

Jonathan O. Hafen (6096) (jhafen@parrbrown.com)
Joseph M.R. Covey (7492) (jcovey@parrbrown.com)
Michael S. Lehr (16496) (mlehr@parrbrown.com)
PARR BROWN GEE & LOVELESS, P.C.
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
Telephone: (801) 532-7840
Facsimile: (801) 532 7750

Attorneys for Court-Appointed Receiver Wayne Klein

**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 NELDON
JOHNSON’S MOTION FOR
PROTECTIVE ORDER**

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

District Judge David Nuffer

R. Wayne Klein, 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 (“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 Neldon Johnson’s Motion for Protective Order.

INTRODUCTION

Neldon Johnson (“Mr. Johnson”) seeks a protective order under Rule 26(c)¹ of the *Federal Rules of Civil Procedure* to avoid his obligations under this Court’s Corrected Receivership Order (“Order”).² Because the Receiver’s requests are no more burdensome than those already imposed on Mr. Johnson under the Order and because he had a reasonable amount of time to produce the documents, his requests should be denied.

ARGUMENT

I. The Order Requires Mr. Johnson to Produce the Requested Documents.

Mr. Johnson’s Motion asks the Court for a protective order “from the oppressive and overly burdensome demands for production of documents and things from the receiver, Mr. Wayne Klein.” The Receiver’s requests, however, are for documents and records that Mr. Johnson should have already produced under this Court’s Order. No subpoena should have been necessary.

The Order provides that all Receivership Defendants—such as Mr. Johnson—are “directed to preserve and *turn over to the Receiver forthwith* all paper and electronic information *of, or relating to, the Receivership Property.*”³ Moreover, the Order states that Receivership Defendants and those who “have possession of the property, business, books, records, accounts, or assets of the Receivership Defendants, *are hereby ordered to deliver the same to the Receiver or his agents or employees.*”⁴ The Order also requires that Receivership Defendants must “*cooperate* with and

¹ Rule 26(c) requires a certification from the movant that it has “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\(c\)\(1\)](#). Mr. Johnson did not confer or attempt to confer with the Receiver before filing his Motion for Protective Order.

² [Docket No. 491](#), filed November 1, 2018.

³ [Id.](#), ¶ 14 (emphasis added). “Receivership Property” is defined broadly in the Order. See [Id.](#), ¶ 13(a).

⁴ [Id.](#), ¶ 17 (emphasis added); see also e.g., [id.](#), ¶¶ 14, 16, 18, 23, 24, 28.

assist the Receiver . . . [and] *must respond promptly and truthfully to all requests for information and documents from the Receiver.*”⁵ Finally, the Order requires Mr. Johnson to produce “all documents as required by the Receiver *regarding the business of the Receivership Defendants or any other matter relevant to the operation or administration of the receivership*”.⁶

These provisions apply directly to Mr. Johnson as a Receivership Defendant. Therefore, Mr. Johnson is required to promptly produce all documents and records regarding the business of the Receivership Defendants or any other matter relevant to the administration of the receivership. Mr. Johnson does not contest the relevance of the requested documents and the requests do not exceed the scope of the documents and records Mr. Johnson is required to produce under the Order. Therefore, he must produce the documents to the Receiver forthwith, as required under the Order.

II. Mr. Johnson had more than a Reasonable Amount of Time to Respond.

Despite the claims in Mr. Johnson’s Motion, February 8, 2019 represented a reasonable amount of time for Mr. Johnson to respond to the document requests. First, the Order was issued by the Court on November 1, 2018.⁷ Upon receipt of the Order, Mr. Johnson was required to “turn over to the Receiver forthwith all paper and electronic information” related to Receivership Property. On December 3, 2018, the Receiver identified the types of information he would like to receive from Mr. Johnson.⁸ On December 11, 2018, the Receiver requested copies of certain records from Mr. Johnson’s attorney.⁹ Then on January 7, 2018—just one day before his scheduled

⁵ *Id.*, ¶ 23 (emphasis added).

⁶ *Id.*, ¶ 28 (emphasis added).

⁷ [Docket No. 491](#).

⁸ See email thread between Steven Paul and the Receiver, attached hereto as Exhibit 1.

⁹ *Id.*

deposition—he cancelled to purportedly “work on getting the information gathered”.¹⁰ Finally, on January 14, 2019, a Notice of Intent to Serve Subpoena to Neldon Johnson was served upon Mr. Johnson’s attorneys.¹¹ The Notice contained exactly the same document requests as the subpoena.

Rule 45(a)(4) of the *Federal Rules of Civil Procedure* requires notice of a document subpoena before service “to give an opposing party the opportunity to object to a subpoena *prior to service*.”¹² Although the Notice was served upon Mr. Johnson’s attorneys on January 14th, no objection was made until February 7, 2018, the day before the documents were due. Now, Mr. Johnson claims that February 8, 2019—more than 14 weeks after the Order was issued and 10 weeks after the Receiver’s initial request—is an “incredibly short period of time to respond”. As the record shows, however, Mr. Johnson had more than a reasonable amount of time to produce the requested documents to the Receiver.

Mr. Johnson points out that he was not personally served with the document subpoena until January 29, 2019. While this is true, the process server attempted to serve the Johnsons multiple times beginning over a week before January 29th.¹³ After multiple unsuccessful attempts the process server concluded “[t]hese people are evading.”¹⁴ Only after many attempts and persistent process servers were the Johnsons finally served on the 29th. This obstructive behavior by Mrs. Johnson and Mr. Johnson is consistent with the conduct set forth in Plaintiff’s Motion to Show

¹⁰ *Id.*

¹¹ [Docket No. 555](#).

¹² *Nunes v. Rushton*, No. 2:14-CV-627, 2015 WL 3537018, at *2 (D. Utah June 4, 2015) (emphasis added) (citing *Butler v. Biocore Med. Techs., In.*, 348 F.3d 1163, 1173 (10th Cir.2003); see also [DUCivR 45-1](#) (“[t]he subpoena may not be served upon the non-party until four (4) days after the service of the notice [on the opposing party].”)

¹³ Email thread between ICU Investigations and Natalie McKean, attached hereto as Exhibit 2.

¹⁴ *Id.*

Cause, filed against Mrs. Johnson and Mr. Johnson (and others).¹⁵ It should also be noted that, despite being served with valid deposition subpoenas, both Mrs. Johnson and Mr. Johnson separately failed to appear at their scheduled depositions. No objection was raised that stayed or excused their absence.¹⁶

III. Information Has Not Been Produced to the Receiver.

The Motion asserts that the Receiver should first obtain from the United States all the information the United States has from a multi-year investigation and cull through that information to find the specific information requested from Mr. Johnson. Mr. Johnson also states that the Receiver should subpoena “original” sources and that he should not be “subjected” to providing the requested information to the Receiver.¹⁷ In fact, Mr. Johnson—as the principal manager, director, and officer for most of the entities and the owner of his personal financial records—is the best (and possibly only) source of the information the Receiver needs to satisfy his obligations under the Order. Moreover, it is more cost-effective and efficient for the Receiver to seek records from the person who is under a court-imposed obligation to provide them to the Receiver than to cull through all the records of counsel for the United States.

Finally, Mr. Johnson states that “almost all (if not all) of the information I have was disclosed or obtained during discovery or at trial of the above case.” None of the Receivership Defendants, however, have produced to the Receiver regular business records of the entities such as QuickBooks files, check registers, bank statements, correspondence, corporate minutes, stock

¹⁵ See [Docket No. 559](#), filed January 29, 2019.

¹⁶ Mr. and Mrs. Johnson *filed motions one business day before their scheduled deposition* claiming their deposition testimony was privileged. The Receiver responded to both motions to inform the Johnsons that their claimed privilege do not excuse them from attending the depositions. Despite the Receiver’s efforts, neither showed up at their deposition.

¹⁷ [Docket No. 565](#), at pg. 2-3.

ledgers or other stockholder records, records of accounts payable and accounts receivable, credit card statements, or sources of funds for real estate purchases.

If Mr. Johnson really does not have his own personal financial records, or other documents related to the Receivership Defendants and affiliated entities in his control, the Order requires that he “provide information to the Receiver identifying the records, the persons in control of the records, and efforts undertaken to recover the records.”¹⁸ Any information of this kind must be provided to the Receiver under oath.¹⁹

CONCLUSION

For the foregoing reasons, Mr. Johnson’s Motion for Protective Order should be denied and, if Mr. Johnson fails to promptly produce records and documents or cooperate with the Receiver as required under the Order, Mr. Johnson should be held in contempt under Rule 45(g) of the *Federal Rules of Civil Procedure*.²⁰

DATED this 20th 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 [Docket No. 491](#), ¶ 24.

¹⁹ *Id.*, ¶ 28.

²⁰ The Court “may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.” [Fed. R. Civ. P. 45\(g\)](#).

CERTIFICATE OF SERVICE

I hereby certify that the above **RECEIVER'S MEMORANDUM IN OPPOSITION TO NELDON JOHNSON'S MOTION FOR PROTECTIVE ORDER** was filed with the Court on this 20th day of February, 2019, and served via ECF on all parties who have requested notice in this case.

/s/ Michael S. Lehr
