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

UNITED STATES OF AMERICA, Plaintiff, vs. RAPOWER-3, LLC, INTERNATIONAL AUTOMATED SYSTEMS, INC., LTB1, LLC, R. GREGORY SHEPARD, NELDON JOHNSON, and ROGER FREEBORN, Defendants.	**UNITED STATES' OPPOSITION TO HEIDEMAN & ASSOCIATES "RULE 52(b), RULE 59(e) AND RULE 60(b)(6) MOTION FOR RELIEF"** Civil No. 2:15-cv-00828 DN Chief Judge David Nuffer Magistrate Judge Evelyn J. Furse

On November 9, 2018, Heideman & Associates ("H&A") filed its "Rule 52(b), Rule 59(e) and Rule 60(b)(6) Motion for Relief."[1] H&A asks the Court to reconsider its determination that H&A is jointly & severally liable, with its former clients, for the United States' reasonable expenses and attorney's fees associated with several motions to compel discovery (deposition testimony and document production) of several third party advisors pursuant to Fed. R. Civ. P. 37(a)(5).[2] The Court should decline H&A's invitation to revisit a decision that was well grounded in fact and law.[3]

But even if the Court were to reconsider the facts and law to explicitly note its evaluation of H&A's opposition brief, the outcome should not change. Under Rule 37, if a discovery motion is granted, or if discovery is provided after a motion is filed, "the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees," unless the responding party's objection was substantially justified.[4] This Court's order that H&A be jointly and severally liable for the United States' attorney's fees and costs incurred in motions practice is correct under Rule 37 and should not be disturbed.

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[1] ECF Doc. No. 503. H&A asks for "amended or additional findings" under Rule 52(b) because it does not believe that the record establishes the basis for the Court's findings, a "new trial" under Rule 59(e) because the Court did not hold oral argument, relief from the judgment under Rule 60 because it does not believe the Court's order is just.

[2] ECF Doc. No. 480. The third party advisors were attorneys Kenneth Birrell & Todd Anderson, and CPA's Ken Oveson, Cody Buck, and Davy Mantyla.

[3] The United States has no objection to the Court expanding on its initial decision to explain the many reasons that H&A engaged in conduct that necessitated the United States' motion to compel.

[4] Fed. R. Civ. P. 37(a)(5); see generally, *Leon v. Summit Cty*, 2017 WL 5891771, at *7 (D. Utah 2017) (Nuffer, J.).

I. The United States substantially prevailed on every discovery issue, either through the Court's order, or by agreement with subsequent counsel, or both.

The United States sought compensation for its expenses in litigating discovery issues:

1. Deposition testimony of Cody Buck, Ken Oveson, and David Mantyla (each associated with accounting firm Mantyla McReynolds);[5]
2. Document production and deposition testimony from Todd Anderson[6]; and
3. Deposition testimony of Kenneth Birrell.[7]

Each of these matters was resolved substantially in the United States' favor because we obtained the documents and deposition testimony we requested. In the context of expenses under Rule 37, it is irrelevant whether the motion is resolved by order of the Court, or if the resisting party subsequently discloses the requested information.[8] H&A was responsible for the meritless privilege assertions that the Court overruled or later counsel abandoned, not the witnesses.

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[5] See ECF Doc. No. 137 (United States' Motion to Compel Deposition Testimony of Cody Buck, Ken Oveson, and David Mantyla); ECF Doc. No. 147 (Defendants' Response); ECF Doc. No. 209, Order Granting Motion to Compel Deposition Testimony of Cody Buck, Ken Oveson, and David Mantyla.

[6] See ECF Doc. No. 124 (Todd Anderson's Motion to Quash Deposition Subpoena); ECF Doc. No. 127 (Defendants' Motion to Quash Todd Anderson's deposition subpoena); ECF Doc. No. 138 (United States' Motion to Compel Todd Anderson to Produce Documents); ECF Doc. No. 150 (Defendants' Objections to the United States' Motion to Compel Todd Anderson to Produce Documents); ECF Doc. No. 163 (United States' Renewed Motion to Compel Todd Anderson to Produce Documents); ECF Doc. No. 176 (Defendants' Opposition to United States' Renewed Motion to Compel Todd Anderson to Produce Documents); ECF Doc. No. 206, Order Granting Motion to Compel Todd Anderson to Produce Documents (noting that "[a]ll documents on topics related to the Anderson letter and its contents are discoverable. All communications between and Defendant and Mr. Anderson on topics related to the Anderson letter and its contents are discoverable," and that "[t]he deposition of Mr. Anderson shall take place on August 4, 2017….").

[7] See ECF Doc. No. 140 (United States' Motion to Compel Deposition Testimony of Kenneth Birrell); ECF Doc. No. 203 (Order Granting Motion to Compel Deposition Testimony of Kenneth Birrell) (noting that "[o]bjections made by counsel for Neldon Johnson, RaPower-3, LLC, International Automated Systems, Inc., and LTB1, LLC are withdrawn by stipulation in open court.").

[8] See Fed. R. Civ. P. 37(a)(5); Wright & Miller, Federal Practice & Procedure § 2288, n. 18 (3d ed. 2018); see also *Rhein Med., Inc. v. Koehler*, 889 F. Supp. 1511, 1518 (M.D. Fla. 1995).

1. The Court ordered Buck, Oveson, and Mantyla to testify.

As the Court is aware, while promoting the solar lens tax scheme, the defendants consulted with various professionals including Ken Oveson and Cody Buck, who put them on notice that their statements about their solar lenses' purported tax benefits were false or fraudulent.[9]

At Cody Buck's deposition, Mr. Christian Austin, of H&A, objected to questions we posed to Cody Buck, claiming that "[i]nformation relating to accountant's advice given related to preparation of tax returns or any other tax advice … are protected by the evidentiary privilege."[10] We pointed to circuit court authority that was contrary to Mr. Austin's position, but he rebuffed us.[11] Mr. Buck's attorney noted that he "had no objection"[12] to the Government's line of questioning, and instructed Mr. Buck not to answer only *after* Mr. Austin's objection noting that his clients "expressly do not waive the privilege of confidentiality" and implicitly threatened to sue Mr. Buck if he answered the questions.[13] Witnesses Ken Oveson[14] and Dave Mantyla[15] similarly declined to answer questions. When the United States moved to compel, the Court ruled **entirely in the United States' favor**, noting that "Counsel made blanket assertions of

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[9] See ECF Doc. No. 467, Findings of Fact and Conclusions of Law, ¶¶ 352-364.

[10] ECF Doc. No. 137-14, Deposition of Cody Buck, 19:16-20:18. Mr. Austin was attempting to invoke the tax practitioner privilege under 26 U.S.C. § 7525. ECF Doc. No. 147 & ECF Doc. No. 148.

[11] ECF Doc. No. 137-14, Deposition of Cody Buck, 21:19-22:20.

[12] ECF Doc. No. 137-14, Deposition of Cody Buck, 20:20-21.

[13] ECF Doc. No. 137-14, Deposition of Cody Buck, 22:17-20. Neldon Johnson confirmed his intention to sue Todd Anderson. ECF Doc. No. 252-32, 30(b)(6) Deposition of RaPower-3 Tr. 129:25-130:12.

[14] See generally, ECF Doc. No. 137-15, Deposition of Ken Oveson, 25:14-27:10.

[15] See generally, ECF Doc. No. 137-16, Deposition of Dave Mantyla, 26:20-28:17.

privilege that failed to demonstrate the basis for the assertion" and cited the same cases we had provided to Mr. Austin during Cody Buck's deposition.[16]

2. Defendants agreed and the Court ordered Todd Anderson to testify and produce documents.

The Court is also familiar with attorney Todd Anderson. Along with his wife, Jessica Anderson, Mr. Anderson informed the defendants that their statements about taxes were false or fraudulent.[17] Nonetheless, in order to sell more lenses, the defendants placed a letter with the Andersons' firm letterhead on their website, knowingly misrepresenting the Andersons' legal opinions to their customers, and ignoring the Andersons' direction that they remove the letter from the website.[18]

Early in discovery, we subpoenaed documents from the Andersons' law firm, and received *no objection* from defendants. Anderson produced some documents and withheld 21 others on the basis of privilege, but on his own volition.[19] By letter dated December 1, 2016, we informed counsel for Anderson, and Justin Heideman, of our position that Defendants waived privilege with respect to the advice they claimed to have received from attorneys by: (1) by publishing documents on their website that referenced the advice; and (2) relying on the advice of the witnesses to support their claims and defenses in this case.[20] Neither party responded until

[16] ECF Doc. No. 209, at 5.

[17] ECF Doc. No. 467, ¶ ¶ 366-388.

[18] Id., ¶¶ 397, 404.

[19] *See generally* ECF Doc. No. 138.

[20] ECF Doc. No. 126-1, a ten page letter explaining that the attorney-client privilege was waived because, *inter alia*, defendants raised reliance on Anderson's advice in their answer and they published Anderson's letter to their website.

the eve of Anderson's deposition, when Anderson moved to quash the deposition subpoena,[21] relying entirely on *Mr. Heideman's* statement that his "client is not interested in waiving any of the Attorney/Client privilege" and instructing that it be maintained "in the strictest fashion."[22] Neither Anderson, nor H&A ever addressed the United States' position that any privilege was waived when the defendants' posted Anderson's advice to their website, or relying on Anderson's advice to support their defenses in this case.

The Court denied the motions to quash Anderson's deposition *entirely*, and directed the United States to "proceed with caution" in questioning on the withheld documents, but did not preclude questioning on the withheld documents.[23] Instead of conducting a deposition without a full set of documents, and in hopes of only deposing Anderson once, the United States opted to move to compel production of 15 of the 21 withheld documents, before it deposed Anderson.[24] After a lengthy hearing on April 12, 2017, the Court ordered: (1) that the privilege log was insufficient and ordered H&A to revise it consistent with the Federal Rules of Civil Procedure, and (2) that the United States take the defendants' depositions to determine the extent to which the defendants relied upon Anderson [and Birrell's] advice.[25] In supplemented interrogatory responses, *signed by Justin Heideman*, RaPower-3,[26] and International Automated Systems[27]

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[21] ECF Doc. No. 124. Defendants joined in the motion to quash. ECF Doc. No. 127.

[22] ECF Doc. No. 124-2.

[23] ECF Doc. No. 132.

[24] ECF Doc. No. 138.

[25] ECF Doc. No. 160 & ECF Doc. No. 161.

[26] ECF Doc. No. 162-10.

[27] ECF Doc. No. 162-9.

identified the Andersons' law firm as someone they consulted regarding the tax implications of their solar lenses, obviating the need for deposing them on this topic.

Thirteen days after disclosing that their clients had received advice from the Anderson law firm, thereby negating any possible argument that such advice might be privileged, H&A moved to withdraw from the case.[28] Defendants' new counsel, Nelson, Snuffer, Dahle & Poulsen agreed, in open court on June 23, 2017, that any attorney-client privilege related to the Anderson letter was waived, and communications between the defendants and Anderson on the topics related to the Anderson letter were discoverable.[29] The Court ordered that all withheld documents related to the Anderson letter be produced.[30] The United States then took Todd and Jessica Anderson's deposition, and both testified at trial favorably for the United States.

3. Defendants agreed and the Court ordered Birrell to testify.

Like Todd Anderson, Kenneth Birrell is an attorney who gave the defendants reason to know that their statements about taxes were false or fraudulent.[31] The defendants posted a memorandum from Birrell on their website and used it to promote the solar lens tax scheme, even though Birrell told them not to.[32]

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[28] ECF Doc. No. 164.

[29] ECF Doc. No. 206.

[30] *Id.*

[31] ECF Doc. No. 467, ¶¶ 389-406.

[32] ECF Doc. No. 467, ¶ 398.

Early in discovery, the United States issued a document subpoena to Birrell with which he fully complied.[33] The defendants did not preserve any objection.[34] Since the United States received a complete document production from Birrell, it was surprised when Christian Austin, of H&A, asserted the attorney-client privilege with respect to communications between the defendants and Mr. Birrell concerning Mr. Birrell's memorandum that was publically available on the defendants' website.[35] Mr. Birrell's attorney expressly did not take a position on the privilege issue, but instructed Mr. Birrell not to answer because *Mr. Austin* was asserting the privilege on behalf of Mr. Birrell's former client.[36]

The United States moved to compel Birrell's testimony,[37] and the defendants, *through H&A*, continued insisting, without support, that "conversations pertaining to the creation of the Kirton memorandum are privileged or otherwise protected."[38] Months later, after lengthy court hearings, an admission that defendants received advice from Birrell,[39] and a substitution of counsel, the Court ordered, pursuant to the parties' agreement, that attorney-client privilege on

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[33] ECF Doc. No. 140-3, Deposition of Ken Birrell (Vol. I), 15:9-18:8.

[34] Defendants objected to the United States' document subpoena to Ken Birrell primarily because the Protective Order was not yet resolved, ECF Doc. No. 87, and mentioned in passing that the information sought was "potentially privileged." ECF Doc. No. 87, p. 4. But they made no attempt to meet their burden of explaining why a privilege applied. *Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records*, 697 F.2d 277, 280 (10th Cir. 1983). Once the Court entered the Protective Order, ECF Doc. No. 116, the defendants' objection was denied without prejudice, ECF Doc. No. 117, and Birrell produced responsive documents, with no objection from the defendants.

[35] ECF Doc. No. 140-3, Deposition of Ken Birrell (Vol. I), 23:4-24-154:19.

[36] ECF Doc. No. 140-3, Deposition of Ken Birrell (Vol. I), 24:5-17. *See also* ECF Doc No. 146, Birrell's response to the United States' motion to compel ("Kenneth Birrell does not have a proverbial dog in the fight.").

[37] ECF Doc. No. 140.

[38] ECF Doc. No. 151,

[39] ECF Doc. No. 162-9 & ECF Doc. No. 162-10.

the subject-matter of Birrell's memorandum was waived, including all communications on topics related to Birrell's memorandum.[40] We then took Birrell's deposition, and he testified at trial favorably for the United States.

II. H&A's objections were not substantially justified.

If an objection is "substantially justified," the party or attorney objecting to discovery will not be required to pay attorney's fees and costs for motions practice.[41] H&A's privilege objections were not "substantially justified." H&A claims it "did nothing more than properly assert that the questions asked may invoke answers that would require the deponent to violate privilege,"[42] and tries to shift responsibility to the witnesses and their attorneys.

But H&A represented the parties asserting the privileges, and made no effort to meet their client's burden[43] of establishing the privileges. H&A simply asserted privileges, failed to support them, and left it to the United States to pursue the information through motions to compel. H&A ignored multiple facts suggesting that no privileges applied. Even if attorney-client privilege did apply, it had been waived: (1) defendants published legal advice to their website to induce people to buy lenses;[44] (2) *all defendants* had asserted reliance on attorneys as an affirmative defense in their

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[40] ECF Doc. No. 203. The only part of the Court's order that restricted the United States' questioning applied to communications between Mr. Birrell and his own attorney. Id., ¶ 3.

[41] Fed. R. Civ. P. 37(a)(5)(A)(ii).

[42] ECF Doc. No. 503, p. 7.

[43] *Matter of Grand Jury Subpoena Duces Tecum Issued on June 9, 1982, to Custodian of Records*, 697 F.2d 277, 280 (10th Cir. 1983).

[44] By publishing legal advice to their website, defendants waived the privilege. See *In re Grand Jury Proceedings*, 616 F.3d 1172, 1184 (10th Cir. 2010). The "confidentiality of communications covered by the privilege must be jealously guarded by the holder of the privilege lest it be waived." *In re Qwest Commc'ns Int'l Inc*., 450 F.3d 1179, 1185 (10th Cir. 2006) (citing *United States v. Ryans*, 903 F.2d 731, 741 (10th Cir.1990)). A client's voluntary disclosure of documents otherwise protected by the attorney-client privilege breaches the confidentiality of the attorney-client relationship and effects a waiver of the privilege not only as to the disclosed documents, but also as

answers,[45] and co-defendant Greg Shepard had specifically identified Kenneth Birrell and Todd Anderson as attorney he relied on;[46] and (3) defendants had failed to timely object to these witnesses producing documents to the United States, thereby waiving any privilege.[47] H&A was aware of all these facts when H&A obstructed the United States' discovery in the face of Tenth Circuit precedent contrary to its positions.

III. There is no need for oral argument, or a "new trial."

H&A claims it was denied an "opportunity to be heard" in violation of the "plain language"[48] of Rule 37(a)(5) and requests oral argument on this matter. H&A is wrong. In 1993 rules committee changed the phrase "after opportunity for hearing" to "after affording an opportunity to be heard" to make clear that the court can consider Rule 37(a)(5) motions on written submissions as well as oral hearing.[49] H&A has made its position clear in two written

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to *all documents relating to the subject matter of the disclosed documents*. *United States v. Graham*, 2003 WL 23198792, at *5 (D. Colo. Dec. 2, 2003) (emphasis added) (*citing In re Sealed Case*, 676 F.2d 793, 809, 818 (D.C.Cir.1982).

[45] ECF Doc. No. 22, Sixth Affirmative Defense, ECF Doc. No. 26, Sixth Affirmative Defense. H&A's clients had not yet disclosed which attorneys they relied on, despite the United States requesting this information on April 8, 2016, at the outset of discovery. See ECF Doc. Nos. 55-1, 56-1, 57-1.

[46] ECF Doc. No. 163-5, Pl. Ex. 411, ¶ 16, pp. 3-4. By raising the advice-of-counsel defense, the defendants waived the attorney-client privilege regarding what advice they received, and the United States was permitted to call these attorneys as witnesses to challenge the defenses. *United States v. Evanson*, 584 F.3d 904, 914 (10th Cir. 2009). See also *New Phoenix Sunrise Corp. v. Comm'r*, 408 F. Appx. 908, 919 (6th Cir. 2010) (finding waiver of the attorney-client privilege with respect to a tax opinion letter and "disclosed and undisclosed communications or information concern[ing] the same subject matter" that "ought in fairness ... be considered" with the tax opinion." (citing Fed. R. Evid. 502(a)) when a litigant relied on a tax opinion letter in its claims and defenses in the case.)

[47] Failure to timely assert an objection, even one of privilege, constitutes a waiver of such objection. *Mackey v. IBP, Inc.*, 167 F.R.D. 186, 200 (D. Kan. 1996).

[48] ECF Doc. No. 503, p. 13.

[49] See Wright & Miller, Federal Practice & Procedure § 2288, n. 26 (3d ed. 2018).

submissions to the Court and the Court is more than familiar with the witnesses at issue; there is no need for oral argument on this motion.

IV. H&A facilitated the defendants' obstruction and it should be jointly liable.

H&A's joint and several liability, with its clients, for the United States' attorney's fees and costs is warranted under Rule 37(a)(5). Further, in its post-trial findings, the Court noted that the defendants' "lack of cooperation … in providing information in the litigation discovery process" had substantially delayed the Government in shutting down the defendants' fraudulent enterprise, thereby "aggravat[ing] losses to the Treasury, increas[ing] the revenues received by the defendants and embolden[ing] the defendants to continue operations."[50] H&A's obstruction facilitated the defendants' efforts to keep their fraudulent scheme going, by advancing frivolous privilege assertions and ignoring overwhelming facts and law showing the privilege did not apply. H&A ignored our efforts to meet and confer and the matter, and later simply claimed we were "overreaching."[51]

The Court reached the correct decision on this matter: H&A is jointly and severally liable for $8,899.98 in attorney's fees and costs incurred by the United States to compel discovery.

[50] ECF Doc. No. 429-1, Trial Tr. 2516:5-19.

[51] ECF Doc. No. 503, p. 11.

Dated: November 21, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 21, 2018, the foregoing document and its exhibits were electronically filed with the Clerk of the Court through the CM/ECF system, which sent notice of the electronic filing to all counsel of record.

/s/ Christopher R. Moran
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Trial Attorney