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

UNITED STATES OF AMERICA, *Plaintiff*, vs. RAPOWER-3, LLC, *et al.*, *Defendants*.	**REPLY MEMORANDUM IN SUPPORT OF RULE 52(b), RULE 59(e) and RULE 60(b)(6) MOTION FOR RELIEF** Case No. 2:15-CV-0828 DN Judge: David Nuffer Magistrate Judge Evelyn J. Furse

COME NOW Justin D. Heideman, of the law firm Heideman & Associates, and pursuant to Fed. R. Civ. P. 52(b), Rule 59(e) and Rule 60(b)(6) submits this *Reply Memorandum in Support of Rule 52(b), Rule 59(e) and Rule 60(b)(6) Motion for Relief*.

ARGUMENT

I. SANCTIONS IN THIS INSTANCE ARE NOT JUSTIFIED BY THE RULES

By their initial motion, and now in opposition to H&A's Rule 52(b), Rule 59(e), and Rule 60(b) Motion for Relief, Plaintiff argues that nonparty H&A should be required to pay attorney fees and costs associated with the depositions of third-party witnesses, when the witnesses **were instructed by their own counsel,** not H&A, to refuse to answer[1]. Plaintiff's Response doubles

[1] By way of example the following portion of the deposition of Kenneth Birrell is offered:

down on the position that H&A should be sanctioned because H&A – acting on the instruction of its client – declined to issue a blanket waiver of Defendants attorney-client privilege and/or tax professional privilege; which refusal according to Plaintiff caused the attorneys for the third-party witnesses to instruct their clients not to answer certain questions. In sum, Plaintiffs argue that H&A's simple objection "to the extent the question calls for privileged information" makes H&A culpable of sanctionable conduct.

Plaintiff's position crosses the line of fair argument, contravenes the Federal and Utah Rules of Civil Procedure, and asks this court to establish a precedent that Defense counsel can be sanctioned for offering a proper objection. As set forth at length in H&A's initial memorandum, there is not a single rule or case supporting Plaintiff's position. Plaintiff has offered *nothing* to this court suggesting impropriety exists, in any respect, by making an objection based on

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Mr. Austin: Were still on the record. I want to state for the record, I haven't instructed the witness not to answer. This is not my client, and I haven't instructed him not to answer, nor has his counsel. So it's up to the witness to decide whether or not to answer. If the witness decides to answer, then you want to – not to answer, then you want to call Judge Wells? That might make sense, but got ahead and do what you're doing. Otherwise, I will just state for the record that my client objects on the basis of attorney-client privilege. And no – no judge can order my client not to raise the attorney-client privilege.

Mr. Hill: On the basis of the objection that has been raised by the former client of Mr. Birrell, as Mr. Birrell's counsel I have a duty to instruct Mr. Birrell not to answer the question that is pending.

Q. (By Ms. Healy Gallagher) Mr. Birrell, were you going to answer the questions pending?

A. On the advice of counsel, no.

Q. Mr. Birrell, about how many actual conversations did you have with Mr. Clements?

Mr. Austin: Objection. Found – or pardon me, privilege.

Mr. Hill: Without taking a position as to the application of the attorney-client privilege in this instance or of any contended waiver thereof, the privilege has been asserted by the former client and on that basis I must instruct the witness not to answer the question regarding client communications until the privilege dispute has been resolved.

Q. (By Ms. Healy Gallagher) Mr. Birrell, will you follow the advice of your attorney?

A. I will.

Q. Mr. Birrell, did Mr. Clements send you documents?

Mr. Austin: Objection. Privilege.

Mr. Hill: On the basis of the privilege being asserted by the former client, I must instruct the witness not to answer.

(*Birrell Depo*, P. 38:2 – p.40:16)

privilege. Indeed, H&A as Defendants' counsel was ethically and professionally responsible to make these objections, because precedent indicates failure to timely object results in waiver.

In stark contrast to the lack of authority for Plaintiffs position is Rule 30(c)(2) of the Utah Rules of Civil Procedure[2], which provides:

> All objections shall be recorded, but the questioning shall proceed, and the testimony taken subject to the objections. Any objection shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a witness not to answer only to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion for a protective order under Rule 37. Upon demand of the objecting party or witness, the deposition shall be suspended for the time necessary to make a motion. The party taking the deposition may complete or adjourn the deposition before moving for an order to compel discovery under Rule 37.

Plainly, there is nothing improper about placing a concise and non-argumentative objection on the record. It is axiomatic that an objection for the record is simply that, and the rules specifically provide that notwithstanding such objections, the witness is required to answer any pending question. In fact, this Court would certainly agree, that objections are recorded as a matter of course in virtually every deposition taken.[3]

The critical difference here is that counsel for the third-party witnesses – *not H&A* – instructed their clients not to answer. Plaintiffs contend this instruction by the Deponents' counsel was issued because Defendants refused to waive privilege. H&A disputes this assertion and objects to it as pure speculation. However, assuming H&A's privilege preserving objection

[2] The Federal rule in pertinent part is nearly identical.
[3] Notable for this Court is the fact that Rule 30(C)(2) is instructive on two fronts. First on when and how an objection must be made, and second on the actions necessary and available should an instruction "not to answer" be issued.

was motivation for the instruction, Plaintiffs position serves only to raise an entirely irrelevant point. Specifically, Rule 30(c)(2) points out that by instructing their clients not to answer, the attorneys issuing the instruction bore the risk of later compulsion to testify. Additionally, those attorneys, not H&A, assumed whatever risk there is regarding liability for costs and fees associated with compulsion.

Defendants are unaware of a single legal authority affirming the position that an attorney can shift responsibility for an instruction not to answer to another attorney by stating that the instruction not to answer is based on a privilege objection raised to preserve the privilege. To the contrary, it is the professional responsibility of every attorney to form their independent opinion regarding whether a question invades an applicable privilege before instructing their client not to answer.[4]

Plaintiff's position takes the shocking turn of asserting a non-instructing attorney, rather than the instructing attorney, should be sanctioned. This is demonstrated by Plaintiffs attempt to gain repayment from Defendants former legal counsel, rather than the witness and his counsel. Moreover, Plaintiff has sought fees on the basis that Defendants' new counsel changed position and waived the privilege, which was opposite to the instruction given H&A. The concept that

[4]Q. Mr. Birrell, other than the memorandum, did you draft any other documents for SOLCO?
Mr. Austin: Objection. May or may not call for the provision of information protected from disclosure by the attorney-client privilege.
Mr. Hill: To the extent you can answer the question without disclosing the content of communications with the client, I will allow you to answer the question.
Q. (By Ms. Healy Gallagher) Mr. Birrell?
A. On the advice of counsel, I will not respond.
(*Birrell Depo*, p. 49: 11-22)

H&A even could be, let alone should be, sanctioned for following a client's express instructions after H&A's representation concluded; is deeply problematic on multiple levels.

First and foremost, the chilling effect of holding an attorney personally responsible for a third-party deponent's refusal to answer based only on a proper (and in fact ethically and professionally required) objection can hardly be overstated.[5] Due to the fact no judge is present to rule on objections, an attorney when faced with a question the attorney reasonably believes may call for the disclosure of privileged information, has a duty to object so any privileged information disclosed can later be excluded.

Under Rule 30, raising an objection does not halt the deposition; or relieve the deponent from the duty to respond to the question. While the deponent may refuse to respond, on the advice of his attorney or otherwise; the party lodging the objection is not, under any statute or authority H&A is aware of, responsible for the deponent's refusal to answer. To hold otherwise permits deponents to refuse to answer without fear of repercussions, as witnesses could simply blame the objection of the unaffiliated attorney. This is not the law.

Simply stated, H&A cannot legally, rationally, or fairly be held responsible for another attorney's instruction to that attorney's client not to answer a deposition question. An attorney cannot decline to make his own independent determination regarding the privileged nature of the communication, and simply state that he is instructing his client not to answer until a party either waives the privilege, or some other entity determines whether the question calls for the

disclosure of protected information. Plainly, the risk testimony will be compelled, and fees and costs awarded, is the instructing attorney's responsibility, not the attorney who merely objected.[6]

II. H&A'S OBJECTION WAS ENTIRELY JUSTIFIED

During deposition, counsel for Plaintiffs took the position that because an opinion letter drafted by an attorney at Kirton McConkie was published on Defendants website, **any and all attorney-client privilege, regarding any subject was entirely waived**. Plaintiffs went so far as to engage in legal argument with counsel for Defendants, *on the record*; going so far as to hand counsel for Defendants case law containing generic discussions of privilege and waiver. Plaintiffs then reiterated that Defendants should concede that **all** privilege had been waived. [7]

Such conduct entirely improper, contravenes the dictates of Rule 30 which affirms that objections are to be stated in a "non-argumentative manner," but it also ignores the reality that the Court when ruling on Plaintiff's motion to compel *at least partially* rejected Plaintiff's

[6] Q. Mr. Birrell, what facts did you learn from any source other than Mr. Clements did you rely upon in drafting your memo?
MR. Austin: Objection. Privilege.
Mr. Hill: To the extent that you can answer that question without disclosing the communications – the content of any communications with a client, I will – I will raise the limited objection as to privileged communications and allow the question to be answered.
…
The Witness: I did independent legal research.
Q. (By Ms. Healy Gallagher) … So putting your legal research to one side, Mr. Birrell, was Mr. Clements your only source for facts about the proposed transaction that you were examining for SOLCO?
…
Mr. Austin: Objection. Privilege.
…
Mr. Hill: And because the answer to that question could disclose information, by inference, that could only be asserted – or obtained through attorney-client communication on the basis of the dispute as to the application of the privilege and any waiver, I will assert the privilege and instruct the client not to answer the question.
Q. (By Ms. Healy Gallagher) Mr. Birrell, will you answer the question?
A. I will follow the advice of counsel.
(*Birrell Depo*, p. 44:7 – p. 45:23)
[7] (*Birrell Depo*, p. 33:4- p.34:10)

position! The Court ruled was *not* a blanket waiver of privilege. The Court held that (1) while some questions could be asked – regarding previously disclosed documents a point H&A conceded at deposition – (2) other questions regarding subjects beyond the contents of the disclosed documents were improper.

The Court's ruling demonstrates precisely why H&A was required, and in fact did, lodge the Client's privilege objections. Had H&A acceded to the Plaintiff's assertions Defendants privilege rights would be deemed waived, and H&A would have failed in H&A's legal duties to its then client. Further, without lodging objections the very discovery which this Court specifically ruled could not be conducted, would have occurred. Further, absent H&A's privilege objection Defendants' legal position would have been damaged and H&A would have been exposed to professional liability.

Plainly, it is imperative that attorneys can rely on the Rules of Civil Procedure and to determine proper conduct. Holding H&A liable for fees and costs, jointly and severally, suggests that H&A engaged in wrongful, unethical, or sanctionable conduct by merely stating the words - "objection, privilege" - during the deposition. Essentially, Plaintiffs position is that Defense counsel becomes personally liable by lodging a legally required, and precedentially supported, objection, if after the objection a third-party's attorney instructs his client not to answer.

Such a decision would completely alter the way currently accepted legal practice is conducted. Fundamentally, such a decision places the attorney in the impossible position of having to choose whether to follow the rules and observe his legal and professional obligations, or to abdicate his responsibilities for fear of personal sanctioned. The obvious result of this conundrum is that proper, if not necessary, objections will not be made. Particularly, if attorneys

are forced to fear incurring tens of thousands of dollars in personal liability when their objection can be relied upon by a third-party's counsel issue an instruction not to answer.

That result is untenable, and would be clear, reversible, error. Objections for the record are permitted by the Rules of Civil Procedure, and do not of themselves provide a basis for a witness not to respond. Accordingly, no basis exists that justifies maintaining a sanction against H&A when the refusal to respond was based on a third-party's independent counsel's advice. Moreover, given this Court's affirmation that many of the questions objected to were deemed impermissible.

III. H&A Did Not Participate In The Decision to Waive

Of critical importance, the issued sanction in this case occurred long after H&A's representation terminated. In analogizing to Rule 41, where a party may dismiss without prejudice one time, but if the matter is refiled they must pay the costs incurred in the first litigation, there was no participation in the later decision by H&A. If this Court's rationale was that the Client's decision to issue the waiver at a later date was the basis of the sanction, then the fact H&A had no part in the later decision is dispositive. H&A did ***exactly*** as instructed by the clients. A subsequent, alternate, decision by the Client is not representative of sanctionable conduct attributable to H&A.

IV. The Law Grants A Right To Be Heard.

H&A was not served with the Motion for Sanction, was not a party to the litigation, but did receive a copy of the motion. H&A responded out of concern that its position would be compromised if no response was issued. The law mandates that a sanction of this type should not issue without the opportunity for H&A to present oral argument and receive a "full hearing."

As indicated previously, H&A believes that because it was not a party its objection was missed when the matter was being ruled on. This is belief is founded in the fact that no hearing was granted. However, because no hearing was granted this Court should reverse the award entirely unless, and until, this legal requirement has been met; at which time H&A shall be afforded its right to fully defend Plaintiff's motion. Such opportunity benefits this Court in multiple ways. First, this Court can fully examine the position of the parties at the deposition, in respect to the rules and ethical duties in place, for purposes of determining the propriety of the actions taken. Second, this Court can explore whether H&A is correct in its assertion that it had no other ethical or professional option, other than to object, under the circumstances; and third, whether a sanction can even issue when H&A's objection was affirmed, even if only in part, and where H&A's objection did not instruct the witness not to answer, but rather the deponents own independent legal counsel issued the instruction.

CONCLUSION

Pursuant to both the Federal and Utah Rules of Civil Procedure, Rule 30(c)(2), H&A respectfully requests that it's Rule 52 (b), Rule 59(e), and Rule 60(b) Motion for Relief be summarily granted. However, in the alternative that this Court does not summarily grant H&A's motion for relief, H&A respectfully requests the Court set this motion for Oral argument at the first available hearing so that H&A may more fully defend its position.

DATED and SIGNED November 28, 2018.

HEIDEMAN & ASSOCIATES
/s/ Justin D. Heideman
JUSTIN D. HEIDEMAN
Former counsel for Defendants

CERTIFICATE OF SERVICE

On November 28, 2018, I hereby certify a true and correct copy of the forgoing **REPLY MEMORANDUM IN SUPPORT OF RULE 52(b), RULE 59(e) and RULE 60(b)(6) MOTION FOR RELIEF** was served on the following:

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