

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

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

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

---

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RAPOWER-3, LLC, INTERNATIONAL  
AUTOMATED SYSTEMS, INC., LTB1,  
LLC, R. GREGORY SHEPARD,  
NELDON JOHNSON, and ROGER  
FREEBORN,

Defendants.

Civil No. 2:15-cv-00828 DN

**UNITED STATES' MOTION FOR  
REASONABLE EXPENSES &  
ATTORNEYS' FEES ASSOCIATED  
WITH MOTIONS TO COMPEL**

Judge David Nuffer  
Magistrate Judge Evelyn J. Furse

---

Pursuant to [Fed. R. Civ. P. 37\(a\)\(5\)](#), the United States moves the Court to enter an order requiring defendants,<sup>1</sup> and/or their former attorneys Justin Heideman and/or Christian Austin,<sup>2</sup> to pay its expenses for motion practice in certain discovery disputes:

1. Deposition testimony of Kenneth Birrell<sup>3</sup>;
2. Document production and deposition testimony from Todd Anderson<sup>4</sup>; and
3. Deposition testimony of Cody Buck, Ken Oveson, and David Mantyla (each associated with accounting firm Mantyla McReynolds).<sup>5</sup>

If a motion to compel discovery is granted, or requested discovery is provided after a motion was the filed, the party (or attorneys) whose conduct necessitated the motion must pay the movant's reasonable expenses.<sup>6</sup>

---

<sup>1</sup> This motion is directed at defendants Neldon Johnson, RaPower-3, LLC, International Automated Systems Inc., and LTB1, LLC and *not* R. Gregory Shepard or Roger Freeborn.

<sup>2</sup> This motion is also directed at defendants' prior counsel, Justin Heideman and Christian Austin of the law firm Heideman & Associates.

<sup>3</sup> See [ECF Doc. No. 140](#) (United States' Motion to Compel Deposition Testimony of Kenneth Birrell); [ECF Doc. No. 203](#) (Order Granting Motion to Compel Deposition Testimony of Kenneth Birrell) (noting that "[o]bjections made by counsel for Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC are withdrawn by stipulation in open court.").

<sup>4</sup> See [ECF Doc. No. 124](#) (Todd Anderson's Motion to Quash Deposition Subpoena); [ECF Doc. No. 127](#) (Defendants' Motion to Quash Todd Anderson's deposition subpoena); [ECF Doc. No. 138](#) (United States' Motion to Compel Todd Anderson to Produce Documents); [ECF Doc. No. 150](#) (Defendants' Objections to the United States' Motion to Compel Todd Anderson to Produce Documents); [ECF Doc. No. 163](#) (United States' Renewed Motion to Compel Todd Anderson to Produce Documents); [ECF Doc. No. 176](#) (Defendants' Opposition to United States' Renewed Motion to Compel Todd Anderson to Produce Documents); [ECF Doc. No. 206](#), Order Granting Motion to Compel Todd Anderson to Produce Documents (noting that "[a]ll documents on topics related to the Anderson letter and its contents are discoverable. All communications between and Defendant and Mr. Anderson on topics related to the Anderson letter and its contents are discoverable," and that "[t]he deposition of Mr. Anderson shall take place on August 4, 2017....").

<sup>5</sup> See [ECF Doc. No. 137](#) (United States' Motion to Compel Deposition Testimony of Cody Buck, Ken Oveson, and David Mantyla); [ECF Doc. No. 147](#) (Defendants' Response); [ECF Doc. No. 209](#), Order Granting Motion to Compel Deposition Testimony of Cody Buck, Ken Oveson, and David Mantyla (noting "[c]ounsel made blanket assertions of privilege that failed to demonstrate the basis for the assertion" and ordering Buck, Oveson, and Mantyla to answer all questions they declined to answer.)

In May and June 2016, we sent document subpoenas to Birrell, Anderson and Mantyla McReynolds. No Defendant showed that the documents were privileged.<sup>7</sup> Birrell and Mantyla McReynolds produced documents. Anderson produced some documents and withheld others on the basis of privilege.<sup>8</sup> By letter dated December 1, 2016, we informed Justin Heideman and Christian Austin, and counsel for Anderson, that Defendants waived privilege with respect to the advice they claimed to have received from attorneys by: (1) by publishing documents on their website that referenced the advice; and (2) relying on the advice of the witnesses to support their claims and defenses in this case.<sup>9</sup> No attorney responded.

---

(...continued)

<sup>6</sup> See [Fed. R. Civ. P. 37\(a\)\(5\)](#); [Leon v. Summit Cty](#), 2017 WL 5891771, at \*7 (D. Utah 2017) (Nuffer, J.) (“Rule 37 presumes that a party forced to file a meritorious motion to compel will be awarded its expenses for the motion, including reasonable attorney’s fees.”). See generally, [Centennial Archaeology, Inc. v. AECOM, Inc.](#), 688 F.3d 673, 678 (10th Cir. 2012); [Olcott v. Delaware Flood Co.](#), 76 F.3d 1538, 1556–57 (10th Cir. 1996) (citing [Robison v. Transamerica Ins. Co.](#), 368 F.2d 37, 39 (10th Cir.1966)) (“The administration of the [discovery] rules lies necessarily within the province of the trial court with power to fashion such orders as may be deemed proper to vouchsafe full discovery for the just, speedy and inexpensive determination of the lawsuit.”).

<sup>7</sup> Defendants objected to the United States’ document subpoena to Ken Birrell primarily because the Protective Order was not yet resolved, [ECF Doc. No. 87](#), and mentioned in passing that the information sought was “potentially privileged.” [ECF Doc. No. 87](#), p. 4. But they made no attempt to meet their burden of explaining why a privilege applied. [Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records](#), 697 F.2d 277, 280 (10th Cir. 1983). Once the Court entered the Protective Order, [ECF Doc. No. 116](#), the defendants’ objection was denied without prejudice, [ECF Doc. No. 117](#), and Birrell produced responsive documents. The defendants never objected to our document subpoenas to Mantyla McReynolds. The first motion they filed with respect to Todd Anderson was their motion to quash his deposition, filed on February 14, 2017, a mere three days before his deposition. [ECF Doc. No. 127](#).

<sup>8</sup> See generally [ECF Doc. No. 138](#).

<sup>9</sup> [ECF Doc. No. 126-1](#), a ten page letter explaining that the attorney-client privilege was waived because, *inter alia*, defendants raised reliance on Anderson’s advice in their answer and they published Anderson’s letter to their website.

We then issued subpoenas for the depositions of Birrell, Anderson, Buck, Oveson, and Mantyla between February 14-17, 2017.<sup>10</sup> During the depositions of Birrell, Buck, Oveson, and Mantyla, defendants' counsel (Christian Austin) objected to our questions as invading the attorney-client privilege (Birrell) and the "tax advice privilege" under 26 U.S.C. § 7525 (Buck/Oveson/Mantyla). Those witnesses refused to answer many of our questions due to Defendants' privilege assertion.<sup>11</sup>

Shortly before his deposition, Anderson filed a motion to quash the deposition,<sup>12</sup> citing Mr. Heideman's instruction, that Anderson maintain the attorney-client privilege in the "strictest fashion."<sup>13</sup> We postponed Anderson's deposition.<sup>14</sup>

We filed motions to compel each witness to testify, and for Anderson to produce the withheld documents.<sup>15</sup> We made the same arguments in our December 1, 2016 letter,<sup>16</sup> during depositions,<sup>17</sup> and in conference calls before we filed motions to compel.<sup>18</sup>

---

<sup>10</sup> [ECF Doc. No. 140-4](#) (Deposition Subpoena to Kenneth Birrell); [ECF Doc. No. 124-1](#) (Deposition Subpoena to Todd Anderson); Pl. Ex. 382 (Notice of Deposition regarding Buck, Oveson, and Mantyla and deposition subpoenas) (attached to this motion).

<sup>11</sup> Each witness would have answered our questions, but for defendants' objections. See [ECF Doc. No. 140-3](#), Deposition of Kenneth Birrell, (Vol. I), 24:5-7 (Mr. Hill [Birrell's attorney]: "We don't take a position either way, whether the privilege is maintained or has been waived."); 38:19-23 (Mr. Hill: "On the basis of the objection that has been raised by the former client of Mr. Birrell ... I have a duty to instruct Mr. Birrell not to answer the question that is pending"); [ECF Doc. No. 146](#), Birrell's response to United States' Motion to Compel Deposition Testimony at p. 1 (noting that he "does not have a proverbial dog in the fight over his deposition testimony."). The defendants implicitly threatened to sue Cody Buck if he violated [26 U.S.C. § 7525](#), which the Court decided did not apply. See [ECF Doc. No. 137-14](#), Deposition of Cody Buck, (Vol. I), 22:16-20 (Mr. Austin [defendants' attorney]: "to the extent that the privilege is breached by the witness, then, of course, my clients have remedies available for that.").

<sup>12</sup> [ECF Doc. No. 124](#).

<sup>13</sup> [ECF Doc. No. 124-2](#).

<sup>14</sup> [ECF Doc. No. 129](#).

<sup>15</sup> [ECF Doc. No. 137](#); [ECF Doc. No. 138](#), [ECF Doc. No. 140](#), [ECF Doc. No. 163](#).

<sup>16</sup> [ECF Doc. No. 126-1](#).

On April 12, 2017, the Court held oral argument on our motions to compel.<sup>19</sup> On June 23, 2017, shortly after obtaining new counsel, defendants withdrew their objections to Birrell's testimony,<sup>20</sup> agreed to produce documents that Anderson withheld, and agreed we could depose Anderson.<sup>21</sup> The Court granted our motion to compel Buck, Oveson, and Mantyla's depositions, noting "Counsel made blanket assertions of privilege that failed to demonstrate the basis for the assertion."<sup>22</sup>

Defendants protracted discovery<sup>23</sup> and forced us to enforce the discovery rules by drafting motions and travelling to Utah, incurring significant travel, lodging and per diem costs.<sup>24</sup> Defendants also forced this Court to expend its resources resolving an unnecessary discovery dispute.

Because the defendants withdrew their objections *after* we filed our motions to compel Birrell and Anderson's testimony and we prevailed on the § 7525 issue, we meet the elements of

---

(...continued)

<sup>17</sup> [ECF Doc. No. 137-14](#), Deposition of Cody Buck (Vol. I), 19:6-27:19; [ECF Doc. No. 140-3](#), Deposition of Ken Birrell (Vol. 1), 23:19-36:23. In granting our motion to compel, ECF Doc. 209, p. 2, the Court cited two cases, *United States v. BDO Seidman*, 337 F.3d 802, 810 (7<sup>th</sup> Cir. 2003), and *Valero Energy Corp. v. United States*, 569 F.3d 626, 631 (7<sup>th</sup> Cir. 2009), that we attempted to bring to Mr. Austin's attention during Cody Buck's deposition, but were rebuffed. [ECF Doc. No. 137-14](#), Buck Dep. 21:19-25:22.

<sup>18</sup> [ECF Doc. No. 137](#), pp. 5-6; [ECF Doc. No. 138](#), p. 5.

<sup>19</sup> ECF Doc. No. 154 (minute entry).

<sup>20</sup> [ECF Doc. No. 203](#).

<sup>21</sup> [ECF Doc. No. 206](#).

<sup>22</sup> [ECF Doc. No. 209](#), at 5.

<sup>23</sup> [ECF Doc. No. 197](#), ¶¶ 2 & 3.

<sup>24</sup> Ms. Healy Gallagher attended oral argument on April 12, 2017 and June 23, 2017, and deposed Kenneth Birrell on August 2, 2017. Mr. Moran deposed Todd Anderson on August 4, 2017, and Buck, Oveson and Mantyla on August 29-30, 2017.

Rule 37(a)(5). The government is entitled to its reasonable expenses, totaling \$8,899.98, which are itemized in Pl. Ex. 712 (attached).<sup>25</sup>

**CERTIFICATION IN ACCORDANCE WITH FED. R. CIV. P. 37(a)(1) &  
THE SHORT FORM DISCOVERY MOTION PROCEDURE (Doc. No. 115)**

The United States made efforts to meet and confer with the defendants and their former counsel, Justin Heideman and Christian Austin, on this matter. On January 19, 2018 we sent them a letter explaining our position and inviting them to discuss the matter during the week of January 22, 2018. On January 30, 2018, we received an email from Denver Snuffer (defendants' current attorney) stating that Mr. Heideman would provide a response. On February 1, 2018, we received a letter from Mr. Heideman rejecting our request for reimbursement of the governments' expenses. Based on the content of the letter, which threatened to seek sanctions against the undersigned attorneys, the parties are at an impasse and further efforts to resolve the dispute among the parties will not be fruitful.

---

<sup>25</sup> The United States is only seeking its costs for the time spent drafting the motions, in depositions, and travel costs. We are not seeking compensation for the attorney's time spent in transit. Even though two attorneys attended the depositions, we are only seeking compensation for the attorney who conducted the deposition or appeared at the hearing.

Dated: February 13, 2018

Respectfully submitted,

/s/ Christopher R. Moran

CHRISTOPHER R. MORAN

New York Bar No. 5033832

Email: christopher.r.moran@usdoj.gov

Telephone: (202) 307-0834

ERIN HEALY GALLAGHER

DC Bar No. 985760

Email: erin.healygallagher@usdoj.gov

Telephone: (202) 353-2452

ERIN R. HINES

FL Bar No. 44175

Email: erin.r.hines@usdoj.gov

Telephone: (202) 514-6619

Trial Attorneys, Tax Division

U.S. Department of Justice

P.O. Box 7238

Ben Franklin Station

Washington, D.C. 20044

FAX: (202) 514-6770

**ATTORNEYS FOR THE  
UNITED STATES**

**CERTIFICATE OF SERVICE**

I hereby certify that on February 13, 2018, the foregoing document was electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record. Furthermore, I will send a copy of this motion to defendant's former counsel, Messrs. Justin Heideman and Christian Austin via email and next-day Fedex at the following address:

Justin D. Heideman  
HEIDEMAN & ASSOCIATES  
2696 North University Avenue, Suite 180  
Provo, Utah 84604  
jheideman@heidlaw.com

Christian Austin  
HEIDEMAN & ASSOCIATES  
2696 North University Avenue, Suite 180  
Provo, Utah 84604  
caustin@heidlaw.com

/s/ Christopher R. Moran  
CHRISTOPHER R. MORAN  
Trial Attorney