

From: Mike Lehr
To: ["denversnuffer@gmail.com"](mailto:denversnuffer@gmail.com); ["spaul@nsdplaw.com"](mailto:spaul@nsdplaw.com); ["dbgarrriott@msn.com"](mailto:dbgarrriott@msn.com); ["joshua.d.egan@gmail.com"](mailto:joshua.d.egan@gmail.com)
Cc: ["wklein@kleinutah.com"](mailto:wklein@kleinutah.com); ["Healy Gallagher, Erin \(TAX\)"](#); [Hines, Erin R. \(TAX\)](#)
Subject: Response to Motion for Protective Order: Spousal Privilege
Date: Tuesday, February 19, 2019 8:13:08 PM

Counsel:

According to your Motion for Protective Order: Spousal Privilege—filed approximately 15 hours before Mrs. Johnson’s scheduled deposition—Mrs. Johnson “declines to provide any testimony involving communications with her spouse” and “[e]verything she knows is derived exclusively from communications with her spouse. She did not learn or obtain any information independent from communications with her spouse.”

As your Motion recognizes, only the marital communication privilege applies in civil proceedings such as our case. The adverse spousal testimony privilege, which protects spouses from being required to adversely testify against their spouse, does not apply. Moreover, even if somehow the adverse spousal testimony privilege does apply (it does not), Mr. Klein will not be asking Mrs. Johnson to testify “against” her spouse. Instead, he will be questioning her about the topics below and about her experience as an employee and bookkeeper of the Receivership Entities and Affiliates.

As I’m sure you are aware, the marital communication privilege—as with any privilege—must be strictly construed. *In re Reserve Fund Sec. & Derivative Litig.*, 275 F.R.D. 154, 157 (S.D.N.Y. 2011). The privilege only protects communications between the spouses, privately made, in confidence, and only with respect to utterances or expressions intended by one spouse to convey a message to the other. *Id.* Mr. Klein will not ask Mrs. Johnson about these types of communications at her deposition.

Instead, Mr. Klein will question Mrs. Johnson about topics he described in his December 3rd and December 11th emails to Steven Paul, such as:

- Her roles in operations of the Receivership Entities (including affiliates), including any roles as employee, officer, director, manager, etc.
- Compensation she received from Receivership Defendants.
- Amount and sources of income other than from Receivership Defendants.
- Real property and other assets held in her name, including the circumstances under which the assets were obtained, the transferors, and the sources of funds for the acquisitions.
- Her use of Receivership Estate assets.
- Sources of the funds that Snell & Wilmer used to file the June 2018 bankruptcy petition for RaPower-3.

I hope this email helps clarify the topics and the scope of Mrs. Johnson’s deposition. Of course, if you believe in good faith that a question from Mr. Klein raises Mrs. Johnson’s strictly constructed marital communications privilege, you can object on the record and we can put the matter before the Court.

Sincerely,
Mike Lehr

Mike Lehr | Attorney | **Parr Brown Gee & Loveless** | A Professional Corporation
101 South 200 East, Suite 700 | Salt Lake City, Utah 84111
T: 801.532.7840 | F: 801.532.7750 | mlehr@parrbrown.com | www.parrbrown.com

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