

Jonathan O. Hafen (6096) (jhafen@parrbrown.com)
Jeffery A. Balls (12437) (jballs@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

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.

**MEMORANDUM IN OPPOSITION TO
NSDP MOTION TO RETAIN
RECORDS**

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

District Judge David Nuffer

R. Wayne Klein, the Court-Appointed Receiver of RaPower-3, LLC (“RaPower”), International Automated Systems Inc. (“IAS”), LTB1 LLC (“LTB1”), their subsidiaries and affiliates,¹ and the assets of Neldon Johnson (“Johnson”) and R. Gregory Shepard (“Shepard”),²

¹ Collectively, unless stated otherwise, RaPower, IAS, LTB1, and all subsidiaries and affiliated entities are referred to herein as “Receivership Entities.” The subsidiaries and affiliated entities are: Solco I, LLC (“Solco”); XSun Energy, LLC (“XSun”); Cobblestone Centre, LC (“Cobblestone”); LTB O&M, LLC; U-Check, Inc.; DCL16BLT, Inc.; DCL-16A, Inc.; N.P. Johnson Family Limited Partnership (“NPJFLP”); Solstice Enterprises, Inc. (“Solstice”); Black Night Enterprises, Inc. (“Black Night”); Starlite Holdings, Inc. (“Starlite”); Shepard Energy; and Shepard Global, Inc (“Shepard Global”).

² Collectively, RaPower, IAS, LTB1, Shepard, and Johnson are referred to herein as “Receivership Defendants.”

(the “Receiver”) hereby submits this Memorandum in Opposition to NSDP Motion to Retain Records.

INTRODUCTION

Nelson Snuffer makes two primary arguments against turning over boxes 15-27 as ordered by the Court. First, Nelson Snuffer attempts to create confusion regarding what documents are at issue and claims the Court’s order is unclear as to which documents were requested by the Receiver and ordered turned over by the Court. Nelson Snuffer asserts that all documents provided to it by Neldon Johnson have previously been provided to the Receiver. Even if Nelson Snuffer has delivered all records from Nelson Johnson, the Receiver still seeks boxes 15-27 in the possession of Nelson Snuffer.

Second, Nelson Snuffer asserts the documents are its work product relating to its representation of the Receivership Defendants and that the documents are necessary for its defense in the Receiver’s lawsuit against Nelson Snuffer.

Both of these arguments fail to provide a basis for Nelson Snuffer to retain the documents and withhold them from the Receiver. As such, the Court should deny the Motion and order the documents be delivered to the Receiver.

ARGUMENT

A. The Court’s Order is Clear as to What Boxes are to be Turned Over to the Receiver.

Nelson Snuffer seeks to create confusion as to what documents are sought by the Receiver and were ordered to be turned over by the Court’s order. The order requires Neldon Johnson to deliver boxes 15-27, that were referenced Neldon Johnson’s declaration filed on

August 2, 2019 as Docket No. 738.³ Neldon Johnson's declaration identified 27 boxes and provided two separate inventories for boxes 15-27.⁴ The Receiver, based upon these inventories of documents, determined he had not yet reviewed these documents and that they were likely relevant to his investigation and analysis.

The contents of boxes 15-27 that the Receiver seeks are not the same boxes previously delivered to the Receiver by Neldon Johnson. This is confirmed by a summary of the documents received by the Receiver from Neldon Johnson⁵ and the summary of the documents contained in boxes 15-27 as identified by Neldon Johnson.⁶ These two summaries identify different records.

Nelson Snuffer disputes that Neldon Johnson delivered boxes 15-27 to its office. Instead, Nelson Snuffer explains the documents are "the original work product of legal services provide by [Nelson Snuffer] for Neldon Johnson, IAS or others affiliated with IAS."⁷ Whether Neldon Johnson was accurate in stating that he delivered boxes 15-27 to Nelson Snuffer is irrelevant. It is clear what boxes of document were ordered to be turned over to the Receiver. Nelson Snuffer's Motion confirms that boxes 15-27 are at its office and that they contain information concerning the Receivership Defendants. Nelson Snuffer does not dispute the inventory of the documents provided by Neldon Johnson. Because the identity of the documents is clear, they should be provided to the Receiver as ordered by the Court.

³ Docket No. 803.

⁴ Docket No. 738 at 9-10.

⁵ A copy of this summary is attached hereto as Exhibit A.

⁶ Docket Nos. 738-27 and 738-28.

⁷ Docket No. 808 at 3.

B. Even if the Documents Consist of Documents Necessary for Nelson Snuffer's Defense, They Should be Provided to the Receiver.

Nelson Snuffer asserts it should not be required to turn over the documents because the documents are purportedly necessary for its defense in the litigation the Receiver has commenced against Nelson Snuffer. The Receiver does not object to allowing Nelson Snuffer to retain a copy of the contents of the boxes for its defense against the Receiver. Nothing in the order prevents Nelson Snuffer from copying the documents if Nelson Snuffer believes such documents are necessary for its defense. Nelson Snuffer, however, cannot deprive the Receiver of the documents in these boxes, which were prepared for and paid for by Receivership Entities.

Nelson Snuffer's claim that boxes 15-27 contain the work product relating to their representation of "Neldon Johnson, IAS or others affiliated with IAS" does not create a basis to withhold the documents. The Corrected Receivership Order requires the production of such documents. It provides: "[a]ll attorneys . . . who have represented any of the Entity Receivership Defendants shall cooperate fully with the Receiver in providing the Receiver the contents of their files relating to those representations."⁸ Thus, boxes 15-27 should have been previously provided to the Receiver in compliance with the Receivership Order and should be provided at this time.

The Receiver controls any legal privilege that could be asserted as to the documents, whether work product or otherwise. The Corrected Receivership Order grants power to the Receiver "[t]o 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."⁹ This Court previously

⁸ Docket 491, at ¶ 41.

⁹ *Id.* at ¶ 13(n).

rejected Nelson Snuffer's attempts to withhold documents relating to its representation of Receiver Entities and held the Receiver owns the legal privileges for documents created by Nelson Snuffer.¹⁰ Thus, the Court has already ruled that the Receiver is entitled to the documents created by Nelson Snuffer. Consequently, the Motion to retain the records should be denied.

Although the privilege belongs to the Receiver, even if Nelson Snuffer could assert the privilege it has failed to meet its burden to show that the documents contained in boxes 15-27 constitute work product. "[T]he party asserting the work product privilege has the burden of showing the applicability of the doctrine."¹¹ It is insufficient to merely allege application of the work product doctrine, the party must show the documents were prepared for the client in anticipation of litigation.¹²

Nelson Snuffer provides nothing beyond a mere assertion that the work product doctrine applies to boxes 15-27. Even a cursory review, however, of the descriptions of the contents do not support Nelson Snuffer's assertions. For example, box 16 is reported to contain copies of trust account summaries and checks, signed contracts for a power plant purchase, documents for IAS's corporate tax returns, and invoices for legal services provided by Nelson Snuffer. Box 20 is reported to contain the operating agreement for Solco I-XI, corporate records for XSun and RaPower3, RaPower3, signed non-disclosures agreements, and various contracts and agreements between the Receivership Defendants. Box 19 appears to contain brokerage account statements and documents relating to the sale of IAS shares.¹³ None of these documents appear to constitute

¹⁰ See Docket 589 (ruling that Receiver holds legal privileges and was entitled to invoices from Nelson Snuffer for work performed and paid for by IAS or Rapower).

¹¹ *Lifewise Master Funding v. Telebank*, 206 F.R.D. 298, 304 (D. Utah 2002).

¹² *Id.*

¹³ Docket Nos. 738-27 and 738-28.

work product. Nelson Snuffer has not met its burden of showing the documents constitute work product.

Because Nelson Snuffer can retain a copy of the documents for its defense, the documents and any legal privilege asserted in them belong to the Receiver, and Nelson Snuffer has not shown the documents constitute work product, the Motion should be denied and the documents should be provided to the Receiver.

CONCLUSION

For the foregoing reasons, the Court should deny the Motion and require that boxes 15-27 be turned over to the Receiver.

DATED this 12th day of December, 2019.

PARR BROWN GEE & LOVELESS, P.C.

/s/ Jeffery A. Balls _____
Jonathan O. Hafen
Jeffery A. Balls
Michael Lehr
Attorneys for R. Wayne Klein, Receiver

CERTIFICATE OF SERVICE

I hereby certify that the above **MEMORANDUM IN OPPOSITION TO NSDP MOTION TO RETAIN RECORDS** was filed with the Court on this 12th day of December, 2019, and served via ECF on all parties who have requested notice in this case.

/s/ Jeffery A. Balls