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**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 GLENDA
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 Glenda Johnson’s Motion for Protective Order.

INTRODUCTION

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

ARGUMENT

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

Mrs. 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 Mrs. Johnson should have already produced under this Court’s Order. No subpoena should have been necessary.

The Order provides that all officers, employees, accountants, any person acting on behalf of Receivership Defendants, and any person receiving notice of the Order is “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 persons “having control, custody, or possession of records of Receivership Defendants” or those who “have possession of the property, business, books, records, accounts, or assets of the Receivership Defendants, *are hereby ordered*

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\(c\)\(1\)](#). Mrs. Johnson did not confer or attempt to confer with the Receiver before filing her 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).

*to deliver the same to the Receiver or his agents or employees.”*⁴ The Order also requires that “any affiliated individuals (*including spouses* and other family members) *shall cooperate* with and assist the Receiver . . . [and] *must respond promptly and truthfully to all requests for information and documents from the Receiver.*”⁵ Finally, the Order requires family members of Neldon Johnson—such as Mrs. 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 Mrs. Johnson because: (1) she was an employee of Receivership Defendants, (2) she has been served with a copy of the Order,⁷ and (3) she is the spouse of Neldon Johnson, a Receivership Defendant. Therefore, the Order requires Mrs. Johnson 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. Mrs. Johnson does not contest the relevance of the requested documents and the requests do not exceed the scope of the documents and records Mrs. Johnson is required to produce under the Order. Therefore, she must produce the documents to the Receiver forthwith, as required under the Order.

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

Despite the claims in Mrs. Johnson’s Motion, February 8, 2019 represented a reasonable amount of time for Mrs. Johnson to respond to the document requests. First, Mrs. Johnson

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

⁵ *Id.*, ¶ 23 (emphasis added).

⁶ *Id.*, ¶ 28 (emphasis added).

⁷ *See* Glenda Johnson Acknowledgment: Receipt of Receivership Order, dated November 29, 2018, attached hereto as Exhibit 1.

acknowledged receipt of the Order on November 29, 2018.⁸ Upon receipt of the Order she 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 Mrs. Johnson.⁹ On December 11, 2018, the Receiver requested copies of certain records from Mrs. Johnson.¹⁰ Then on January 7, 2018—just two days before her scheduled deposition—she cancelled to purportedly “work on getting the information gathered”.¹¹ Finally, on January 14, 2019, a Notice of Intent to Serve Subpoena to Glenda Johnson was served upon Mrs. Johnson’s attorneys.¹² 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 upon a non-party “to give an opposing party the opportunity to object to a subpoena *prior to service*.”¹³ Although the Notice was served upon Mrs. Johnson’s attorneys on January 14th, no objection was made until February 7, 2018, the day before the documents were due. Now, Mrs. Johnson claims that February 8, 2019—more than 11 weeks after receipt of the Order and 10 weeks after the Receiver’s initial request—is an “incredibly short period of time to respond”. As the record shows, however, Mrs. Johnson had more than a reasonable amount of time to produce the requested documents to the Receiver.

⁸ *Id.*

⁹ See email thread between Steven Paul and the Receiver, attached hereto as Exhibit 2.

¹⁰ *Id.*

¹¹ *Id.*

¹² [Docket No. 554](#).

¹³ *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., Inc.*, 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].”))

Mrs. Johnson points out that she 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. 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 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 that at their scheduled depositions. No objection was raised that stayed or excused their absence.¹⁶

II. 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 Mrs. Johnson. Mrs. Johnson also states that the Receiver should subpoena other sources to save her the “trouble” of “requiring her to track down documents for the benefit of the receiver.”¹⁷ In fact, Mrs. Johnson—as employee and bookkeeper for most of the entities and the owner of her personal financial records—is the best (and possibly only) source of the information the Receiver needs to satisfy his obligations under the Order.

¹⁴ Email thread between ICU Investigations and Natalie McKean, attached hereto as Exhibit 3.

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.

Moreover, it is more cost-effective and efficient for the Receiver to seek records from the person who (1) created and maintained these records, and (2) 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, Mrs. Johnson states that “almost all (if not all) of the information Glenda Johnson has in her possession or control was obtained by her counsel during discovery or at trial of the above case. A copy of that material has been copied and produced to the receiver.” Neither the Receivership Defendants nor Mrs. Johnson, however, have produced to the Receiver regular business records of the entities such as QuickBooks files, check registers, bank statements, correspondence, corporate minutes, stock ledgers or other stockholder records, records of accounts payable and accounts receivable, credit card statements, payments to Mrs. Johnson by Receivership Defendants, or sources of funds for her real estate purchases.¹⁸

If Mrs. Johnson really does not have her own personal financial records, or documents related to the Receivership Defendants and affiliated entities in her control, the Order requires that she “provide information to the Receiver identifying the records, the persons in control of the records, and efforts undertaken to recover the records.”¹⁹ Any information of this kind must be provided to the Receiver under oath.²⁰

CONCLUSION

For the foregoing reasons, Mrs. Johnson’s Motion for Protective Order should be denied and, if Mrs. Johnson fails to promptly produce records and documents or cooperate with the

¹⁸ The Receiver notes that while Mrs. Johnson claims that producing all the records requested by the Receiver would be oppressive and overly burdensome, she has produced none of the records requested. There has been no effort on her part to deliver to the Receiver any of the records she created and maintained.

¹⁹ [Docket No. 491](#), ¶ 24.

²⁰ *Id.*, ¶ 28.

Receiver as required under the Order, Mrs. Johnson should be held in contempt under Rule 45(g) of the *Federal Rules of Civil Procedure*.²¹

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

²¹ 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 GLENDA 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
