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

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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 MOTION FOR  
PROTECTIVE ORDER: SPOUSAL  
PRIVILEGE**

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

District Judge David Nuffer

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R. Wayne Klein, the Court-Appointed Receiver (“Receiver”) of RaPower-3, LLC (“RaPower”), International Automated Systems, Inc. (“IAS”), and LTB1, LLC (collectively “Receivership Entities”), as well as certain subsidiaries and affiliated entities (“Affiliated Entities”) and the assets of Neldon Johnson (“Mr. Johnson”) and R. Gregory Shepard (“Shepard”) hereby submits this Memorandum in Opposition to Motion for Protective Order: Spousal Privilege.

## INTRODUCTION

On Tuesday February 19, 2019, Glenda Johnson (“Mrs. Johnson”) filed a Motion for Protective Order: Spousal Privilege (“Motion”),<sup>1</sup> asking the Court to “reset” her deposition just hours before she was scheduled to be deposed on Wednesday, February 20, 2019. In the Motion, Mrs. Johnson—through her counsel, which is also Nelson Snuffer Dahle & Poulsen (“Nelson Snuffer”)—claims that “[h]er knowledge, to the extent she has any about any of the Defendants, is *wholly derived from conversations between her and her husband*”, “she has no information apart from what she obtained from her husband . . . she cannot be required to testify in this matter”, “[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.”<sup>2</sup> These statements by Mrs. Johnson are false. They represent a gross misrepresentation of Mrs. Johnson’s role with RaPower and the scope of the spousal privilege and appear to be an intentional attempt to delay and obstruct the Receiver’s investigation.

Despite the statements in the Motion suggesting she would not testify at her scheduled deposition, Nelson Snuffer represented to the Receiver that Mrs. Johnson planned to attend her deposition at February 20<sup>th</sup> at 9:00 AM. To clarify the purpose of the deposition and assure Mrs. Johnson that privileged communications would not be discussed at her deposition, counsel for the Receiver sent an email to Nelson Snuffer: 1) outlining the scope of the spousal privilege, 2) stating that the Receiver would not ask Mrs. Johnson about communications that would fall within the scope of the spousal privilege, and 3) outlining the topics about which the Receiver

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<sup>1</sup> [Docket No. 577](#), filed February 19, 2019.

<sup>2</sup> *Id.* (Emphasis added).

intended to question Mrs. Johnson.<sup>3</sup> Notwithstanding Nelson Snuffer’s statements and the Receiver’s email, Mrs. Johnson failed to appear at her deposition in violation of Rule 45 of the *Federal Rules of Civil Procedure*.<sup>4</sup> The Receiver asks that her Motion be denied. Due to Mrs. Johnson’s repeated and continuing violations of the Corrected Receivership Order (“Order”), failure to comply with valid subpoenas, and her untimely eleventh-hour motions for protective orders,<sup>5</sup> the Receiver believes her conduct also provides further evidence that Mrs. Johnson should be held in contempt.<sup>6</sup>

## **ARGUMENT**

### **I. Mrs. Johnson’s Testimony is Not Privileged.**

Federal courts recognize two different marital privileges: the testimonial privilege which permits one spouse to decline to testify against the other during marriage, and the marital communications privilege which permits a spouse to refuse to testify as to confidential communications made during the marriage.<sup>7</sup> As Mrs. Johnson recognized in the Motion, only the marital communications privilege applies in civil proceedings.<sup>8</sup> Moreover, even if somehow the testimonial privilege does apply (it does not), Mrs. Johnson was not being asked to testify “against” Mr. Johnson. Instead, the Receiver would have questioned her about her role in the

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<sup>3</sup> Email from Michael Lehr to Nelson Snuffer, February 19, 2019. A copy of which is attached hereto as [Exhibit 1](#).

<sup>4</sup> [Fed. R. Civ. P. 45\(c\)](#).

<sup>5</sup> Mrs. Johnson previously filed a motion for protective order the day before she was required to produce documents under a subpoena. See *Motion for Protective Order for Non-Party Glenda Johnson*, [Docket No. 565](#), filed February 8, 2019.

<sup>6</sup> See [Fed. R. Civ. P. 45\(g\)](#); see also *United States Motion to Show Cause why Glenda Johnson, et al., Should Not be Held in Civil Contempt*, [Docket No. 559](#), filed January 29, 2019.

<sup>7</sup> [United States v. Bahe](#), 128 F.3d 1440, 1442 (10th Cir. 1997).

<sup>8</sup> [L-3 Commc'ns Corp. v. Jaxon Eng'g & Maint., Inc.](#), No. 10-CV-02868-MSK-KMT, 2014 WL 183303, at \*5 (D. Colo. Jan. 12, 2014) (citing [S.E.C. v. Lavin](#), 111 F.3d 921, 925 (D.C.Cir.1997)). Mrs. Johnson argues—without support—that the even thought this is a civil proceeding, the testimonial privileged may apply because “threat of criminal prosecution remains.” That is not the law.

operations of the Receivership Entities and about her income and assets.<sup>9</sup>

The marital communication privilege, on the other hand, protects communications between spouses, privately made, in confidence, and only with respect to utterances or expressions intended by one spouse to convey a message to the other.<sup>10</sup> Any claim of privilege under the marital communications privilege must be strictly construed.<sup>11</sup> The Receiver was clear that he did not intend to ask Mrs. Johnson about any of these types of communications with her husband.<sup>12</sup>

In multiple emails with her counsel, the Receiver outlined the scope of the testimony he was seeking from Mrs. Johnson including her role in the Receivership Entities, the compensation she received from the Receivership Entities, the real property and other assets held in her name, and the source of funds used to pay Snell & Wilmer to file the July 2018 bankruptcy petition for RaPower.<sup>13</sup> To the extent the Receiver may have asked about communications between Mrs. Johnson and her husband—made privately, in confidence, intended by one spouse to convey a message to the other—she could have objected to the question as privileged and refused to answer. The marital communications privilege does not, however, allow her to refuse to attend her deposition or to assert a blanket claim of privilege for her entire testimony.<sup>14</sup>

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<sup>9</sup> See Exhibit 1.

<sup>10</sup> *In re Reserve Fund Sec. & Derivative Litig.*, 275 F.R.D. 154, 157 (S.D.N.Y. 2011).

<sup>11</sup> *Id.*

<sup>12</sup> See Exhibit 1; see also email thread between Steven Paul and Receiver, [Docket 579-2](#), filed February 21, 2019.

<sup>13</sup> *Id.*

<sup>14</sup> *In re Reserve Fund Sec.*, 275 F.R.D., at 158 (citing authority stating that the privilege must be established for “the communication” and for each “communication”).

**II. Mrs. Johnson has Extensive Personal Knowledge Regarding Matters Relevant to the Receivership Estate.**

The evidence shows that Mrs. Johnson has extensive personal knowledge of matters relevant to the Receivership Estate. The claim that “[h]er knowledge, to the extent she has any about any of the Defendants [including RaPower], is wholly derived from conversations between her and her husband”<sup>15</sup> is false as shown by multiple independent sources of testimony, statements made under the penalty of perjury, and documents the Receiver has recovered during his investigation.

First, as part of RaPower’s 2018 bankruptcy filing, Neldon Johnson listed Mrs. Johnson as the person who maintained the books and records for RaPower from 2010 to 2018.<sup>16</sup> She was also listed as the individual in possession of the books and records in July 2018.<sup>17</sup> Neldon Johnson signed these bankruptcy disclosures under the penalty of perjury.<sup>18</sup> Next, a RaPower customer testified at trial that Mrs. Johnson signed her RaPower commission check and dealt with her directly when an issue came up regarding her commissions.<sup>19</sup> Mrs. Johnson routinely signed checks on behalf of RaPower.<sup>20</sup> Also at trial, Ken Birrell—an attorney from the law firm Kirton McConkie—testified that Mrs. Johnson was present with him at a meeting with a prospective lens customer.<sup>21</sup> He also testified that she gave him instructions and she requested changes to the memorandum he prepared for RaPower.<sup>22</sup> Finally, it was revealed at trial that

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<sup>15</sup> [Docket No. 577](#), at 1.

<sup>16</sup> *In re RaPower-3, LLC*, Bankr. No. 18-24865, [Docket No. 11](#) at 9, filed July, 13, 2018.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 11.

<sup>19</sup> Trial Tr.1014:20-1015:11.

<sup>20</sup> *See e.g.*, Excerpt of Plaintiff’s Trial Exhibit 747, attached hereto as Exhibit 2.

<sup>21</sup> Trial Tr. 421:24-422:24.

<sup>22</sup> *Id.*

Mrs. Johnson was the primary person who made entries to RaPower's customer database.<sup>23</sup>

Nelson Snuffer expressed an understanding that Mrs. Johnson could and did in fact input information into the database.<sup>24</sup>

Moreover, the *Receiver's Report and Recommendation on Inclusion of Affiliates and Subsidiaries in the Receivership Estate*<sup>25</sup> identifies a number of additional roles Mrs. Johnson had with the Receivership Entities and their affiliates—roles where she would have knowledge of actions taken that did not derive solely from conversations with Neldon Johnson. She was a member and owner of Solco I.<sup>26</sup> She was assistant manager for Solco I and XSun Energy.<sup>27</sup> She controlled bank accounts for RaPower and XSun.<sup>28</sup> Along with her husband, she received funds from Receivership Entities and their affiliates.<sup>29</sup>

As the record shows, Mrs. Johnson's statements—through Nelson Snuffer, who served as trial counsel to Defendants—that “everything she knows is derived exclusively from communications with her spouse” is false. Ms. Johnson was bookkeeper to RaPower for eight years, the person who input RaPower customer information into a database, consulted with attorneys on behalf of RaPower, and dealt directly with RaPower customers. She has vast amounts of personal knowledge regarding the Receivership Defendants that is clearly relevant to the Receiver's investigation and not protected by spousal privilege.

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<sup>23</sup> Trial Tr. 736:1-12.

<sup>24</sup> Trial Tr. 893:11-18.

<sup>25</sup> [Docket No. 581](#), filed February 25, 2019.

<sup>26</sup> *Id.* at 8, 40.

<sup>27</sup> *Id.* at 8, 10, 40.

<sup>28</sup> *Id.* at 11

<sup>29</sup> *Id.* at 11, 15, 41.

**CONCLUSION**

For the foregoing reasons, the Receiver asks the Court to deny the Motion for Protective Order and hold Mrs. Johnson in contempt for her repeated and continuing failures under the Order, subpoenas, and her untimely motions for protective orders seeking protection from documents that she has already been ordered to produce.

DATED this 5<sup>th</sup> day of March, 2019.

**PARR BROWN GEE & LOVELESS**

/s/ Michael S. Lehr  
Jonathan O. Hafen  
Michael S. Lehr  
*Attorneys for Receiver*

**CERTIFICATE OF SERVICE**

I hereby certify that the above **RECEIVER'S MEMORANDUM IN OPPOSITION TO MOTION FOR PROTECTIVE ORDER: SPOUSAL PRIVILEGE** was filed with the Court on this 5th day of March, 2019, and served via ECF on all parties who have requested notice in this case.

*/s/ Michael S. Lehr*

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