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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*.	**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 *Rule 52(b), Rule 59(e) and Rule 60(b)(6) Motion for Relief* regarding the Court's October 23, 2018 Memorandum Decision and Order Granting Plaintiff's Motion for Reasonable Expenses and Attorneys' Fees [DOC 480].

INTRODUCTION

On February 13, 2018 Plaintiff filed a motion seeking reimbursement of costs and attorney fees [DOC 290]. Plaintiffs' motion for fees was based almost entirely on the fact that during the depositions Plaintiff conducted of third-party witnesses, including Defendants' former legal counsel and professional tax advisors, then-counsel for Defendants, Heideman &

Associates, lodged an objection to several questions. The objection was only "to the extent the question called for the disclosure of privileged information."

All of these third-party deponents were represented by counsel, if at all, that were not affiliated with Heideman and Associates. Further, no counsel for Defendants instructed the witness "not to answer" any question. In fact, as indicated each of these witnesses was **represented by their own counsel** during the depositions, and relied exclusively on their own retained counsel when responding to the questions posed. Based on **their own counsel's** instructions, the deponents declined to answer many of the questions posed by counsel for Plaintiff. Thereafter, Plaintiff elected to bring a motion to compel these third-party witnesses to answer questions that the witnesses had, at the instruction of **their own counsel**, refused to answer during their depositions.

STATEMENT OF FACTS

1. On April 12, 2017, a hearing was held regarding Plaintiff's Motion to Compel. [DOC 154].

2. This hearing lasted in excess of four hours. [DOC 154].

3. Thereafter, the Court ruled that deponents were required to answer questions **on some** of the subject areas at issue.

4. Critical to this analysis however, is the fact that the Court placed strict limits on the scope of the questioning that it was allowing.

5. Further, the Court held that the witnesses properly declined to answer many of the questions based on privilege.

6. Heideman & Associates was terminated as Defendants' counsel on May 22, 2017 before any of the rescheduled depositions were taken.

7. Defendants' new counsel, Nelson, Snuffer, Dahle & Poulson, adopted a different litigation strategy.

8. Defendants' new counsel "decided to withdraw objections related to the attorney-client privilege to support the advice of counsel defense in this case." [DOC 317].

9. New Counsel's decision – made without consultation with Heideman & Associates – resulted in Plaintiff's decision to file the instant motion for costs and attorney fees related to the depositions.

10. Plaintiff's instant motion was filed on February 13, 2018. [DOC 290].

11. Presumably, Plaintiffs argument is best summarized as an assertion that Defendants decision to render a limited waiver should entitle Plaintiff to recover the fees they incurred in litigating the issue previously.

12. Heideman & Associates, who was never been a party to the litigation; and who had withdrawn months earlier was surprised to see its name identified in the pleading.

13. Despite the fact Heideman & Associates was not a party, it felt compelled to file an opposition to Plaintiffs' motion since its own interests were impacted by the representations of Plaintiff.

14. The basis of Heideman and Associates Opposition was that Heideman & Associates had not engaged in any conduct justifying an Order that amounted to a sanction against it.

15. In fact to the contrary, Heideman & Associates had done exactly as it was required to by its clients – and by the dictates of malpractice law – It had properly preserve privileged communications.

16. Further, the content of the depositions makes plain that attorney's from Heideman & Associates made only brief, proper, objections; did not instruct a witness not to answer, and did not interfere or attempt to offer legal advice to a third party deponent.

17. In fact, as noted above, when the motion to compel was brought to this Court the objections were sustained, and it was determined that the bulk of Plaintiff's questions were impermissible; and those that were permitted were severely limited.

18. Moreover, and stated again for emphasis, at no time did any attorney from Heideman & Associates instruct any the third-party deponents "not to answer."

19. Notable for this Court's analysis should be the fact that the **only time** a witness refused to answer a question was when that deponent was instructed by his own counsel.

20. It is of therefore curious, at best, that Heideman & Associates is being sanctioned when it was not Heideman & Associates that even offered this instruction.

21. What is additionally disturbing about the Court's decision is that despite the request from Heideman & Associates, no hearing was held wherein Heideman & Associates was even afforded an opportunity to present its arguments on this point to this Court regarding Plaintiffs' Motion for Attorney Fees.

22. Understandably, Heideman & Associates is concerned that its memorandum in opposition was never brought to light; since the Court's order make no mention or reference to it.

23. Certainly, this is understandable if the Opposition was overlooked, given the vast quantity of filings, briefings, motions, trial, and post-trial motions.

24. However, given the fact that this Court is sanctioning Heideman & Associates for behavior that was sustained by the Court when it was raised, there appears to be a disconnect that merits this Court's reconsideration.

25. Following an extensive multi-week trial, this Court entered judgment in favor of Plaintiff.

26. Seventeen weeks later, Heideman & Associates was stunned on October 23, 2018 when this Court, without oral argument or reference to Heideman & Associates objection entered Judgment for Attorney Fees, ordering "judgment … in favor of Plaintiff against Defendants Neldon Johnson, RaPower-3 LLC, International Automated Systems, Inc., and LTB1 LLC a*and the law firm of Heideman & Associates, jointly and severally*, for reasonable attorney's fees and costs in the total amount of $8,899.98." [DOC 480]. [Emphasis added]

Based on the foregoing, and pursuant to Rules 52(b), 59(e) and 60(b)(6) of the Federal Rules of Civil Procedure, Heideman & Associates seeks relief from the Judgment for Attorney Fees entered against it herein. Incorporated by this reference are the arguments and assertions contained in Heideman & Associates, previously-filed memorandum [DOC 313] attached hereto as Exhibit 1, and as further explained hereafter.

ARGUMENT

I. Rule 52(b)

Rule 52(b) states: *"Amended or Additional Findings.* On a Party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings – or make additional

finding – and may amend the judgment accordingly….” Here, non-party Heideman & Associates (H&A), moves this court for either amended, or additional, findings. Specifically, H&A asks this court to outline the basis, rationale, and legal conclusions regarding the determination that non-party, H&A, should be jointly and severally liable for the award of attorney's fees issued.

The Court's October 23, 2018 decision offers footnotes 1, 2, and 3. In these footnotes, the Court indicates that it reviewed Docket numbers, 290, 140, 138, 163, 137, 203, 206, and 209. However, there is no mention in the Order of any review as to H&A's objection Docket number 313.

The only finding that is contained in the Court's order is "[b]ecause the conduct of Defendants *and the firm* necessitated the discovery motions and was not substantially justified, Defendants and the Firm are required under Rule 37(a)(5)(A) of the Federal Rules of Civil Procedure to pay the United States' reasonable attorneys' fees…." (Emphasis added) There is however no mention of what the Firm's offending conduct is. Specifically, H&A asks this court to review Docket Number 313, as well as the remainder of this motion, and then state the findings of fact, and conclusions of law, with sufficient detail so as to at least allow H&A to understand the basis of the sanction issued against it.

Specifically, in the event the Court believes there was conduct that is worthy of sanction on the part of H&A, then H&A asks this Court to amend its findings and conclusions such that the conduct is able to be identified. Accordingly, H&A moves this court to clarify what conduct occurred, which H&A engaged in, and that was not substantially justified, so that the Court of Appeals can properly and fully review the decision.

As more fully explained hereafter, H&A **firmly** believes it did nothing more than properly assert that the questions asked may invoke answers that would require the deponent to violate privilege. H&A did not instruct a witness not to answer, was not the attorney representing the deponent in the matters addressed in the Motion to Compel and limited its objection to brief statements such as "Objection privilege."

Moreover, H&A believes that its objections – such as they were – were entirely justified as demonstrated by the Court's own decision. Accordingly, H&A moves this Court to render specific findings and conclusions as to why the objections H&A raised on behalf of the client were not "substantially justified."

H&A's position regarding its conduct is based on the fact that:

1) Plaintiff's motion to compel was "denied in part;" and

2) That those questions which were ultimately permitted were severely limited in scope; and

3) That the waiver of the privilege was made by H&A's former clients *after H&A was terminated* by the clients and replaced by a different law firm that choose to engage a different legal strategy than the strategy the Clients' had directed H&A to follow.

II. Rule 59 - New trial

Rule 59 states in pertinent part

> (2) After a nonjury trial, the court may, on motion for new trial, open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new ones, and direct the entry of a new judgment.
> …
> (e) A motion to alter or amend a judgment must be filed no later than 28 days after the entry of the judgment.

As to the sanction issued by the Court, and addressed in this motion, there was no trial. Moreover, despite H&A's request, there was not even an oral argument provided for. A review of the Court's order does not identify any specific conduct that H&A engaged in, for which H&A is being sanctions; further, there is no reference to the objection that H&A filed. Accordingly, it is unclear as to whether that objection was identified and reviewed by the Court prior to the issuance of the sanction.

Given the extensive motion practice, weeks long trial, and contentious nature of the relationship between the parties, H&A understands how its objection could have been overlooked. To that end, H&A moves this court pursuant to Rule 59 for a "New Trial" regarding whether H&A's conduct was substantially justified. H&A seeks oral argument on its opposition, if the Court chooses not to summarily grant its request; or alternatively seeks oral argument on this motion for purposes of clarifying and discussing all concerns or questions that this Court has regarding H&A's role in the depositions.

III. Rule 60(b)

Rule 60(b) states, in pertinent part:

> On motion and upon just terms, the court may relieve a party or its legal representative from a judgment, order, or proceeding for the following reasons:
>
> (b)(6) any other reason that justifies relief.

In *Salazar v. Chavez*, 2012 Ut. App. 177 the Court of Appeals explained the purpose behind Rule 60(b). It said, "Rule 60(b) is "remedial and equitable in nature, and permits the trial court to provide relief in the furtherance of justice." The Court then went on to further explain,

"A trial court's discretion should be exercised in furtherance of justice, and should incline towards granting relief in a doubtful case to the end that the party may have a hearing." (*Id.*)

Based on the undisputed facts in this case, the interests of justice are served by granting H&A relief from the Judgment of Costs and Attorney's Fees, which summarily held H&A "jointly and severally liable" for costs and attorney fees incurred by Plaintiffs in conducting the depositions of the subject witnesses and prosecuting their motion to compel – which motion Plaintiffs lost.

I. PRIVILEGE OBJECTIONS ARE PROPER AND NECESSARY

In this case, H&A did nothing more than observe its professional obligations to its clients by lodging objections to questions that could potentially call for the disclosure of privileged information. The vast majority of these objections consisted of only two words - "Objection, privilege." Federal courts have repeatedly held that the privilege "**is so sacred and compellingly important that the courts must, within their limits, guard it jealously**." *IMC Chems., Inc. v. Niro Inc.*, 2000 U.S. Dist. LEXIS 22850 (D. Kan.). (Emphasis added)

Of deep concern to H&A during the depositions is the fact that federal courts have also repeatedly held that privilege can be waived, either expressly or by implication. In particular, federal courts have held that "[a] failure to properly assert a privilege, as a matter of federal procedure, can result in a waiver of the privilege. This is true although a waiver might not result under state law. . . . State law is superseded by federal procedure." *Cunnigham v Connecticut Mut. Life Ins.*, 845 F. Supp. 1403, 1408 (S.D. Cal. 1994). In the context of depositions, "[f]ailure 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).

Under this authority, it was, and remains, imperative that an attorney lodge an objection to any question "they reasonably believe invade the privilege," or else counsel risks waiving the privilege entirely. The propriety of privilege objections has accordingly been repeatedly and consistently been affirmed. *See Houweling's Nurseries Oxnard, Inc. v. Robertson*, 2016 U.S. Dist. LEXIS 9662 (D. Utah, 2015). Further, courts typically decline to limit deposition testimony "in advance by an attempt to establish bright lines around what is "privileged" and "not privileged." *Id.* Rather, "if objections are raised based on attorney-client privilege" courts prefer to resolve the objections "on a question by question basis." *Id.*

In the instant case, H&A's attorney did **exactly** as he were supposed to do. It is error for this court to sanction them for such conduct. In fact the court's ruling begs the question, of what other course of action was properly open to counsel. If the courts sanction stands this court will set the precedent in this District that asserting a privilege – even one that is affirmed as properly asserted when reviewed – is sanctionable conduct if it later determined that the privilege should be waived *by new counsel*. The chilling effect of such a ruling is obvious, and demonstrates the need to reverse course on this decision.

II. MOTION TO COMPEL

If a motion to compel is brought pursuant to Rule 37 of the Federal Rules of Civil Procedure challenging the refusal to answer deposition questions based on the assertion of "privilege," and the motion is granted "or if the disclosure or requested discovery is provided after the motion was filed" then "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 party or deponent who opposed the motion its reasonable expenses

incurred in opposing the motion, including attorney fees." Fed. R. Civ. P. 37(a)(5)(A).

However, Rule 37 further provides that "[b]ut the court **must not** order this payment if "the opposing party's nondisclosure, response, or objection was substantially justified" or if "other circumstances make an award or expenses unjust." *Id.* A discovery request is "substantially justified under Rule 37 if reasonable people could differ on the matter in dispute." *Entrata, Inc. v. Yardi Sys.*, 2018 U.S. Dist. LEXIS 185744 (D. Utah, 2018).

As asserted previously, H&A did not engage in any conduct during the depositions that "necessitated the motion," and did not "advis[e] that conduct." Rather, H & A merely made the objections required under controlling law in order to preserve applicable privilege. Plaintiffs' motion to compel was instead necessitated due to the individual deponents' refusal to answer, based on the advice of their own attorneys. Notwithstanding any objection made for the record by H&A, it is entirely the responsibility of the deponents and their attorneys to determine whether or not a question calls for the disclosure of information protected by privilege, and whether or not to answer the question. As such, it is difficult to understand how the current sanction can be properly extended to H&A. Particularly in light of the rules plain language.

Specifically, Rule 37 (a)(5)(C) provides that if the motion is "granted in part and denied in part," then it is within the Court's discretion to "apportion reasonable expenses for the motion." Plaintiffs' own Motion to Compel demonstrated the need for H&A's objection. Therein Plaintiffs' typical overreaching nature was asserted when it argued that there had been a blanket waiver of all privilege by the disclosure of certain documents. Plaintiffs also sought unrestricted discovery of any and all information that would have otherwise been covered by the privilege. Indeed, this was the precise position Plaintiffs took during the depositions of the deponents, and

which necessitated H&A's objections. In what results as a disappointing irony Plaintiffs took this position, mandating as a matter of prudent practice that H&A assert the objection, then Plaintiffs lose the motion to compel affirming H&A's proper use of the "sacred" objection, and then Plaintiffs seek and are awarded sanctions for forcing the issue.

It should be emphasized that Plaintiffs did not prevail on their motion to compel. While the Court did rule, after an extensive hearing, that the privilege had been waived as to certain limited subjects, the Court nevertheless severely restricted the scope of questioning, and the subjects that could be inquired into. As such, it is difficult to imagine how Plaintiff could credibly contend that H&A's objections during depositions, or its opposition to Plaintiff's motion to compel were not "substantially justified." Further, given that Plaintiff's Motion to Compell was granted only on a limited basis, and denied entirely in part, H&A must surely be entitled to at least present argument regarding the proper allocation of expenses as provided by Rule 37 (a)(5)(A); particularly given the prohibition against fees when there was substantial justification for the objection at the time it was raised.

Notable to this step in the analysis is that the "after the fact" waiver, by an entirely new law firm, cannot reasonably be deemed justification for this sanction. H&A could not control, and had no say, in later counsel's decision-making process. H&A should at a minimum be afforded the presumption of substantial justification based on the outcome of the Motion to Compel, and this Court should concur that H&A is not able to divine the future thought process of its clients as to litigation strategy. To hold otherwise would place H&A, and any law firm that is terminated, at the mercy of later discovered facts, law, or evidence that necessitates alteration of position within the litigation. This burden is entirely inequitable.

Finally, H&A was never afforded a full and fair "opportunity to be heard" on Plaintiff's motion for attorney fees. H&A was not even a party to the matter, had been terminated, had no clients in the case, and wasn't entirely sure it could even properly file an Objection since it was not entirely clear that H&A was even properly before the Court. However, because H&A was named in the sanction motion, and unwilling to allow that to simply go unanswered, H&A did file the objection. The fact that H&A was not able to present oral argument, at a hearing, on the motion is deeply problematic for the award. Given the plain language of the rule, and based on this factor alone, no award should be made until, at a minimum, H&A has been provided the full opportunity to explain its role and position to the Court.

DATED and SIGNED November 9, 2018.

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

CERTIFICATE OF SERVICE

On November 9, 2018, I hereby certify a true and correct copy of the forgoing **RULE 52(b), RULE 59(e) and RULE 60(b)(6) MOTION FOR RELIEF** was served on the following:

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