

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,)	
)	
NELDON JOHNSON and)	Judge David Nuffer
)	
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

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

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,

1 **five-year property.**

2 Q. So, Mr. Birrell, Plaintiff's Exhibit 362,
3 the e-mail, was sent Wednesday, October 31st, 2012.
4 What, if any, follow-up do you recall after this?

5 A. So after this, again, Glenda Johnson
6 contacted either me or my assistant, requesting some
7 typographical errors be corrected. We made those
8 changes and re-provided them. I do not remember any
9 further contact from anyone associated with SOLCO.

10 Q. I'm handing you what's been marked
11 Plaintiff's Exhibit 363. Would you take a look at
12 that, please, and let me know when you're done?

13 A. Uh-huh (affirmative).

14 Q. That's Bates numbers KM164 through 208.
15 Mr. Birrell, this is an e-mail from you to
16 Mr. Clements on November 9, 2012.

17 Do you see that?

18 A. Yeah.

19 Q. Okay.

20 A. Yes.

21 Q. And you are sending a new set of documents
22 to Mr. Clements, right?

23 A. Correct.

24 Q. Do you recall what prompted this e-mail
25 and the changes?

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., LTBl, 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**

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

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?

1 **A. Yes.**

2 Q. Were you paid for -- well, was Kirton
3 McConkie paid for the work that was done?

4 **A. Yes.**

5 Q. And do you know how much, total, the
6 Kirton McConkie billed for the work?

7 **A. It's in the billing statement. It was**
8 **almost 5 or \$6,000.**

9 Q. And was that paid by the client?

10 **A. I believe so, yes.**

11 Q. Do you believe that at the time that you
12 drafted the memorandum you had a sufficient
13 understanding of the consumer transactions relating
14 to the purchase of the solar lenses to make the
15 conclusions and analysis in the memorandum?

16 MS. HEALY GALLAGHER: Object to form.

17 MR. HILL: You can answer.

18 THE WITNESS: I had an understanding of
19 the proposed transactions based upon the standardized
20 documents. Whether actual transactions follow that
21 form or not, I wouldn't know.

22 Q. (BY MR. PAUL) Do you feel that you had
23 sufficient opportunity to ask questions and obtain
24 clarification of any of the factual issues related to
25 the sale transactions of the solar lenses before you

1 wrote your memorandum?

2 **A. You mean kind of the proposed**
3 **transaction -- the structure that was reflected in**
4 **the transaction documents?**

5 Q. Yes.

6 **A. Yes, I was able to discuss that with**
7 **Mr. Clements.**

8 Q. Do you feel that at the time you drafted
9 the memorandum you had been fully apprised of the
10 solar business, as described in the memorandum and
11 the transaction documents?

12 MS. HEALY GALLAGHER: Objection.
13 Misstates earlier testimony.

14 THE WITNESS: I thought that the
15 memorandum didn't accurately describe what had been
16 represented to me, yes.

17 Q. (BY MR. PAUL) And I suppose my question
18 is, do you feel that at the time you drafted the
19 memorandum you had a sufficient understanding of the
20 transactions to be able to offer the opinions that
21 are in the memorandum?

22 MS. HEALY GALLAGHER: I'm going to object
23 to mischaracterization of things that Mr. Birrell has
24 testified to or said.

25 THE WITNESS: Yes, I felt I had enough

1 information to draft the memorandum.

2 Q. (BY MR. PAUL) And the memorandum was
3 meant to be a general overview of the tax benefits
4 associated with the solar business that was described
5 therein, correct?

6 A. Correct.

7 Q. And that you recommended that each
8 taxpayer should seek advice from its own tax advisor?

9 A. I don't believe that's stated in the
10 memorandum, but, yes. It might be.

11 Q. Is it generally your practice to sort of
12 disclaim --

13 A. The understanding was that the memorandum
14 would be shown to people. Whether they wanted to
15 obtain their own independent tax advice or not would
16 be up to them to decide. But the memorandum
17 expressly says that it cannot be relied upon to avoid
18 penalties, which is part of saying it's not an
19 opinion letter.

20 Q. Okay. And if you still have the exhibits
21 in front of you, Exhibit 370.

22 A. Yes.

23 Q. If you'll turn to page KM288.

24 A. Yes.

25 Q. And that is what you just mentioned, the

1 circular 230 disclosure says that it can't be used at
2 all to avoid appropriate taxes. Is that what I
3 understand that first sentence to be?

4 **A. Yes.**

5 Q. And then the second sentence -- or, excuse
6 me, the third sentence says, "Each taxpayer should
7 seek advice based on the taxpayer's particular
8 circumstances from an independent tax advisor."

9 **A. Yes.**

10 Q. What's the purpose of including that
11 circular 230 disclosure?

12 **A. So circular 230, as it existed at that
13 time, treated almost anything that was put in writing
14 as a tax opinion unless you disclaimed it from being
15 a tax opinion letter. And so this was to disclaim
16 this from being -- I mean, you quite often saw it on
17 everybody's e-mails and so forth to clarify that
18 anything that was put in writing was not a tax
19 opinion that could be relied upon to avoid penalties
20 unless you expressly intended to do that and stated
21 that in the written document.**

22 Q. Together with the recommendation that any
23 taxpayer that does seek to rely on it, obtain
24 independent tax advice?

25 **A. Well, you have to include that piece there**

1 **as optional, I guess. But, yes.**

2 Q. To your knowledge, does the tax code
3 require solar technology to be operational to qualify
4 for the tax credit?

5 MS. HEALY GALLAGHER: Objection. Calls
6 for a legal conclusion.

7 THE WITNESS: That is my understanding,
8 yes, that it's -- the tax credit is there to provide
9 an incentive for the creation of alternative forms of
10 energy, and so it needs to actually create that
11 energy to be useful.

12 Q. (BY MR. PAUL) Okay, but does it cover
13 research and development of the solar energy?

14 **A. Certain aspects of the credit could be,**
15 **but not the ones that I was addressing in the**
16 **memorandum, no.**

17 Q. Is there anything in your memorandum that
18 specifically states that the solar technology has to
19 be operational before a taxpayer can apply for or
20 receive the solar tax credit or depreciation?

21 **A. I don't remember that being -- well, I**
22 **mean, it says it has to be placed in service. And**
23 **the normal understanding of "placed in service" is**
24 **it's being used in its normal -- for its normal use,**
25 **and the use of a solar lens would be to generate**

1 **energy.**

2 Q. Okay. Can it be used for marketing
3 purposes?

4 MS. HEALY GALLAGHER: Objection. Calls
5 for a legal conclusion on the spur of the moment.

6 THE WITNESS: I do not believe that using
7 it simply for marketing purposes would qualify for
8 the energy tax credit, no.

9 Q. (BY MR. PAUL) So, in your opinion, you
10 don't think that the solar energy credit or
11 depreciation is available for conceptual energy
12 programs?

13 **A. It could be available. I mean, things**
14 **produced and conceptual things available for**
15 **depreciation, yes. Whether something is eligible for**
16 **depreciation is a completely separate issue than**
17 **whether something is eligible for an energy tax**
18 **credit.**

19 Q. Okay. So would depreciation be available
20 to an individual under the strategy that's outlined
21 in your memorandum if the solar lenses are used for
22 research and development?

23 MS. HEALY GALLAGHER: Objection. Calls
24 for a legal conclusion.

25 THE WITNESS: Again, to qualify for

1 depreciation the asset has to be placed in service.

2 If the use of that asset is in research and

3 development, it would be being used in that and it

4 potentially could qualify for depreciation, yes.

5 Q. (BY MR. PAUL) And the same for marketing,

6 depreciation could be taken for an asset that exists

7 that is being used for marketing purposes?

8 A. Yes.

9 MS. HEALY GALLAGHER: Objection. Calls
10 for a legal conclusion.

11 THE WITNESS: Yes, assets used in
12 marketing can qualify for depreciation.

13 MR. PAUL: Okay. Thank you. Those are
14 all my questions.

15 FURTHER EXAMINATION

16 BY MS. HEALY GALLAGHER:

17 Q. Mr. Birrell, what are the facts that you
18 assumed or believed to be true that you no longer
19 believe are true?

20 A. That the solar lenses would be
21 incorporated into a larger system that would be able
22 to transmit the heat collected by the solar lenses
23 and convert that into some form of power, whether
24 electric or something else.

25 Q. Anything other facts?

1 **A. And that the 1603 grant had actually been**
2 **received.**

3 MS. HEALY GALLAGHER: Pass the witness.

4 MR. PAUL: I have no further questions. I
5 don't know if Chris has any questions.

6 MR. HILL: I do not, but thank you for
7 asking.

8 MR. PAUL: I didn't mean you, Chris.

9 THE WITNESS: Didn't want to leave you
10 out.

11 MS. HEALY GALLAGHER: All right. Well,
12 then, I think we are ready to go off the record.
13 Before we do that, we'll ask that you read and sign
14 this volume of your deposition as well.

15 THE WITNESS: I can -- I will.

16 MS. HEALY GALLAGHER: Okay. Anything
17 further before we close?

18 MR. PAUL: I don't think so. What about
19 Friday? Same time, 8:00?

20 MS. HEALY GALLAGHER: We'll talk about
21 that.

22 MR. MORAN: We'll go off the record.

23 MS. HEALY GALLAGHER: We are off the
24 record.

25 (Deposition concluded at 10:59 a.m.)

1 REPORTER'S CERTIFICATE

2 STATE OF UTAH)
3 COUNTY OF SALT LAKE) ss.

4
5 I, Dawn M. Perry, Certified Shorthand
6 Reporter and Notary Public in and for the State of
7 Utah, do hereby certify:

8
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
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
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
26 I further certify that I am not kin or
27 otherwise associated with any of the parties to said
28 cause of action and that I am not interested in the
29 outcome thereof.

30
31 WITNESS MY HAND this 7th day of August,
32 2017.

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