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BEFORE THE DEPARTMENT OF WATER RESOURCES

OF THE STATE OF IDAHO

IN THE MATTER OF THE PETITION FOR DELIVERY CALL OF RANGEN, INC.'S WATER RIGHT NOS. 36-02551 & 36-07694	Docket No. CM-DC-2011-004 **RANGEN, INC'S RESPONSE IN OPPOSITION TO MOTION TO COMPEL AND REQUEST FOR SANCTIONS**

Rangen, Inc. ("Rangen"), through its attorneys, submits the following Response in Opposition to City of Pocatello and IGWA's Motion to Compel Production of Research List and Request for Sanctions.

I. BACKGROUND

The City of Pocatello and IGWA have filed a motion requesting that the Director issue an order requiring Rangen to produce a "research list" that was identified during the deposition of David Brock. The Intervenors argue that they "have tried repeatedly to

obtain a specific accounting of unperformed research projects." Motion to Compel, p. 7. IGWA argued at Mr. Brock's deposition that: "I think we have the right to see what projects Rangen had planned and couldn't perform." Brock Transcript, p. 146, lines 10-11. The list that the Intervenors are seeking is NOT a list of research projects that Rangen had planned and could not perform. Moreover, even if it did contain that information, the Intervenors are not entitled to the list because: (1) it constitutes an attorney-client communication; and (2) it is attorney work-product and the Intervenors have other means of discovering the information they are requesting. For these reasons, Rangen requests that the Intervenors' Motion to Compel be denied. Alternatively, if the Intervenors' Motion is granted, Rangen requests that the Intervenors' Motion for Sanctions be denied because Rangen's position is substantially justified and sanctions would be unjust.

II. RANGEN HAS NO OBLIGATION TO PRODUCE THE RESEARCH LIST BECAUSE IT IS PRIVILEGED

1. Rule 520.02 of the Department's Rules of Procedure provides that the scope of discovery in this matter is governed by Rule 26(b). See IDAPA 37.01.01.520.02.

2. Rule 26(b)(1) describes the scope of discovery in relevant part as:

> Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows: (1) Parties may obtain discovery regarding any matter, **not privileged**, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter.

IRCP 26(b)(1) (emphasis added).

3. There are two privileges which protect the disclosure of the "research list:" (1) attorney-client communication; and (2) attorney work-product.

4. The Intervenors recognize that Rangen does not have to reveal attorney-client communications. Their argument is that the research list is not a confidential communication. The research list came about as a result of an email exchange between Robyn M. Brody, counsel for Rangen, and Wayne Courtney, Rangen's Executive Vice President. Brody Aff. at ¶ 2. The list was not a business record, but was created as the result of a request from Rangen's attorney. See Brock Depo., p. 98, lines 14-17. Attorney Brody sent Mr. Courtney an email and he returned an email with the list attached as well as explanatory text. Brody Aff. at ¶ 2. The list is not self-explanatory or complete and must be read in conjunction with the emails to be understood. Id. While the Intervenors state that they are not seeking communications between Rangen and its attorney, it is not possible to separate the research list from the communications between Mr. Courtney and Attorney Brody.

5. The Intervenors also contend that the research list is not an attorney-client communication because Mr. Brock testified that it was intended to be disclosed to the Intervenors. In support of their position, the Intervenors cite Farr v. Mischler, 129 Idaho 201, 207, 923 P.3d 446, 452 (1996). The Farr case involves the interpretation of Idaho Rule of Evidence 502(a)(5) and is distinguishable on that basis. The Department's Rules of Procedure expressly provide that the Idaho Rules of Evidence do not apply unless they are adopted by the Department or their application is required by Idaho law. See IDAPA 37.01.01.052. As such,

the Farr case is inapplicable to this dispute. Moreover, even if the rule set forth in IRE 502(a)(5) were a requirement under the common law attorney-client privilege, Attorney Brody never had any communications with Mr. Brock concerning the research list until this dispute arose during the course of his deposition. Brody Aff. at ¶ 3. Brock was not a participant in the communication between Attorney Brody and Wayne Courtney and his understanding of the "intent" behind the communication is not controlling.

6. While the Intervenors dismiss the argument that the research list constitutes an "attorney-client" communication, they acknowledge that the list constitutes attorney work-product. Motion to Compel, at p. 7 (citing United Heritage Prop & Cas. Co. v. Farmers Alliance Mut. Ins. Co., No. 1: CV 10-456-BLW, 2011 WL 781249, at *4 (D. Idaho Mar. 1, 2011).

7. The Supreme Court of the United States explained the importance of the attorney work-product privilege in the landmark case of Hickman v. Taylor, 329 U.S. 495, 511 (1947):

> Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. Proper preparation of a client's case demands that he assemble information, sift what he considers to be the relevant from the irrelevant facts, prepare his legal theories and plan his strategy without undue and needless interference. That is the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. This work is reflected, of course, in interviews, statements, memoranda, correspondence, briefs, mental impressions, personal beliefs, and countless other tangible and intangible ways — aptly though roughly termed by the Circuit Court of Appeals in this case as the "work product of the lawyer."

> Were such materials open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in the giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

Hickman, 329 U.S. at 511.

8. The Intervenors contend that the Director should set aside the long-recognized attorney work-product privilege because they have a "substantial need" for the research list and they cannot obtain the "substantial equivalent" of the list by other means. Motion to Compel, at p. 8. The Intervenors' position is untenable for several reasons.

9. First, as far as "substantial need" goes, the parties have a disagreement as to the relevancy and admissibility of the evidence the Intervenors are seeking. As explained in Rangen's Motion for Partial Summary Judgment re: Material Injury, this type of evidence has no place in the analysis of whether Rangen has suffered material injury. Rangen understands that the Intervenors disagree with this legal analysis. Nonetheless, this is a legal issue that the Director has not yet resolved.

10. Second, as explained in the opening section of this Response, the research list identified by Brock is not an accounting of abandoned research projects. The Intervenors claim that they "need" the list to determine what research Rangen had planned, but could not complete, but the production of the list will not answer the Intervenors' question.

11. Finally, even if the list were an accounting of abandoned research projects, the Intervenors could obtain whatever information Rangen has concerning this subject through other means. One of the simplest and least expensive methods to obtain this type of information is simply by crafting an interrogatory directed to the corporation. The Intervenors argue that they have been requesting information about Rangen's abandoned research projects since November 2012. At no point in time, however, have they submitted an interrogatory to the corporation asking it to supply this information.

12. There is no justification for setting aside the attorney work-product privilege in a case where the admissibility of the information sought is doubtful, the privileged document will not provide the information being sought, and there are other means of seeking the information without violating the attorney-client or attorney work-product privilege. For these reasons, the Intervenors' Motion to Compel should be denied.

III. NO SANCTIONS ARE WARRANTED

13. The Intervenors contend that Rangen should be "punished" with sanctions for its refusal to produce the research list. In support of its position, the Intervenors argue that IRCP 37(a)(4) provides that the Director "shall" award costs and fees if the Motion to Compel is granted. Noticeably absent from the Intervenors' Motion, however, is any discussion or even reference to the remaining part of rule 37(a)(4) which provides that costs and fees are not appropriate if the Director

finds that Rangen's opposition to the motion is substantially justified or that an award of costs or fees would be unjust. Rules 37(a)(4) states in its entirety:

> The court shall, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, **unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.**
>
> If the motion is denied, the court shall, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.
>
> If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

14. Rangen's assertion of the privilege was substantially justified. In fact, the Intervenors acknowledge that the research list is attorney work-product. They argue, however, that the Director ought to make an exception and abrogate the privilege because they have a substantial need for the information and cannot get the information through other means. It would be unjust to award costs and fees as a sanction against a party when there is a genuine dispute as to whether an exception to a privilege applies.

15. The Intervenors also contend that Rangen should have supplemented its answers to IGWA's first set of discovery and identified the research list as privileged in accordance with IRCP 26(b)(5)(A). The Intervenors have not identified which interrogatory or request for production should have

been supplemented. Moreover, the Rules of Civil Procedure do not apply to this case except as expressly provided by the Department's Rules of Procedure or as otherwise required by Idaho law. See IDAPA 37.01.01.052. The only part of Rule 26 that has been incorporated into the Department's Procedural Rules is the scope of discovery set forth in Rule 26(b)(1). See IDAPA 37.01.01.520.02. The Department has not adopted the portion of Rule 26 requiring the identification of privileged information.

16. Sanctions are an extreme measure and should be reserved for cases involving misconduct. They are not appropriate in cases where there is a genuine dispute about whether an exception to a long-standing privilege applies. As such, the Intervenors' request for sanctions should be denied even if the Motion to Compel is granted.

IV. CONCLUSION

For the foregoing reasons, Rangen respectfully requests that the Intervenors' Motion to Compel be denied in its entirety. In the event the Motion is granted, Rangen requests that the Intervenors' request for sanctions be denied.

DATED this 13th day of February, 2013.

BRODY LAW OFFICE, PLLC

By: _____
Robyn M. Brody

CERTIFICATE OF SERVICE

The undersigned, a resident attorney of the State of Idaho, hereby certifies that on the 13th day of February, 2013 she caused a true and correct copy of the foregoing document to be served upon the following by the indicated method:

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