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

<p>UNITED STATES OF AMERICA, Plaintiff, Counterclaim Defendant v. RAPOWER-3, LLC, et al., Defendant.</p>	<p>MOTION TO MODIFY TRIAL SUBPOENA (Todd Anderson and Jessica Anderson) Case No.: 2:15-cv-00828-DN-EJF</p>
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RELIEF SOUGHT AND GROUNDS FOR RELIEF

Non-parties Jessica Anderson and Todd F. Anderson (collectively “the Andersons”) seek the Court modify the United States’ Subpoena compelling them to testify at trial. Alternatively, the Andersons seek modification of the subpoena to alleviate undue burdens. As further outlined below, the Andersons cannot be compelled to attend trial under the Plaintiff’s subpoena because of substantial expense and undue burden. The Andersons are not attempting to avoid testifying. However, compliance will require them to incur significant travel expenses, personal expenses as a result of their young children, and professional costs because of substantial time away from

their law practice. Compliance will also require them to offer expert testimony by answering questions about legal issues, but they are not retained experts. The court should modify the subpoena conditions to provide fair compensation to alleviate undue burdens and expense on the Andersons. Specifically, the Andersons' seek \$1,600.00 per day for lost income/professional fees for each day Todd Anderson must appear, \$400.00 per day for lost income/professional fees for each day Jessica Anderson must appear, as well as all travel-related costs and child care costs.

RELEVANT FACTS

1. Jessica Anderson and Todd F. Anderson are listed as trial witnesses for Plaintiff and Defendants. (Docket # 314, United States' Fed. R. Civ. P. 26(a)(3)(A)(i) Witness List, p.2; Docket # 294, Defendants' Pretrial Disclosures, p. 2.)
2. The Andersons previously served as attorneys for Defendant RaPower-3, which has raised a defense in this action that it acted on advice of counsel. (Docket # 22, Answer of Defendants, ¶ 42, p. 7; Sixth Defense, p. 21.)
3. The subpoenas issued to the Andersons require them to appear at 8:00 am on April 2, 2018 for trial. It is counsel's understanding that the trial is set for several days, and that the witnesses will need to be flexible with the timing of their testimony.
4. The Andersons live and run a full-time law practice in Delta, Utah, which is over 100-miles from the Court. They estimate that they would have to leave at 5:00 am to comply with the subpoena, and may not return until 8:00 pm the same day. (Declaration of Todd Anderson, attached as Exhibit A, ¶¶ 3-6.)
5. The Andersons have four children, ranging in age from two to seven. (Ex. A, ¶ 4.)

6. The Andersons expect that during their time complying with the subpoena, they will not be able to work on legal matters for their clients. (Ex. A, ¶¶ 3-9). Typically, the Andersons charge \$200.00 per hour for work on legal matters. (Ex. A, ¶ 10.)

7. Plaintiff took the depositions of Jessica Anderson and Todd Anderson. In each deposition, they were asked questions about matters that involve legal knowledge.¹

ARGUMENT

I. The Andersons Will Incur Substantial Expenses in Traveling Over 100 Miles.

Normally, a subpoena can only require attendance of a non-party who lives in the same state as the trial to travel over 100 miles if they “would not incur substantial expense.” (Fed. R. Civ. P. 45(c)(1)(B).) However, the court can require the subpoena’s issuing party to pay expenses to alleviate substantial expenses. (*See id.* Advisory Committee Notes, 2013 Amendment.) The Andersons live and work in Delta, Utah. They would have to pay for their travel to and from Delta, possibly several times over a multi-day trial, which by itself is a substantial expense, and could only be avoided by staying near the court for the duration of the trial, which could have the alternative expense of hotel costs. Additionally, the Andersons would need to pay for child care for the duration of their travel, increasing an already significant cost. The subpoena cannot require the Andersons to appear without modifications given these substantial expenses. As discussed further below, the Andersons will also suffer loss of income because they will not be

¹ (Deposition of Jessica Anderson at 25:7-15; 30:1-4; 33:15-23; 34:12-22; 35:11-17; 35:21-36; 37:10-19; 48:17-49:4; 49:11-15; 52:3-16; 53:3-7; 53:23-54:7; 60:5-17; 62:5-18; 62:24-63:2. 70:11-71:2; 71:11-23; 75:19-76:1; 81:23-82:14; 83:2-10; 85:7-15; 89:20-90:6; 95:3-96:16; 108:16-19; 109:8-16; 111:16-112:12; 117:23-118:7; 123:12-24; 125:2-11; 141:20-25; 142:1-16; 142:18-143:3; and 143:5-13; Deposition of Todd Anderson at 27:12-24; 86:23-87:12; 88:4-10; 97:23-98:15; 127:5-13; 178:25-179:12; 186:4-9; 186:17-24; and 188:1-15.)

able to work on legal matters for clients while they are traveling and participating in court, including waiting to be called for testimony. As a result, the subpoena should be modified to cover the reasonable transportation, lodging, child care, and loss of income costs.

II. The Subpoena Should be Modified Because of Undue Burden.

The Court “must . . . modify a subpoena that . . . subjects a person to undue burden.” *Id.* at 45(d)(3)(A). Attendance at trial would subject the Andersons to an undue burden, and therefore the Court is required to modify it to relieve the burden. As discussed above, trial attendance away from home will require large expenses and travel time because of the distance from Delta, Utah. Additionally, the Andersons would be forced to leave their very young children in the care of others. These expense and travel away from their children constitute an undue burden. Moreover, the Andersons will have to suspend their small law practice, which serves clients in rural communities. Todd Anderson represents Delta as the City Attorney. It is an undue burden to take the Andersons away from their law practice which is also their source of income, especially given the circumstances of its unique nature serving legal needs in rural communities. Attendance at trial could place a large burden on their ability to support themselves as well as their business. Because the subpoena would require the Andersons to be subjected to an undue burden, Rule 45 requires the Court to modify the subpoena.

III. The Subpoena May be Modified Because the Andersons Will Offer Specialized Testimony Relating to Legal Issues as Unretained Experts.

When a court finds compliance with a subpoena would require disclosing unretained expert testimony, the Court has the discretion to modify the subpoena. (Fed. R. Civ. P.

45(d)(3)(B).) It is well recognized that parties can be compensated for compliance with a subpoena for costs, testimony, and lost earnings. *See Legal Voice v. Stormans Inc.*, 738 F.3d 1178 (9th Cir. 2013); *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001); *Wright v. Jeep Corp.*, 547 F.Supp. 871 (E.D. Mich., 1982); *Coleman v. Dydula*, 190 F.R.D. 320 (W.D.N.Y. 1999). Independent of the issues stated above, the court should modify the subpoena because compliance with it will require the Andersons to serve as unretained expert witnesses because of their expert knowledge as educated and practicing attorneys. RaPower raised the issue that it acted on the advice of counsel, the Andersons. As became clear in their depositions, the Andersons will be asked at trial questions that require the knowledge of the practice of law, issues of tax law, business entities, and other information that goes beyond simple fact testimony and into expert territory. For example, their testimony may require knowledge of the information an attorney would need to obtain from a client before offering an opinion, whether their writings or statements to RaPower constituted legal advice or opinions, what legal issues their writings and statements were meant to address and not address, what the limits and purposes were of their writings and statements to RaPower, and what constitutes general legal principles versus specific legal advice. The Andersons are unique as witnesses because their testimony includes legal expertise.

In *Wright v. Jeep Corp.*, 547 F.Supp. 871 (E.D. Mich., 1982), non-party Snyder moved to quash a subpoena which compelled him to testify at trial because of the burden imposed on him as a non-retained witness. Snyder's testimony was sought because of research he had conducted into defendant's products, although neither party had retained him to testify. The court recognized that he had relevant information about the issues in the case, and this information was

within the context of expert knowledge. *Id.* at 874. The court found that although the parties had shown a need to have Snyder's information as part of the case, he was still entitled to a fee for testifying. *Id.* at 876-77. Here, if the Andersons are compelled to testify, they should be similarly entitled to professional fees for their testimony and time as experts. It would be unfair to give the parties the benefit of their expert knowledge of the law, without the compensation that expert services should be allowed.

Similarly, in *Coleman v. Dydula*, 190 F.R.D. 320 (W.D.N.Y. 1999), the court found that treating physicians were entitled to a reasonable fee for deposition testimony because they were expected to offer opinion testimony. The court noted that the doctors "provide invaluable services to the public and should be remunerated for their time when they cannot deliver medical care." *Id.* at 323 quoting *Haslett v. Texas Industries, Inc.* 1999 WL 354227 (N.D. Tex., May 20, 1999) at *2. Here, the Andersons also provide services to the public, particularly in their service of rural community legal needs and acting as City Attorney for Delta. Their time spent away from the practice of law, to testify in a matter where their education and skills will be related to their testimony, should be fairly compensated.

Rule 45 explicitly anticipates that there are times when a non-party witness may be compensated for loss of income. (*See Fed. R. Civ. P. 45(d)(1)* (providing for sanctions "which may include lost earnings".) The Rule contemplates that, in some circumstances, the person responding to a subpoena may naturally incur lost earnings by complying with the subpoena. Additionally, under Rule 45 (d)(3)(C), the court is permitted to specify conditions that "ensures that the subpoenaed person will be reasonably compensated." As detailed above, the Andersons will incur costs and expenses, including loss of income, simply because of the distance they

would have to travel and their time away from their law practice. Further, their testimony at trial will include technical knowledge and opinions as experts. Given the costs they will incur, and the nature of their testimony, this is a situation where Rule 45 authorizes the court to modify or place conditions on a subpoena so that the non-party witnesses are fairly compensated.

DATED this 19th day of March, 2018.

STRONG & HANNI

/s/ Byron G. Martin

Byron G. Martin
Attorneys for Todd Anderson

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of March, 2018 a true and correct copy of the foregoing **MOTION TO MODIFY TRIAL SUBPOENA** was served by the method indicated below, to the following:

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