>	