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LTB1, Neldon Johnson, and R. Gregory Shepard*

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, and
NELDON JOHNSON,

Defendants.

Civil No. 2:15-cv-00828-DN-EJF

**RULE 26(c) MOTION FOR
PROTECTIVE ORDER**

Judge David Nuffer

I. Relief Sought and Grounds for the Motion

Pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, Defendants hereby request that a protective order be entered in this matter to prevent the unredacted disclosure of client billings of the law firm Nelson, Snuffer, Dahle & Poulsen, P.C., to the Receiver, Wayne Klein. Wayne Klein is not an attorney and does not have any duty to protect a client's privilege. If the billings have any relevance for the Receiver, Defendants request that the billings be redacted to the extent that the billings contain privileged information regarding legal advice

given to the clients within the scope of the Firm's representation of the Defendants in this and other matters.

II. Argument

A Protective Order is Appropriate Because the Firm cannot comply with the Receiver's request without violating the attorney-client privilege.

The attorney-client privilege is a right that belongs to the client and may be waived by the client himself or by an attorney acting with his authorization on his behalf.¹ The 10th Circuit recognizes that unredacted billing records often contain information protected by the attorney-client privilege.² In this case, these are the very records which the Receiver has requested.

On January 30, 2019, the Receiver sent the following request to the firm:

“I am hereby requesting copies of all Nelson Snuffer invoices that show the work that was performed leading to these payments from IAS and RaPower. In other words, please send me copies of all invoices showing work that was performed by your firm and paid for by IAS or RaPower.”

These invoices contain information subject to the attorney-client privilege. The Firm's billings contain detailed descriptions of questions researched, case law and statutes researched, advice given, summaries of meetings and communications between attorneys and clients, and other notes related to the Firm's work product. A wholesale production without the benefit of redaction would violate the attorney-client privilege by disclosing information that squarely falls

¹ [*Sorenson v. Rizzo*](#), No. 2:06-CV-749 TS, 2008 U.S. Dist. LEXIS 46642, at *13 (D. Utah June 16, 2008) (

² [*Team Sys. Int'l, LLC v. Haozous*](#), 706 F. App'x 463, 466 (10th Cir. 2017) (unpublished decision) (citing [*United States v. Anderson \(In re Grand Jury Subpoenas\)*](#), 906 F.2d 1485, 1492-93 (10th Cir. 1990) (holding that fee contracts could reveal attorney-client privilege and noting that in camera review of any of possibly privileged documents would be appropriate); [*Chaudhry v. Gallerizzo*](#), 174 F.3d 394, 403 (4th Cir. 1999) (holding billing records constituted attorney-client and work-product privileged communications because they revealed legal research, including the identity of the federal statutes researched, which would divulge confidential information regarding legal advice)).

within the protections afforded by the attorney-client privilege.³ And the firm is not aware of any waiver of any kind of this privilege relating to the Firm's billings. It is therefore protected.

Additionally, safeguarding this privilege is at its zenith where an appeal of the issues researched, discussed, and advised upon is currently pending with the 10th Circuit (and before appellee's brief is due.) Given that the terms of the Corrected Receivership Order allow the communication and consultation between the Receiver (who has requested the information) and counsel for the United States, the disclosure of information to the Receiver is tantamount to disclosure to the opposing party in the currently pending appeal.⁴ Assuming the Receiver has a good reason to seek these confidential materials, he should disclose that reason to justify his request. The Court should weigh that justification to see if it has merit before considering whether to address the request. Even if the Court chooses to address the request, consideration should be deferred until after the 10th Circuit Court has ruled on the pending appeal. If the decision of this Court is reversed, the Receiver's request is moot and can be denied. If the decision is upheld, the conflict will have been resolved.

Finally, the Firm obtained advice from the Office of Professional Conduct of the Utah State Bar ("OPC"). OPC cautioned us against voluntarily making the disclosure sought, and informed the Firm to seek a protective order. In the event a protective order is denied, we were advised to seek further advice from OPC again to guide us in the event such information is ordered to be produced by the Court. We want to avoid unethical behavior and believe Rules of Professional Conduct govern what we can disclose when the client opposes the disclosure.

³ [Chaudhry](#), 174 F.3d at 403 (holding since "legal bills revealed the identity of the federal statutes researched... the records would divulge confidential information regarding legal advice, they constitute privileged communications and, as such, should not be disclosed.").

⁴ See [ECF Doc. 491](#), ¶¶ 7, 59, 60, 70.

III. Conclusion

For the reasons stated above, Defendants request that a protective order enter which denies the Receiver unredacted billings he has requested in January 30, 2019 letter to the Firm. If such production is ordered, Defendants request they be permitted to confer with the Office of Professional Conduct, and in any event before releasing the material the Court conduct a review of the materials first *in camera* to protect against the disclosure of privilege information to third parties, including the opposing party in a currently pending 10th Circuit Court appeal.

DATED this 1st day of February, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Denver C. Snuffer, Jr.
Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **RULE 26(c) MOTION FOR PROTECTIVE ORDER** was sent to the following and in the manner described below.

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