

Denver C. Snuffer, Jr. (#3032) denversnuffer@gmail.com

Steven R. Paul (#7423) spaul@nsdplaw.com

Daniel B. Garriott (#9444) dbgarrriott@msn.com

Joshua D. Egan (15593) Joshua.d.egan@gmail.com

NELSON, SNUFFER, DAHLE & POULSEN

10885 South State Street

Sandy, Utah 84070

Telephone: (801) 576-1400

Facsimile: (801) 576-1960

*Attorneys for RAPower-3, LLC, International Automated Systems, Inc.,
LTB1, Neldon Johnson, and R. Gregory Shepard*

IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF UTAH, CENTRAL DIVISION

<p>UNITED STATES OF AMERICA,</p> <p>Plaintiff,</p> <p>vs.</p> <p>RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, and NELDON JOHNSON,</p> <p>Defendants.</p>	<p>Civil No. 2:15-cv-00828-DN-EJF</p> <p>NELSON, SNUFFER, DAHLE & POULSEN'S RESPONSE TO RECEIVER'S QUARTERLY REPORT (ECF Doc. 557)</p> <p>Judge David Nuffer</p>
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The Receiver filed a Quarterly Report ([ECF 557](#)) in which ¶¶ 6 a-n from page 38 to page 44 of the Report there is listed purported "Cooperation Failures" of this law firm. In response to these items we feel compelled to make the record clear as to each item:

It is not the understanding or belief of any member of this law firm that we have failed to cooperate with the Receiver, to the contrary we have struggled to comply and have gone to extraordinary lengths with the clients to try to fully respond. Our primary effort has been directed to the pending Tenth Circuit appeal which has required significant amounts of still unpaid legal time. We face challenges not only in dealing with the client, but also with our

retainer being frozen and non-payments since September of last year. We have fully cooperated, and believe the Receiver has deliberately misled the Court about the events, which we clarify below:

As to item 6a: The bank account was inadvertently listed as belonging to one Defendant, when it in fact belonged to another. As soon as the typographical error was discovered, it was corrected.

As to item 6b: The only information withheld was detailed billing statements containing attorney-client communications that the firm has been instructed by the client we are not to reveal. We contacted the Utah Bar Counsel's Office and spoke with a member of the OPC staff, Barbara Townsend, who advised us that the privilege belonged to the client and not the law firm, and that until there was a waiver we should follow the client's instructions.

Furthermore, in response to the Receiver's request to provide this information, on December 17, 2018, David Nelson provided a response to these requests.¹ With regard to the request for "a copy of all invoices sent to any of the entity defendants for services performed. The invoices should identify the dates on which work was performed, detailed descriptions of the work performed on each date, the person performing the work, and details regarding any expenses for which reimbursement was sought." Mr. Nelson responded:

"The information requested is subject to the attorney client privilege as to each of the Receivership Entities, including particularly the Receivership Entities which are not Receivership Defendants. The request is also substantially overbroad, unduly burdensome, and not reasonably calculated to result in the discovery of information relevant to the duties of the Receiver. For example, the divorce of Defendant Neldon Johnson happened many years ago and involved substantial legal work over several years. The work required to recover the payments, dates and amounts from that matter closed many years ago would be

¹ See Exhibit 1, Email from David Nelson to Wayne Klein and others dated December 17, 2018, including letter correspondence attached to email, but not other attachments identified in email.

cost-prohibitive and unlikely to be fully successful, even with our best efforts. The information requested as to the Receivership Defendants will not be produced pending further clarification from the Court as to the appropriate scope of these inquiries.”²

On December 18th, the Receiver responded and narrowed his request to focus only on payments, in which he stated:

“Payments to Nelson Snuffer. Pursuant to ¶ 9 of the Receivership Order, all prior directors, officers, managers, employees, attorneys, and other agents of RaPower-3 and IAS were dismissed effective October 31, 2018. Under ¶ 3, I have exclusive authority to act on behalf of RaPower-3 and IAS. In light of that, I renew- and narrow-my request for information about all payments made to Nelson Snuffer by RaPower-3 and/or IAS. I want to know what payments RaPower-3 or IAS made to Nelson Snuffer. If you do not have this information for all prior time periods, I am requesting the information-as the sole authorized representative of RaPower-3 and IAS-please so indicate in writing.”³

The Receiver additionally requested that Mr. Nelson respond by December 26th.⁴

On December 26th, Mr. Nelson responded via letter, in which he stated:

“As stated above, no waiver of the attorney client privilege is made as to any information not expressly provided in this letter or the attached exhibits. The attorney client privilege is reserved as to all other information and matters, including information that may be related to the information presented in this response or the attached exhibits.

Attached, as Exhibit “M”, is a tabulation of payments received from IAS, and Exhibit “N”, which is a tabulation of payments received from RaPower-3, both beginning with January 1, 2009. These tabulations were produced by our office manager, and, to the best of my knowledge, were derived from the best information available.

Attached, as Exhibit “O”, is a copy of checks issued by RaPower-3, beginning in June 2017, which I understand are not included in the tabulation presented in Exhibit “N”. It is my understanding that these checks are primarily for fees related to the US v. RaPower-3 et al. lawsuit.”⁵

² *Id.* at p. 2, response to 4.a.

³ See Exhibit 2, Email from Wayne Klein to David Nelson, dated December 18, 2018, with letter attached. See p. 1 of attached letter.

⁴ *Id.* at p. 2.

⁵ See Exhibit 3, letter from David Nelson to Wayne Klein dated December 26, 2018, p. 1-2.

On December 27th, the Receiver responded via email to Mr. Nelson: “Thank you for providing this information so promptly. I will review it and let you know if I have questions.”⁶

There has been no follow up communication received from the Receiver about any further request. Nelson Snuffer’s assertion of privilege was reasonable and directly responsive. Follow ups were immediately and appropriate. To the best of our understanding the Receiver was fully satisfied, thanked us for the response and cooperation, and left us with the clear understanding that everything was satisfactory. We are disappointed to read he now thinks this is evidence of non-cooperation.

As to item 6c: The Receiver’s assumption is incorrect. Nelson Snuffer does not have extensive corporate records for the Defendant corporations. The records Nelson Snuffer has in its possession relate to the current litigation, or have been provided to the Receiver, with the sole exception of a file notebook we were recently able to locate titled “DCL16BLT, Inc.” (an affiliated entity, but not a Defendant) prepared by an attorney Graham H. Norris in Cheyenne, Wyoming. This recently obtained notebook is being copied and the original will be provided to the Receiver. This corporation was domesticated to Utah and copies of those domestication records can be provided.

Contrary to the representations of the Receiver, Nelson Snuffer has not been counsel for IAS since its inception. IAS was incorporated in 1986 and Nelson Snuffer did not provide any services for IAS until approximately 1995, which initially were just patent related services. IAS has had securities counsel, and this firm has not and does not provide securities services for any client. Since 1995, Nelson Snuffer has not been corporate counsel for IAS. A number of law

⁶ See Exhibit 4, email from Wayne Klein to David Nelson dated December 27, 2018.

firms have provided a variety of services, including securities advice and assistance, to IAS since 1995, and those firms have interacted directly with IAS. Nelson Snuffer has only provided specific limited services when requested, most of which has been related to patent or litigation related matters. Nelson Snuffer has not attended an IAS Board of Directors' meeting and has not maintained the corporate records of IAS. Nelson Snuffer has not been involved in the day-to-day business of IAS at any time.

Although Nelson Snuffer aided in drafting initial limited liability company documents for RaPower-3, LLC (which have all been provided), Nelson Snuffer has never been corporate counsel for RaPower-3, LLC. A number of law firms have provided a variety of services to RaPower-3, LLC since its inception, and those firms have interacted directly with RaPower-3, LLC. Nelson Snuffer has only provided specific services when requested, almost all of which relate to this matter. Nelson Snuffer has not attended any RaPower-3, LLC meetings and has not maintained the corporate records of RaPower-3, LLC. Nelson Snuffer has not been involved in the day-to-day business of RaPower-3, LLC at any time.

As to item 6d: This allegation is altogether inaccurate. On December 17th, Mr. Nelson timely provided all documentation in Nelson Snuffer's possession regarding NPJFLP.⁷ Additional information regarding that partnership and its ownership interests was provided in correspondence also attached to that email.⁸ *Id.*

On December 18th, the Receiver stated in a letter to Mr. Nelson the following regarding the family partnership:

⁷ See Exhibit 1, attachments "C" – N.P. Johnson Family Limited Partnership Agreement; "D" NP JohnsonFLP-Hamblin Sale Agr – 14 Jan2011.

⁸ *Id.* at pp. 4-8 of attached letter.

“If I understand information in your letter correctly, the following are owners of the N.P. Johnson Family Limited Partnership:

- a. 15% is owned by the LaGrand T. Johnson Family Trust;
- b. 15% is owned by the Randale P. Johnson Family Trust;
- c. 20% is owned by Roger Hamblin, which was purchased from Neldon Johnson;
- d. 20% is owned by DCL-16A (which was sold by Neldon Johnson to Roger Hamblin);

Please identify the owner(s) of the remaining 30% of the entity.”⁹

Later that same day, December 18th, the Receiver sent the following communication via email: “In reading the amended partnership agreement of the NP Johnson Family Limited Partnership I found the identify of the owners of the remaining 30% of the partnership interests (LaGrand T. Johnson and Randale P. Johnson). Unless these have changed, you do not need to respond to that question in my letter.”¹⁰

The Receiver cites as evidence for this alleged failure the December 18 letter from Receiver to J. David Nelson, and Mr. Nelson’s letter of December 26, 2018, which admittedly does not address the question of ownership interests in NPJFLP, but deliberately omitted Receiver’s email of December 18th indicating that no further response was necessary. That deliberate omission is misleading for the Court. It also suggests there was non-cooperation, when in fact cooperation has been provided.

The family limited partnership was an estate planning vehicle. It did not involve buying and selling interests. It had testamentary purpose not arms-length bargaining involved with its structure and creation.

As to item 6e: To the best of our knowledge and understanding, we do not have and have never been in possession of bank account statements for XSun or Solco. The only account

⁹ See Exhibit 2, attached letter, pp. 1-2.

¹⁰ See Exhibit 5, email from Wayne Klein to David Nelson dated December 18, 2018.

information we have ever seen was provided to us and the Court by the government during the trial of this case, including exhibits summarizing the account information at trial. The information obtained by the government through subpoenas directly from the banks and provided by the government to us is the only source of banking information in our possession. We have nothing more and have never been in possession of bank account information.

As to item 6f: Steven Paul provided the information and agreement the client authorized, and when the client changed his mind, the depositions we anticipated taking place were canceled. We notified the Receiver of the cancellation as soon as we learned the client intended to refuse to participate. We have no control over the client's decision. (See [ECF 559-2](#)).

As to item 6g: The letter identified the parcels as IAS property because the Receiver claimed it to be such. Immediately below the chart the clarification is provided that states: "Property (aa), the California Condo Unit G, is owned by Glenda Johnson, not IAS, and is not an asset belonging to IAS. See attached property tax notice." A tax notice was also provided to clarify the ownership. It is impossible to read the correspondence and be misled about who is identified as the owner of the property. The listing in the chart was intended to help alert the Receiver to the IAS issue, which was then promptly clarified immediately below the chart.

As to item 6h: This law firm is not in possession of any information or lease documentation concerning the properties. That information must come from the client, and we have nothing provided to us to allow us to respond.

As to item 6i: The control of foreign entities has been arranged and managed outside of the knowledge or participation of this law firm. We can provide nothing other than what the client chooses to provide to us.

As to item 6j: After researching the issue, we have discovered that a lawsuit regarding this claim was settled on July 17, 2017. A copy of the Release and Settlement Agreement is attached.¹¹

As to item 6k: We have no information about the Cessna 414 and therefore cannot provide any information.

As to item 6l: We have no information about the payments for interests in the Family Limited Partnership, and therefore cannot provide any information. The only information we have was included in what was provided. The best evidence of the contributions made by the identified trusts was contained within the copy of the limited partnership agreement, wherein the contribution from those trusts is stated as “undetermined.” Nelson Snuffer had no involvement with the contributions, record keeping, or other matters relating to the Family Limited Partnership until the sale of ownership interests was made to Roger Hamblin. Nelson Snuffer prepared the documents to document that sale at the time, and copies of those documents were provided.

As to item 6m: David Nelson did not know that the request to identify the Alabama litigation had been made of him because the litigation was not pending.¹² RaPower-3, LLC was dismissed from that case on May 11, 2016.¹³ Service upon IAS was quashed on May 11, 2016 and there were no subsequent efforts to serve IAS known to IAS, RaPower-3, LLC, or Nelson

¹¹ See Exhibit 6.

¹² See Exhibit 7, Order dismissing RaPower-3, LLC from lawsuit dated May 11, 2016 from *Tate v. RaPower-3, LLC, et al.*, Circuit Court of Montgomery County Alabama, Case No. CV-2016-900056.00.

¹³ *Id.*

Snuffer.¹⁴ Because the plaintiff in that action failed to prosecute that case and it was inactive for several years, the case was dismissed on October 17, 2018.¹⁵ The matter was not pending as of December 3, 2018, and had no activity for several years prior. David Nelson has never been an attorney of record for that case.

As to item 6n: We have been paid a retainer to permit us to provide legal assistance, which has been frozen, and remains in our trust account. We assert the right to payment from those frozen funds, and believe we hold them subject to a statutory attorney lien, in addition to the agreement to be paid from those funds, the payment was provided from a non-Defendant whose identity was known to the Plaintiff before filing the present suit. The Plaintiff elected to not name them as a party to the case, and therefore we believe the freeze of those funds is inappropriate.

We believe the Receiver's Quarterly Report is misleading as to all the foregoing, and suggests a lack of cooperation which has not happened. To the best of our ability to do so, we have cooperated with the Receiver and timely provide information in our possession or control, despite the fact that doing so has required numerous hours of still unpaid legal effort. The Receiver's report also suggests we have been discharged as legal counsel, and therefore we intend to end our effort and withdraw as counsel. A motion to withdraw will be filed shortly.

DATED this 31st day of January, 2019.

NELSON SNUFFER DAHLE & POULSEN

/s/ Steven R. Paul

¹⁴ See Exhibit 8, Order granting IAS motion to quash service upon them dated May 11, 2016 from *Tate v. RaPower-3, LLC, et al.*, Circuit Court of Montgomery County Alabama, Case No. CV-2016-900056.00.

¹⁵ See Exhibit 9, Order of Dismissal dismissing IAS from lawsuit dated October 17, 2018 from *Tate v. RaPower-3, LLC, et al.*, Circuit Court of Montgomery County Alabama, Case No. CV-2016-900056.00.

Denver C. Snuffer, Jr.
Steven R. Paul
Attorneys for Defendants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **DEFENDANT R. GREGORY SHEPARD'S RESPONSE TO MOTION FOR ATTORNEY'S FEES** was sent to counsel for the United States in the manner described below.

Erin Healy Gallagher
Erin R. Hines
US Dept. of Justice
P.O. Box 7238
Ben Franklin Station
Washington, DC 20044
Attorneys for USA

Sent via:
 Mail
 Hand Delivery
 Email: erin.healygallagher@usdoj.gov
erin.r.hines@usdoj.gov
 Electronic Service via Utah Court's e-filing program

Wayne Klein, Receiver
P.O. Box 1836
Salt Lake City, Utah 84110

Sent via:
 Mail
 Hand Delivery
 Email: wklein@kleinutah.com
 Electronic Service via Utah Court's e-filing program

Jonathan O. Hafen
Joseph M.R. Covey
PARR BROWN GEE & LOVELESS
101 South 200 East, Suite 700
Salt Lake City, Utah 84111
Attorneys for Receiver

Sent via:
 Mail
 Hand Delivery
 Email: jhafen@parrbrown.com
jcovey@parrbrown.com
 Electronic Service via Utah Court's e-filing program

/s/ Steven R. Paul
Attorneys for Defendants