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**UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
CENTRAL DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

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

Defendants.

**RECEIVER’S MEMORANDUM IN
OPPOSITION TO DEFENDANTS’
MOTION FOR PROTECTIVE ORDER**

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

District Judge David Nuffer

R. Wayne Klein,¹ the Court-Appointed Receiver (the “Receiver”) of RaPower-3, LLC (“RaPower”), International Automated Systems, Inc. (“IAS”), and LTB1, LLC (“LTB1”) (collectively, the “Receivership Entities”), as well as certain of their subsidiaries and affiliates

¹ Mr. Klein is an attorney. He was admitted to the Utah State Bar in 1982 and has served as chair of the Bar’s Litigation Section. See <http://www.kleinutah.com/index.php/about>.

(“Related Entities”) and the assets of Neldon Johnson (“Johnson”) and R. Gregory Shepard (“Shepard”) (collectively “Receivership Defendants” or “Defendants”), hereby submits this Memorandum in Opposition to Defendants’ Motion for Protective Order.

INTRODUCTION

Receivership Defendants seek a protective order because they “cannot comply with the Receiver’s request without violating the attorney-client privilege.”² A protective order is, however, unnecessary because the *Federal Rules of Civil Procedure* and the Receivership Order contain adequate protection for privileged material.³ Under the Order, if Receivership Defendants believe that the information the Receiver requests is protected by attorney-client privilege, they are to provide a “privilege log specifically identifying each document or item withheld from production and provide sufficient foundational information to allow an individual assessment as to the applicability of the claimed privilege.”⁴ Defendants have not attached a privilege log to their motion and no log has been provided to the Receiver for review. Moreover, notwithstanding the requirements of the Receivership Order, Defendants must “bear the burden” of proving attorney-client privilege “as to specific questions or documents, not by making a blanket claim.”⁵ Their Motion does not meet the requirements of the Receivership Order, the *Federal Rules of Civil Procedure*,⁶ or satisfy their burden under the law. Therefore, it should be denied.

² [Docket No. 562](#), filed on February 1, 2019.

³ [Fed. R. Civ. P. 26\(b\)\(1\)](#) (allowing discovery for “any matter not privileged”); *see infra* note 4.

⁴ [Docket No. 491](#), filed on November 1, 2018. Receivership Order, at ¶ 41.

⁵ *In re Foster*, 188 F.3d 1259, 1264 (10th Cir. 1999) (“A party claiming the attorney-client privilege must prove its applicability, which is narrowly construed. The party must bear the burden as to specific questions or documents, not by making a blanket claim.”) (citations omitted).

⁶ Rule 26(c) requires a certification from the movant that they have “in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action.” [Fed. R. Civ. P. 26\(c\)\(1\)](#). Defendants did not confer or attempt to confer with the Receiver before filing their Motion for Protective Order.

ARGUMENT

The Receiver has the power and duty to “assume all legal privileges, including attorney-client and accountant-client privileges, belonging to the Receivership Defendant Entities, and determine in his discretion whether and when to assert or, on motion, to waive such privileges.”⁷ The Receivership Order is clear that the Receivership Entities’ attorney-client privilege belongs to the Receiver. Withholding any Receivership Entity documents from the Receiver under a claim of privileged is tantamount to an attorney withholding documents from the client on the basis of attorney-client privilege. The privilege belongs to the Receiver, not the entities’ attorney. There is no basis for withholding these documents as privileged.⁸

Moreover, the type of information the Receiver seeks from Receivership Defendants is generally not subject to attorney-client privilege.⁹ “Courts have routinely held that fee arrangements and accounting information are not generally privileged.”¹⁰ As Defendants note in their Motion, the Receiver’s request states “please send me copies of all invoices showing work that was performed by your firm and paid for by IAS or RaPower.” These billing records would likely show the amount of the fee, the client, the identification of payment by case name, and the purpose of the work performed. Courts do not recognize this information as privileged.¹¹ Further,

⁷ [Receivership Order](#), at ¶ 13(n).

⁸ It should be noted that Nelson Snuffer is not without procedural protection in the event the Receiver decided to waive the privilege. *See* discussion, *infra*.

⁹ *See* [Wing v. Fulbright & Jaworski LLP](#), No. 2:09CV200, 2010 WL 1566801, at *2 (D. Utah Apr. 16, 2010) (citing [In re Grand Jury Subpoenas](#), 906 F.2d 1485, 1492 (10th Cir.1990)).

¹⁰ *Id.*

¹¹ [United States v. Amlani](#), 169 F.3d 1189, 1194 (9th Cir. 1999) (“[o]ur decisions have recognized that the identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.”; *see also* [Wing](#), 2010 WL 1566801 at *2 (citing [Amlani](#), 169 F.3d at 1194)).

these documents are business records of IAS and RaPower to which the Receiver is entitled¹² and are clearly relevant to the Receiver's duty to manage and control the Receivership Entities and to "pursue and preserve all their claims."¹³

To be clear, the Receiver is not seeking client files or privileged information regarding legal work that Nelson Snuffer performed for clients other than the Receivership Entities. To the extent Nelson Snuffer's clients were Neldon Johnson, Glenda Johnson, or persons other than Receivership Entities, the Receiver acknowledges that those client files may be privileged and that the Receiver may not have a right to examine files that contain privileged information—with two exceptions. First, if those records were submitted to RaPower or IAS in connection with RaPower or IAS paying legal fees to Nelson Snuffer, then those records are business records of RaPower or IAS. Any business records of RaPower or IAS belong to the Receiver and are required to be turned over to him.¹⁴ Second, if RaPower or IAS paid fees to Nelson Snuffer for legal work that Nelson Snuffer performed for persons other than Receivership Entities, the Receiver is entitled to know the identity of the client, the amount of the fee, and the general purpose of the work.¹⁵

Next, Receivership Defendants assert—citing their pending Tenth Circuit appeal—that because the Receiver is allowed to communicate and consult with counsel for the United States, they should not have to provide the requested records to the Receiver. They state that disclosure of information to the Receiver is the same as "disclosure to the opposing party [United States] in the currently pending appeal." Defendants are wrong. In the event the Receiver wishes to waive

¹² [Receivership Order](#), at ¶ 15

¹³ *Id.*, at ¶ 12.

¹⁴ *Id.*, at ¶¶ 11, 13(b), 14, 15, 17, 18, 24, and 35(b).

¹⁵ See [United States v. Amlani](#), 169 F.3d at 1194.

attorney-client privilege, the Receivership Order requires that notice be provided seven days before any disclosure is made.¹⁶ Within that seven day period Receivership Defendants are empowered to file a motion articulating reasons why the Receiver should not be allowed to waive the privilege. Therefore, if the requested records are in fact privileged, the Receiver could not disclose their contents with attorneys for the United States without Receivership Defendants first having the opportunity to oppose the disclosure. This procedural protection satisfies concerns about disclosures to the United States regarding the Tenth Circuit appeal.

Finally, the Receiver does not know what to make of Defendants' discussion with the Office of Professional Conduct. The Receivership Order and the *Federal Rules of Civil Procedure*—both of which govern the Receiver's investigation—clearly allow for privileged material to remain privileged. There is simply no need for a protective order. Any claim of privilege by Receivership Defendants is to be evaluated by examination of a privilege log. If, after examination, the requested documents are found not to be privileged, Receivership Defendants should be satisfied that their disclosure would not constitute unethical behavior or violate the *Rules of Professional Conduct*. The fact that Defendants would prefer not to disclose the requested documents does not justify withholding the documents and further delaying the Receiver's investigation.¹⁷

In sum, if the legal work was performed for RaPower or IAS, the Receiver is entitled to copies of all the records relating to that work. If the legal work was performed for persons other than Receivership Entities, the Receiver is entitled to obtain information showing the amounts and

¹⁶ *Id.*, at ¶ 61.

¹⁷ See *Receiver's Initial Quarterly Status Report*, [Docket No. 557](#), filed on January 28, 2019. The Status Report lists cooperation failures of Receivership Defendants and others, including Nelson Snuffer, which have delayed his investigation.

the beneficiaries of the legal services whose invoices were paid by RaPower or IAS.

CONCLUSION

For the foregoing reasons, Receivership Defendants' Motion for Protective Order should be denied and the Court should order the production of the requested documents.¹⁸

DATED this 12th day of February, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Michael S. Lehr _____

Jonathan O. Hafen

Michael Lehr

Attorneys for R. Wayne Klein, Receiver

¹⁸ See [Fed. R. Civ. P. 26\(c\)\(2\)](#) (“If a motion for protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.”)

CERTIFICATE OF SERVICE

I hereby certify that the above **RECEIVER'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER** was filed with the Court on this 12th day of February, 2019, and served via ECF on all parties who have requested notice in this case.

/s/ Michael S. Lehr
