Exhibit I

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Not Reported in F.Supp.2d, 2006 WL 1156723 (E.D.Mich.)
(Cite as: 2006 WL 1156723 (E.D.Mich.))

Only the Westlaw citation is currently available.

United States District Court,
E.D. Michigan,
Southern Division.
IRON WORKERS LOCAL NO. 25 PENSION FUND, et al., Plaintiffs,
v.
WATSON WYATT & COMPANY, Defendant.
Civil Case No. 04-40243.

May 1, 2006.

Michael J. Asher, Sharon S. Almonrode, Sullivan, Ward, Southfield, MI, for Plaintiffs.

Eugene Driker, Morley Witus, Sharon M. Woods, Matthew J. Bredeweg, Barris, Sott, Detroit, MI, Thomas S. Gigot, Groom Law Group, Washington, DC, for Defendant.

ORDER OVERRULING DEFENDANT'S OBJECTIONS TO THE MAGISTRATE'S REFUSAL TO ALLOW THE DEPOSITION OF ANTHONY ASHER

PAUL V. GADOLA, District Judge.

***1** On September 7, 2005, Defendant filed a motion to compel the deposition of Anthony Asher [docket entry 14]. The motion was subsequently referred to Magistrate Judge Donald A. Scheer. On November 30, 2005, Magistrate Scheer issued an order denying Defendant's motion to compel the deposition of Mr. Asher after considering the submitted briefs and after hearing oral argument. On December 14, 2005, Defendant filed an objection to the Magistrate's order.

Nondispositive orders, such as Magistrate Judge Scheer's order denying Defendant's motion to compel the deposition of Mr. Asher, are governed by the terms of 28 U.S.C. § 636(b)(1)(A) and Rule 72(a) of the Federal Rules of Civil Procedure. Section 636(b)(1)(A) states: "A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." 28 U.S.C. § 636(b)(1)(A); *see also* Fed.R.Civ.P. 72(a). "According to the Supreme Court and the United States Court of Appeals for the Sixth Circuit, '[a] finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.' " *United States v. Mandycz*, 200 F.R.D. 353, 356 (E.D.Mich.2001) (Gadola, J.) (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 398 (1948); *Hagaman v. Comm'r of Internal Revenue*, 958 F.2d 684, 690 (6th Cir.1992)).

Defendant argues that the Magistrate Judge's order is clearly erroneous because it required the Defendant to make an additional showing of cruciality, or need, before taking Mr. Asher's deposition. Because Magistrate Judge should not have determined that Mr. Asher is Plaintiff's trial or litigation counsel, Defendant argues, the cruciality requirement should not apply. The requirement comes from *Shelton v. American Motor Corp.*, 805 F.2d 1323, 1327 (8th Cir.1987), which established a three-part test to determine whether a court should order the deposition of opposing counsel: "(1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and nonprivileged; and (3) the information is crucial to the preparation of the case." *Shelton v. American Motor Corp.*, 805 F.2d 1323, 1327 (8th Cir.1987) (citation omitted). The Sixth Circuit adopted the *Shelton* test in *Nationwide Mutual Ins. Co. v. The Home Ins. Co .*, 278 F.3d 621 (6th Cir.2002).

After reviewing the record, the Court finds that the Magistrate Judge's order is not clearly erroneous or contrary to law because it applied the *Shelton* test after finding that Mr. Asher is Plaintiff's trial/

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litigation counsel. The Court agrees that Mr. Asher is Plaintiff's trial/litigation counsel and that the *Shelton* test must be applied. Further, the Court finds that the Defendant has failed to overcome the *Shelton* requirements. Therefore, the Court overrules Defendant's objections and affirms the Magistrate Judge's order denying Defendant's motion to compel the deposition of Mr. Asher.

***2 ACCORDINGLY, IT IS HEREBY ORDERED** that Defendant's objections [docket entry 50] to the Magistrate Judge's order are **OVERRULED.**

SO ORDERED.

E.D.Mich.,2006.
Iron Workers Local No. 25 Pension Fund v. Watson Wyatt & Co.
Not Reported in F.Supp.2d, 2006 WL 1156723 (E.D.Mich.)

END OF DOCUMENT

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Only the Westlaw citation is currently available.

United States District Court, S.D. Ohio, Eastern Division.
UNITED STATES OF AMERICA, Plaintiff,
v.
OHIO EDISON COMPANY, et al., Defendants.
STATE of New York and State of Connecticut, Plaintiffs-Intervenors,
v.
OHIO EDISON COMPANY, et al., Defendants.
STATE of New Jersey, Proposed Plaintiff-Intervenor,
v.
OHIO EDISON COMPANY and Pennsylvania Power Company, Defendants.
No. C2-99-1181.

July 11, 2002.

United States and several states sued utility to enforce Environmental Protection Agency (EPA) regulations allegedly requiring permits for utility's modifications to power plant. Governments moved to compel discovery of utility's employees' communications with utility attorneys, in connection with utility's defenses of lack of adequate notice, failure to comply with notice-and-comment procedures, and estoppel. The District Court, Kemp, United States Magistrate Judge, held that utility's assertion of defenses did not waive attorney-client privilege, since utility did not affirmatively rely on attorneys' advice as grounds for those defenses.

Motion denied.

West Headnotes

Privileged Communications and Confidentiality 311H 168

311H Privileged Communications and Confidentiality
311HIII Attorney-Client Privilege
311Hk168 k. Waiver of Privilege. Most Cited Cases
(Formerly 410k219(3))
Utility's assertion of routine defenses of inadequate notice and violation of notice-and-comment rule-making procedures, as well as estoppel, in federal and state governments' action to enforce Environmental Protection Agency (EPA) regulations allegedly requiring permits for utility's modifications to power plant, did not constitute waiver of attorney-client privilege so as to permit discovery of utility's attorneys' communications with utility employees concerning attorneys' interpretation of regulations in question; utility did not affirmatively rely on its attorneys' advice as grounds for defenses.

OPINION AND ORDER

KEMP, Magistrate J.

***1** On October 2, 2001, three of the state plaintiffs, the State of New York, the State of Connecticut, and the State of New Jersey, moved to compel discovery. The following day, the United States of America filed a similar motion. Ohio Edison filed a consolidated memorandum in opposition to both motions on November 5, 2001, and the plaintiffs then filed a reply memorandum. The motion is now ripe for decision.

I.

The facts underlying the motion to compel are deceptively simple, and can be stated easily. In its answer and counterclaim, defendant Ohio Edison has raised a number of issues which, depending upon how they are construed, might conceivably involve the disclosure of otherwise privileged communications. In particular, the plaintiffs note that Ohio Edison has defended and counterclaimed on the grounds that the regulations sought to be enforced in this action were originally interpreted differently

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by the EPA and, as so interpreted, would not have required Ohio Edison to obtain a permit for certain modifications made to the Sammis power plant which is at issue here. However, Ohio Edison asserts that the EPA has now changed its interpretation of those regulations in order to support its litigation position.

Ohio Edison argues that there are at least three reasons why the EPA is not entitled to enforce the regulations, as currently interpreted, against prior modifications made at the Sammis plant. First, Ohio Edison contends that it did not receive reasonable notice that the EPA would be changing its interpretation of these regulations. Second, it asserts that any change to a long-standing interpretation of a federal regulation is required to be preceded by "notice and comment" rulemaking and that the EPA did not follow this procedure. Third, it contends that it reasonably relied upon the prior interpretation of the regulation in making modifications without obtaining a permit, and that the plaintiffs are now estopped from enforcing the regulations against these modifications.

Plaintiffs sought to discover the factual bases for these defenses through both written discovery and depositions. During the course of that discovery, plaintiffs learned that Ohio Edison's prior understanding of the meaning of the regulations at issue came primarily, if not exclusively, through opinions rendered by its attorneys. Plaintiffs assert that the defenses and counterclaims raised by Ohio Edison necessarily imply that Ohio Edison was unaware that the regulations at issue could be interpreted in a fashion which would require permits for modifications to the Sammis plant. If Ohio Edison has made such a factual assertion, plaintiffs claim they are entitled to find out whether it is true. Thus, they asked whether Ohio Edison had actually been advised by its attorneys that the regulations might require permits for such modifications. All of plaintiffs' questions about the content of communications between Ohio Edison's attorneys and its employees concerning the interpretation of the regulations were met with the assertion of the attorney-client privilege. Plaintiffs have now moved to compel answers to these questions. They rely upon the general legal doctrine that a party may not raise a defense which has as an element information which is otherwise privileged but simultaneously refuse to divulge that privileged information in order to thwart the opponent's ability to test the merits of the defense. Because the waiver issue relates to three separate defenses or counterclaims raised by Ohio Edison, the Court will discuss each in turn to determine whether, by pleading the defense or counterclaim, Ohio Edison has waived the attorney-client privilege for information relevant to that defense or counterclaim.

II.

A.

***2** The Court begins its analysis with Ohio Edison's "notice and comment" defense. As explained in its opposing memorandum, Ohio Edison intended, by pleading that defense, to raise the issue of whether the EPA is legally permitted to change a long-standing interpretation of regulation without first (1) giving notice of the proposed change to the persons or entities affected by that regulation, and (2) giving those persons or entities an opportunity to comment on the proposal. Ohio Edison relies on a number of decisions which, in its view, prohibit an agency from reinterpreting a regulation to require different conduct without going through the same process of notice-and-comment rulemaking which preceded the adoption of the original regulation. *See* Defendants' Consolidated Memorandum at 7-8. According to Ohio Edison, whether it had been advised by its attorneys at some point that a different interpretation of the regulation was either feasible or was actually being followed by the EPA is simply irrelevant to the question of whether the EPA failed to follow required procedures before it adopted a contrary interpretation of the regulations.

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Plaintiffs' initial motions lump this defense together with the "fair notice" defense (which is discussed in the following section), and do not specifically argue that Ohio Edison's knowledge of the interpretation of the regulation would prohibit it from raising a defense that proper rulemaking procedures were not pursued. However, in their reply memorandum, plaintiffs assert that, as a matter of substantive law, a party cannot succeed on an objection to the absence of notice and comment rulemaking if that party had actual notice of the agency's revised interpretation of the regulation. Consequently, plaintiffs contend that, as to this defense, if they can demonstrate that Ohio Edison had actual notice of a change in the interpretation of the regulations from any source, the defense is unavailable.

Ohio Edison does not appear to take substantial issue with the plaintiffs' position that if the EPA had given it actual notice of a proposed change, the failure to publish that notice in the Federal Register would not be fatal to the EPA's ability to enforce the regulation as currently interpreted. However, Ohio Edison contends that the focus of the inquiry must be on the agency's action in giving notice rather than upon the subjective understanding of the regulated party. In other words, if the agency gave adequate notice, Ohio Edison's failure to understand the content of that notice might prove fatal to its defense, but if EPA failed to give adequate notice, Ohio Edison's subjective belief that the regulation either was or might be subject to reinterpretation would be irrelevant.

B.

Although Ohio Edison's "fair notice" defense differs from the notice-and-comment defense, the conceptual disagreement among the parties over the privilege issue is essentially the same. In its "fair notice" defense, Ohio Edison asserts that, even if EPA was not required to follow a different rulemaking procedure with respect to the current interpretation of its regulations, the fact that it never gave Ohio Edison or other members of the regulated public fair notice of the change independently prevents the EPA from enforcing the regulation against Ohio Edison with respect to projects which were undertaken before notice was given. Again, according to Ohio Edison, the only issue raised by this defense is whether EPA gave, "fair notice." Ohio Edison again contends that its own subjective understanding of the regulation is irrelevant to this defense. Plaintiffs, on the other hand, contend that Ohio Edison's subjective understanding could completely undermine this defense, and that if the plaintiffs can show that Ohio Edison understood, even in the absence of official agency pronouncements, that its projects required permits, it cannot now be heard to complain about the fact that it never received independent notice from EPA that it had to obtain those permits.

C.

***3** The third defense raised by Ohio Edison is an estoppel defense. This defense contains the traditional elements of estoppel, including the element of reasonable reliance. Thus, according to plaintiffs, if an estoppel defense can be raised based on the facts of this case, Ohio Edison must be claiming not only that it relied upon the allegedly contrary interpretation of the regulations when it failed to request permits for the modification of the Sammis plant, but that such reliance was reasonable. If Ohio Edison had been told by its attorneys that it was required to obtain permits under the applicable regulations, plaintiffs assert that Ohio Edison's purported reliance on a contrary interpretation of the regulations would not have been reasonable. Thus, in order to undercover the factual basis for this defense, plaintiffs need to know what Ohio Edison was told by its attorneys concerning how these regulations applied.

Ohio Edison continues to argue, as it did with its other defenses, that its estoppel defense rests upon factual evidence concerning what a reasonable person would have believed the EPA's interpretation of the regulation to be, and not upon what Ohio Edis-

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on actually believed. Perhaps recognizing that the estoppel defense differs conceptually from both the notice and comment rulemaking defense and the fair notice defense because it does appear to contain a subjective element of reasonable reliance, Ohio Edison also asserts that "it is important to emphasize that all Ohio Edison has done is pleaded the defense of estoppel in response to the Plaintiffs' filing of complaints." Ohio Edison asserts that the mere pleading of the defense, "without specifically putting reliance on advice of counsel in issue, is insufficient to waive privilege." Defendants' Consolidated Memorandum, at 17.

D.

Although these three defenses are conceptually separate, the underlying question raised by the present motion to compel is the same: has Ohio Edison necessarily and affirmatively put its subjective understanding of the regulations at issue in this case by pleading these defenses? If so, principles of fundamental fairness would appear to require that Ohio Edison disclose all of the information in its possession which is relevant to its defenses. If not, there would appear to be no justification to permit plaintiffs to intrude upon Ohio Edison's privileged communications with its attorneys.

III.

No analysis of the issue of whether, by pleading an affirmative defense or a counterclaim, a defendant waives the attorney-client privilege for communications relating to that defense or counterclaim, can begin without an analysis of the decision in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D.Wash.1975). *Hearn* involved an action brought under 42 U.S.C. § 1983 in which the defendants raised the defense of "good faith immunity." Although, under current law, *see Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), the determination of whether a defendant is entitled to qualified immunity in a civil rights action is based upon an objective view of the applicable law, that was not so in 1975. Rather, at that time, the defendant's subjective understanding of the state of the law was an element of defense. The plaintiff in *Hearn* contended that by pleading this defense, the defendants had necessarily placed their state of mind at issue, and that any legal advice given to them by the Washington Attorney General was relevant to that state of mind. After reviewing other cases where courts held that a privilege was waived by pleading a particular claim or defense, the Court noted that

> ***4** "All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party."

Hearn, 68 F.R.D. at 581. The court held that an implied waiver can be found if three matters can be established: first, that the party possessing the privilege took some affirmative act, such as filing a suit; second, that the affirmative act served to put the protected information at issue by making it relevant to the case; and third, if the court recognized the claim of privilege, the opposing party would have been denied access to information vital to the defense. Applying those factors, the Court found that the assertion of an affirmative defense containing a subjective good faith element constituted a waiver of the attorney-client privilege. The court found it irrelevant whether the defendants actually raised an "advice of counsel" defense, and implied the waiver from the fact that they raised a defense which depended in part upon what advice their counsel had given them. *Id.* at 581 n. 5.

Perhaps the next major decision on this issue is *United States v. Exxon Corp.*, 94 F.R.D. 246 (D.D.C.1981). That case, like this one, was a government enforcement action in which the target of enforcement raised an affirmative defense which, according to the government, waived the attorney-cli-

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ent privilege. The defense raised in that case was that Exxon had complied in good faith with the governmental regulations at issue. Following *Hearn v. Rhay*, the court noted that the issue of good faith reliance had been affirmatively pleaded by the party who subsequently asserted the attorney-client privilege, and it would be unfair to permit a party to raise such a defense without allowing the opposing party discovery concerning the underlying factual basis of that defense. The Court rejected Exxon's assertion that the defense was confined solely to communications between Exxon and the government concerning the regulations at issue, concluding that internal communications within Exxon, including communications with its own attorney, were also pertinent to its "corporate state of mind...." *United States v. Exxon Corp.*, 94 F.R.D. at 247. The court further rejected Exxon's attempt to limit the scope of the waiver to communications which it relied upon in support of its defense, noting that "because the waiver is generated by the injection of an entire defense, the magnitude of the waiver must be proportionately larger" and "must pertain to all documents bearing upon the subject matter of the defense." *Id.* at 249.

Not all courts which have considered this issue have relied upon such broad pronouncements. For example, the Court of Appeals for the Third Circuit, in both *Rhone-Poulenc Rorer v. Home Indemnity Co.*, 72 F.3d 851 (1994) and *Glenmede Trust Co. v. Thompson*, 56 F.3d 476 (1995), distinguished between defenses which generally placed the defendant's state of mind at issue and defenses which specifically relied upon advice of counsel. In *Rhone-Poulenc*, the Court noted that advice of counsel was not open to discovery simply because it was relevant to some issue in the case, including the issue of whether the client had a particular state of mind, but became an issue only "where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney-client communication." *Id.* at 863. By contrast, the Ninth Circuit appears to follow the District Court's decision in *Hearn*, which is broader than the test followed by the Third Circuit and by some district courts within the Seventh Circuit. Compare *Home Indemnity Co. v. Layne Powell Moss & Miller*, 43 F.3d 1322 (9th Cir.1995) *with Beneficial Franchise Co. v. Bank One*, 205 F.R.D. 212, 216-17 (N.D.Ill.2001); *see also Chamberlain Group v. Interlogix, Inc.*, 52 Fed.R.Serv.3d 38 (N.D.Ill.2002).

***5** In the Court's view, a test which explores only whether attorney-client communications are relevant to an affirmative defense or counterclaim does not give due respect to the attorney-client privilege. As noted in *Interlogix*, *supra*, "[r]elevancy is not the test for an implicit waiver of attorney-client privilege." *Interlogix*, 52 Fed.R.Serv.3d 38, 2002 WL 467153, *3, *citing United States v. Zolin*, 491 U.S. 554, 562-63, 109 S.Ct. 2619, 105 L.Ed.2d 469. Thus, "[a] party must affirmatively use privileged communications to defend itself or attack its opponent in the action before the implicit waiver rule is applicable." *Id.* Consequently, merely pleading the defense of equitable estoppel in patent case without affirmatively relying upon advice of counsel is not sufficient to imply waiver. *Id; see also Beneficial Franchise*, 205 F.R.D. at 217.

The defenses which Ohio Edison has raised in this case can fairly be described as routine defenses to a governmental enforcement action. It is not uncommon for a party against whom a particular statute or regulation is being enforced to claim that the statute is not readily susceptible of the interpretation being given to it by the agency; or that the agency's interpretation of the statute, even if permissible, renders the statutory language sufficiently vague that reasonable persons could not have been expected to understand that their conduct was unlawful; or that the agency, through the procedures which it used to interpret the statute, violated some aspect of the Administrative Procedure Act. Although it is less common to raise an estoppel defense against the United States because of the difficulty in establishing such a defense, estoppel is certainly a common defense in many types of actions. For the Court to hold that

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a waiver occurs in every case where a target of government regulation takes issue with the adequacy of the notice given to it concerning the interpretation regulation would be unduly to discourage parties from raising valid defenses. That is not so simply because the party's attorneys might have advised it of possible interpretations of the statute or regulation which are consistent with the ones being advanced by the government, but because all of the communications on the same subject matter would thereby be made the subject of discovery. Once a waiver has been found, the scope of that waiver would ordinarily extend to the entire subject matter of the transaction at issue.

The converse is also true, of course. If Ohio Edison were to attempt to prove that it lacked fair notice of the meaning of these regulations because even its attorneys said it was not required to obtain permits, it would open the door to full discovery of attorney-client communications. If it contends that the government is estopped from enforcing these regulations in the manner asserted in this lawsuit because its attorneys said that the regulations did not require it to obtain permits and that its reliance upon such advice was reasonable, it would pave the way for the plaintiffs to explore the full complement of attorney-client communications relating to that subject. The Court assumes, from its vigorous efforts to shield these communications from discovery, that Ohio Edison does not intend to introduce any such evidence in this case.

***6** This does not mean that the plaintiffs are completely foreclosed from performing discovery as to these defenses. The Court assumes that information which Ohio Edison learned about the interpretation of these regulations from sources other than its own attorneys, even if those sources were not the EPA, has been disclosed. For discovery purposes, that type of information meets the broad relevance test set forth in Fed.R.Civ.P. 26(b) even if the District Judge ultimately determines that it is only the agency's official pronouncements which "count" with respect to the defenses raised. Again, however, because the test for invading attorney-client privilege communications is not simply relevance but affirmative waiver, the Court does not believe that privileged communications are properly discoverable in the absence of some additional action by Ohio Edison which makes it clear that such communications will be relied upon in advancing these defenses.

The Court recognizes that, in order to present a full rebuttal to Ohio Edison's defenses, plaintiffs would like to see what Ohio Edison's attorneys told Ohio Edison about the regulations at issue. It is probable that, by allowing discovery into such communications, the Court would advance the search for the truth which is the ultimate goal of litigation. Nevertheless, all evidentiary privileges necessarily impinge upon the parties' search for the truth, and do so because the policies which require recognition of the privilege outweigh the policies behind full and complete discovery under certain circumstances. The Court is not persuaded that the attorney-client communications at issue here are irrelevant to the fair notice, notice and comment rulemaking, or estoppel defenses, but the Court is persuaded that Ohio Edison has not waived the privilege which otherwise protects such communications simply by pleading those defenses. Consequently, the plaintiff's motions to compel discovery with respect to these motions (file docs. # 82 and # 83) are denied.

Any party may, within ten (10) days after this Order is filed, file and serve on the opposing party a motion for reconsideration by a District Judge. 28 U.S.C. § 636(b)(1)(A), Rule 72(a), Fed.R.Civ.P.; Eastern Division Order No. 91-3, pt. I., F., 5. The motion must specifically designate the order or part in question and the basis for any objection. Responses to objections are due ten days after objections are filed and replies by the objecting party are due seven days thereafter. The District Judge, upon consideration of the motion, shall set aside any part of this Order found to be clearly erroneous or contrary to law.

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This order is in full force and effect, notwithstanding the filing of any objections, unless stayed by the Magistrate Judge or District Judge. S.D. Ohio L.R. 72.4.

S.D.Ohio,2002.
U.S. v. Ohio Edison Co.
Not Reported in F.Supp.2d, 2002 WL 1585597 (S.D.Ohio)

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Not Reported in F.Supp.2d, 2008 WL 2355798 (E.D.Ky.)
(Cite as: 2008 WL 2355798 (E.D.Ky.))

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Only the Westlaw citation is currently available.

United States District Court,
E.D. Kentucky,
Central District,
at Lexington.
Ken HODAK, Plaintiff
v.
MADISON CAPITAL MANAGEMENT, LLC et al., Defendant.
Civil Action No. 5:07-cv-005-JMH.

June 5, 2008.

Beth A. Bowell, Erica Leigh Keenan, Robert L. Roark, William Scott Hunt, Walther, Roark & Gay, P.L.C., Lexington, KY, for Plaintiff.

Alexander J. Moeser, Sadhna G. True, Susan C. Sears, Dinsmore & Shohl LLP, Lexington, KY, for Defendants.

MEMORANDUM OPINION AND ORDER

JAMES B. TODD, United States Magistrate Judge.

I. INTRODUCTION

***1** On January 10, 2007, plaintiff Ken Hodak ("Hodak"), former CEO of UAR GP Services ("UAR"), filed a complaint in U.S. District Court against defendants Madison Capital Management, LLC, UAR GP Services, LLC, United American Resources, LP; and UAR GP, LLC, alleging that the defendants violated KRS Chapter 337 under which the plaintiff alleges he is entitled to severance/dismissal pay in the amount of $250,000. In addition to his KRS Chapter 337 claim, plaintiff also asserts a breach of contract claim, seeking reimbursement for expenses incurred with respect to a vehicle he purchased. Additionally, plaintiff is seeking declaratory judgment under KRS Chapter 418, to render the Non-Competition Agreement signed by the plaintiff as invalid and unenforceable. Plaintiff also puts forth a claim of fraud, seeking damages resulting from the defendants' alleged use of fraudulent misrepresentations and material omissions. Lastly, and as an alternative to the above claims, on a finding that Madison Capital and Madison Investment are not plaintiff's employer (individually or jointly with UAR), the plaintiff asserts a tortuous interference with contractual relations claim, seeking damages that resulted from the alleged interference. Additionally, plaintiff is seeking damages for emotional distress and mental anguish, punitive damages, and reasonable attorney fees and costs in connection with each of these claims.

In response to the complaint, defendant UAR filed a counterclaim against plaintiff, alleging that Hodak has breached certain terms of the Non-Competition Agreement he signed on May 12, 2006, and breached his fiduciary duty to GP Services by disclosing confidential information to his present employer, National Coal, concerning the interest GP Services had expressed in acquiring Mann Steel and the Norwest Report. GP Services seeks compensatory and punitive damages against Hodak for his alleged violations of the Non-Competition Agreement.

II. THE DISCOVERY DISPUTE

This matter is before the court on Hodak's motion to compel discovery from Bryan Gordon ("Gordon"), Chauncey Curtz ("Curtz") and Jonathan Baum ("Baum") concerning the answering of specific deposition questions which Hodak asserts, as a result of a waiver, are not protected by attorney-client privilege. More particularly, Hodak requests that Gordon, Curtz and Baum be compelled to answer questions relating to communications regarding the termination of his employment. Hodak also requests that he be awarded attorney's fees in-

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curred relative to the subject motion to compel discovery.

In response, UAR argues that Hodak's motion to compel should be denied because the defendants have neither (1) placed the privileged communications "in issue", nor have they (2) waived the privilege, pursuant to Fed.R.Civ.P. 26(b)(5)(A), through Gordon's deposition testimony. Therefore, for all of these reasons, UAR contends that Hodak's motion to compel discovery should be denied and that it should be awarded its attorney's fees incurred in having to respond to Hodak's motion to compel.

Discussion

***2** Summarizing Hodak's argument, Hodak asserts that Curtz, Gordon and Baum should be compelled to give deposition testimony pursuant to F.R.C.P. 37(a)(3)(B)(i). Hodak submits that through the deposition testimony of Curtz, Gordon and Baum, the attorney-client privilege has been waived as a result of the protected information being placed "in-issue". In further support of his motion to compel, Hodak asserts that an additional waiver of the attorney-client privilege was established through Curtz and Gordon's deposition testimony in which Hodak asserts they voluntarily disclosed the confidential character of their communications concerning the termination of Hodak. In a nutshell, Hodak argues that Curtz, Gordon and Baum should be compelled to give deposition testimony relating to the reasons for Hodak's termination due to a waiver of the attorney-client privilege created through their own deposition testimony.

Summarizing UAR's argument in response to Hodak's motion to compel, UAR argues that the defendants have neither put the privileged communications "in-issue" nor relied on the "advice of counsel" as a defense. Relying on Rule 26(b)(5)(A), UAR counters Hodak's contention that a waiver was established through Gordon's deposition testimony concerning his conversation with Baum. UAR contends that under Rule 26(b)(5)(A), (1) Gordon was required to acknowledge the existence of the conversation he had with Baum in order to claim the privilege, and (2) Gordon failed to give deposition testimony concerning the specifics of the communication, therefore not establishing a waiver to the attorney-client privilege. For these reasons, UAR submits that Hodak's motion to compel should be denied and that since defendant's position on privilege is substantially justified and since defendants made an attempt to resolve the privilege issue in good faith, an award of attorney's fees to Hodak would be inappropriate.

Analysis

I.

The purpose of the attorney-client privilege is to "encourage full and frank communication between attorneys and their clients". *Upjohn Co. v. U.S.*, 449 U.S. at 383,389. This privileged communication is encouraged so the client may "make well-informed legal decisions and conform his activities to the law." *Static Control Components, Inc. v. Lexmark Intern.*, Inc., Slip Copy, 2007 WL 902273 at 3 (E.D.Ky.2007). Defining the scope of the privilege, the court in *Upjohn* stated: "The privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice." *Id.* at 389.

Hodak asserts that a waiver to the attorney-client privilege has occurred as a result of the defendants placing the protected information "in-issue" or where they relied upon "advice of counsel" in a manner so as to place the protected information in issue. Hodak utilizes *Hearn v. Rhay*, 68 F.R.D. 574,581 (E.D.Wash.1975), and the factors laid out in that case to demonstrate that an "in-issue" waiver has been established in the present case.

***3** The Magistrate Judge is unpersuaded by Hodak's use of *Hearn v. Rhay, supra*, to demonstrate that an

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in-issue waiver to the attorney-client privilege has been established in the present action. In particular, the Magistrate Judge is unpersuaded by Hodak's claim that the "waiver extends to all communications relevant to the issue asserted" by Curtz and Gordon, which in turn would include all communications between Baum, Curtz and Gordon concerning the termination of Hodak. An implicit waiver of the attorney-client privilege is not triggered by whether or not the communications are relevant to the issue asserted, *United States v. Zollin*, 491 U.S. 554, 562-63, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), for the implicit waiver rule to become applicable, a party must affirmatively use privileged communications to defend itself or attack its opponent in the action. *Dawson v. New York Life Insurance Co.*, 901 F.Supp. 1362 (N.D.Ill.1995). For instance, the court in *Harter v. Univ. of Indianapolis*, 5 F.Supp .2d 657,665 (S.D.Ind.1998), found that Harter's state of mind might have been relevant, but the possibility that privileged communications could provide the opponent with relevant evidence is not a sufficient basis for finding a waiver of the privilege. The deposition testimony of Curtz and Gordon, which relates to communications they both had with Baum, is not used in an affirmative manner to defend or support the termination of Hodak. The extent that the deposition testimony refers to those privileged communications is limited to recognition of the communications with Baum and that Baum provided advice that aided in the termination of Hodak. The communications with Baum lack relevance in this case because they are not used as reasoning or in support of reasoning for the termination of Hodak; those reasons are laid out extensively through the deposition testimony of Gordon.

Assuming arguendo that the *Hearn v. Rhay*, *supra*, analysis is applicable to the present action, the *Hearn* court's formula for determining whether an "in issue" waiver has been established contains an additional requirement that the application of the privilege deny the opposing party access to information vital to making their case. *Hearn v. Rhay*, 68 F.R.D. at 581. The defendants in the present action have stated their intention not to rely on the protected communications in establishing cause for the termination of Hodak; therefore eliminating the vital nature of those communications.

The Magistrate Judge is also unpersuaded by Hodak's assertion that an "in-issue" waiver of the attorney-client privilege was established as a result of the defendants relying upon "advice of counsel" in a manner that placed the protected information in issue. In *Rhone-Poulenc v. Home Indem Co.*, 32 F.3d. 851,863 (C.A.3.1994), the court discussed "advice of counsel" and stated "advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner." The deposition testimony of Gordon reveals that he sought Baum's advice on the termination of Hodak, but that alone doesn't bring that conversation "in-issue" in the present case. As the court in *Rhone* goes on to explain, "the advice of counsel is placed "in-issue" where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication." *Id.* As the testimony set out below demonstrates, Gordon defended the termination of Hodak through extensive reasoning without reliance on the protected communications he had with Baum:

***4** Q: Who made the decision to fire Ken Hodak?

A: I did.

Q: And why was he fired?

A: He was fired because he was completely and utterly inadequate with respect to the job he had been hired to perform. He did not achieve any of the goals or objectives or milestones which had been agreed upon over time that he would achieve. It was my feeling that his leadership skills were lacking at best, his industry instincts were unimpressive, his presence both internally and externally was appalling, his preparedness

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> and ability to answer questions was absolutely substandard, and I felt his judgment was poor, and he had completely and utterly lost the confidence of the people who were closest to the project on a day-to-day basis and whose counsel I respected greatly, and had no results to speak of after being teed up with a great deal of opportunity and resources, and I felt that, you know-to use an expression I, felt that he had overpromised and under-delivered in terms of his capabilities, and he was essentially an empty suit.

(Gordon Dep. at pp. 100-101).

And;

> A: Mr. Hodak had, it turns out, poorly honed deal and negotiating instincts and made a number of ham-handed steps in the process of negotiating the deal ...
>
> Q: Okay. Tell me exactly what you mean by that.
>
> A: Well, I mean, negotiating is partly a science and partly an art form, and Mr. Hodak was very transparent and very unsophisticated in terms of the way that he interacted with the Marshall Resources principals and telegraphed many of our negotiating positions in a way that was disadvantageous to what we believed was the best ultimate outcome for the UAR companies.

(*Id.* at 54).

And;

> Q: What specifically did he do wrong with the due diligence team (referring to Hodak)?
>
> A: Well, the due diligence project came in late, it came in radically over budget, and it came back that we missed the side of the barn in terms of the preliminary assessment and pricing of the deal. So I would say that at the end of the day, that's a pretty bad result any way you look at it. And you know, you can delegate, you know, authority, but you can't delegate responsibility, and I held and continue to hold Mr. Hodak primarily responsible for the failure of that project and those results.

(*Id.* at 75-76).

In conclusion, the defendants have been careful to note that they have no intentions of relying on the privileged communications Curtz and Gordon had with Baum as support for a showing of cause in Hodak's termination. Therefore, the defendants' use of these privileged communications conforms to the ideal that "[T]he attorney-client privilege cannot at once be used as a shield and a sword." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.1991), and "While the sword stays sheathed, the privilege stands." *In Re Lott*, 139 Fed. Appx. 658,661 (6th Cir.2005). As long as the defendants continue to avoid using the substance of the protected conversations with Jonathan Baum as a defense for the termination of Hodak, such privileged communications shall remain protected.

II.

***5** Hodak also asserts that a waiver of the attorney-client privilege was established through the deposition testimony of Curtz and Gordon in which Hodak alleges they voluntarily disclosed privileged communications they had with Baum. Hodak is basing this claim on Gordon's testimony in which Gordon testified that he relied upon advice and reasoning provided by Baum in connection with his decision to terminate Hodak. Additionally, Hodak references deposition testimony in which Curtz testified that he did not recall whether he made a recommendation on whether to terminate Hodak.

The Magistrate Judge is unpersuaded by Hodak's assertion that Curtz, Gordon, or Baum's deposition testimony regarding the termination of Hodak creates a waiver of the attorney-client privilege. "It is the long established rule that confidential communications between an attorney and his client are absolutely privileged from disclosure against the will of the client." *Diversified Industries, Inc. v.*

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Meredith, 572 F.2d 596,601 (C.A .Mo.1977). Citing confidentiality as the key to the privilege, the court in *United States v. Ryans*, 903 F.2d 731, 741 n. 13 (10th Cir.1990), stated that "[t]he attorney-client privilege is lost if the client discloses the substance of an otherwise privileged communication to a third party." In particular the Magistrate Judge is unpersuaded because the deposition testimonies failed to reveal the substance of the privileged communications with Baum.

The deposition testimony of Gordon was limited to a description of the subject matter of the communications he had with Baum, falling short of disclosing the confidential character of those communications. The Magistrate Judge finds instead the deposition testimony of Gordon meets the requirements of Fed.R.Civ.P. 26(b)(5)(A). As seen from the language of Fed.R.Civ.P. 26(b)(5)(A), when a party withholds information otherwise discoverable by a claim it is privileged, the party shall: (1) "make the claim expressly," (2) "shall describe the nature of the ... communications in a manner that, without revealing information itself privileged ..., will enable other parties to assess the applicability of the privilege ..." Fed.R.Civ.P. 26(b)(5)(A). Gordon's deposition testimony concerning the conversations between himself and Baum referenced the subject matter of the communications (advice from counsel) but refrained from revealing the substance of those communications; the actual information UAR contends is privileged (the particulars of the conversations) was not revealed. The deposition testimony of Curtz was limited to an inability to recollect whether he had made a recommendation one way or the other to Gordon. Curtz did not disclose information during his deposition testimony which could be viewed as the substance of those privileged communications.

In conclusion, the deposition testimony of Curtz, Gordon, or Baum failed to reveal the substance of the claimed privileged communications. Without disclosing more than the subject matter of the privileged communications, there has been no waiver of the attorney-client privilege in this case.

III. CONCLUSION

***6** In summary, for all of the foregoing reasons, the Magistrate Judge concludes that the defendants did not put the privileged communications "in-issue" nor did they waive the privilege through disclosure of the protected communications.

The court further concludes that the defendant's position on the privilege issue is substantially justified; therefore the plaintiff is not entitled to recover sanctions against the defendant.

Accordingly, **IT IS HEREBY ORDERED** that plaintiff Hodak's Motion to Compel Deposition Testimony from defendant UAR [DE # 58] is **DENIED.**

E.D.Ky.,2008.
Hodak v. Madison Capital Management, LLC
Not Reported in F.Supp.2d, 2008 WL 2355798 (E.D.Ky.)

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(Cite as: 2010 WL 3883436 (S.D.Ind.))

Only the Westlaw citation is currently available.

United States District Court,
S.D. Indiana,
Terre Haute Division.
Laura RODRIQUEZ, Plaintiff,
v.
PARSONS INFRASTRUCTURE & TECHNOLOGY GROUP, INC., and Shaw Environmental and Infrastructure, Inc., Defendants.
No. 2:08-cv-273-RLY-WGH.

Sept. 28, 2010.

Robert F. Hunt, Hunt Hassler & Lorenz LLP, Terre Haute, IN, for Plaintiff.

Candace S. Walker, Kristin B. Keltner, Steven F. Pockrass, Ogletree, Deakins, Nash, Smoak & Stewart, Indianapolis, IN, for Defendants.

ORDER ON REQUEST FOR FEES ASSOCIATED WITH PARSONS' MOTION TO QUASH SUBPOENA AND FOR PROTECTIVE ORDER

WILLIAM G. HUSSMANN, JR., United States Magistrate Judge.

***1** This matter came before the Honorable William G. Hussmann, Jr., United States Magistrate Judge, on Defendant Parsons Infrastructure & Technology Group, Inc.'s Request for Fees Associated With Parsons' Motion to Quash Subpoena and for Protective Order filed June 18, 2010 (Docket No. 118). Plaintiff filed a Response on July 20, 2010 (Docket No. 124), and Defendant filed its Reply on July 30, 2010 (Docket No. 126).

Findings of Fact

1. Plaintiff, Laura Rodriguez, filed suit in this case on July 11, 2008, against Defendants Parson Infrastructure and Technology Group, Inc. ("Parsons") and Shaw Environmental and Infrastructure, Inc. ("Shaw"). Plaintiff alleged that Defendants interfered with her contractual employment relationship with her employer Alion Science and Technology Corporation, causing Alion to terminate her because of her gender and sexual orientation.

2. After the parties had completed a substantial portion of discovery, counsel for Shaw sent letters to counsel for Plaintiff indicating that Shaw intended to file a Motion for Summary Judgment and would pursue "costs" as a prevailing party if Shaw prevailed on the Motion for Summary Judgment. Counsel for Shaw also explained that Shaw intended to seek sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure and 28 U.S.C. § 1927.

3. Three days before the dispositive motion deadline, Plaintiff filed a Motion to Dismiss, agreeing to dismiss all claims against Shaw on March 12, 2010.

4. On April 16, 2010, Shaw filed a Motion for Sanctions.

5. On May 7, 2010, counsel for Plaintiff, Robert Hunt ("Hunt"), informed counsel for Parsons, Steven F. Pockrass ("Pockrass"), that Hunt intended to serve Pockrass personally with a notice of deposition and subpoena duces tecum in connection with Plaintiff's response to Shaw's Motion for Sanctions. Hunt informed Pockrass that it was his belief that Pockrass' deposition was warranted given the fact that Pockrass and counsel for Shaw were part of the same law firm.

6. Pockrass objected to this attempt to depose him. Pockrass also advised Hunt that, if Hunt proceeded with his plan to serve Pockrass with a subpoena and notice of deposition, Parsons would file a motion to quash and for protective order and would seek an award of all fees and costs associated with having to address this issue.

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7. Hunt served a Notice of Deposition and Subpoena on May 10, 2010, commanding Pockrass to appear for a deposition and to produce the *entire contents of his file* pertaining to the instant litigation on May 25, 2010.

8. On May 17, 2010, Parsons filed its Motion to Quash Subpoena and for Protective Order ("Motion to Quash") (Docket Nos. 105-107), arguing that the Subpoena should be quashed and a protective order issued because Plaintiff's Notice of Deposition and Subpoena served only to annoy and harass, they subjected Parsons and Pockrass to undue burden and expense, they were premature, the discovery they sought could be obtained from other sources, and the burden and expense of the proposed discovery outweighed its likely benefit. (Motion to Quash at 8-14).

***2** 9. The Court set Parsons' Motion to Quash for a hearing on May 21, 2010.

10. During the hearing, this Magistrate Judge did not issue any formal order, but indicated that he was likely to grant Parsons' Motion to Quash.

11. When Pockrass then indicated during the hearing that he believed that the procedural rules would mandate an award of fees if the Motion to Quash was granted, Hunt then offered to withdraw the Notice of Deposition and Subpoena so that he would have an opportunity to submit a written response to the Motion to Quash.

12. On June 3, 2010, the Magistrate Judge entered an Order on Motions to Quash and for Protective Order concluding that Hunt was required to respond to Shaw's Motion for Sanctions by establishing what information was known by Plaintiff prior to filing the Complaint, without first conducting discovery of Shaw's files or any attorney's billing practices. The order further indicated that if Shaw's Motion for Sanctions was granted and some sanction was required, then a second set of briefs could address the appropriate amount of sanctions. The order further stated that if the Court determined that sanctions are necessary and that the appropriate amount of sanctions must be established, "the court will then consider whether Hunt may be entitled to resubmit subpoenas. If such subpoenas must be resubmitted, Hunt is cautioned that they not seek items that are clearly attorney-client privilege or work product."

13. Finally, the Magistrate Judge's order permitted the filing of a request for fees incurred by Parsons in connection with preparing the Motion to Quash within fifteen (15) days of the date of the order or within ten (10) days of the final judgment entry.

14. On June 18, 2010, Parsons filed a Request for Fees Associated With Parsons' Motion to Quash Subpoena and for Protective Order.

Conclusions of Law

1. Rule 26(c) of the Federal Rules of Civil Procedure provides that a party attempting to avoid discovery may move for a protective order. It provides as follows:

> A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending-or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense ....

2. The Rule further provides that Rule 37(a)(5) applies to the awarding of expenses associated with the filing of a motion for a protective order. *See* FED. R. CIV. P. 26(c)(3).

3. Rule 37(a)(5) explains that a prevailing party on a motion for a protective order is entitled to recover

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"reasonable expenses incurred in making the motion, including attorney's fees." Such an award is not warranted if the motion for protective order was filed before a good faith attempt to resolve the matter was attempted, if objection to the protective order was substantially justified, or if other circumstances make the awarding of expenses unjust. FED. R. CIV. P. 37(a)(5).

***3** 4. The Seventh Circuit has indicated that, subject to the exceptions discussed above, Rule 37 "presumptively requires every loser to make good the victor's costs ...." *Rickels v. City of South Bend, Ind.*, 33 F.3d 785, 786 (7th Cir.1994).

Discussion

In this case, Hunt served a subpoena duces tecum that was: (1) overbroad (i.e., requested the production of an attorney's entire file without any attempt to limit or restrict what must be produced); (2) served on counsel for a party not a part of the sanctions dispute then pending before the Court; and (3) served prematurely (i.e. directed toward the issue of damages before the issue of liability had been settled).

Hunt can be forgiven for serving the subpoena prematurely. Although in many instances when sanctions are sought, the liability for sanctions is bifurcated from the amount of the sanctions, this is not always the case, and Hunt could reasonably have believed that he should start assembling his data as early as possible.

However, the Subpoena issued is clearly overbroad. More importantly, this Magistrate Judge cannot understand how Parsons' counsel's file could be relevant to the issue of whether Hunt and his client had a reasonable basis and conducted a reasonable inquiry before filing suit against Shaw. Hunt's purported reason-that counsel for both Parsons and Shaw belonged to the same law firm-rings hollow here. Whether both were from the same firm has no bearing on what Hunt and his client knew before suit.

Parsons' Motion for Protective Order was, therefore, proper. Rule 37 suggests fees should be awarded unless: (1) a motion for a protective order was filed before a good faith effort was made to resolve the matter; (2) objection to the protective order was substantially justified; or (3) other circumstances make the awarding of expenses unjust. In this case, the e-mails exchanged between Pockrass and Hunt on May 7 and 8 (Request for Fees Associated With Parsons' Motion to Quash Subpoena and for Protective Order at Ex. B) represent an effort to resolve the matter before filing the Protective Order. Although the two sides expressed neither a willingness to compromise nor flexibility, further attempts at resolution of the issue were not mandated.

Hunt's objection to the Protective Order was also not substantially justified. There has been no explanation which clarifies what information Pockrass and Parsons might have possessed that addressed the issue of sanctions which might be imposed based upon what Plaintiff knew prior to initiating suit against Shaw.

Finally, there are no suggested "other circumstances" making the award unjust at this time. This being the case, an award of fees and expenses should be entered.

Parsons' counsel has submitted records reflecting a request for fees and expenses in the amount of Twelve Thousand Six Hundred Eighty-five Dollars and Fifty Cents ($12,685.50). While the attorney billing rates do not seem excessive, there is considerable duplication for "strategy" sessions. In addition, total attorney billing hours for research, drafting, and reviewing the brief amount to nearly thirty (30) hours.[FN1] This is excessive in light of the relatively straightforward issue of whether a single subpoena should be quashed. Additionally, over seven hours are billed preparing for a hearing in which no evidence was submitted or argued and which consumed less than one hour of court time.[FN2] The Magistrate Judge concludes that the fees

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sought should be reduced to reflect a degree of inefficiency or over-lawyering. A reduction of twenty (20) hours of partner time at Three Hundred Thirty Dollars ($330.00) an hour is a reasonable reduction. Subtracting Six Thousand Six Hundred Dollars ($6,600.00) (20 hours x $330) from the request results in a fee award of Six Thousand Eighty-Five Dollars and Fifty Cents ($6,085.50).

FN1. See entries for the following dates: 5-10 (3.6 hours); 5-11(1.1); 5-12(2.2); 5-12(5.1); 5-12(.7); 5-13(1.7); 5-13(.8); 5-13(.3); 5-16(4.3); 5-17(8.7); 5-17(.8); and 5-17(.7).

FN2. See entries for the following dates: 5-19 (.2 hours); 5-20(1.0); 5-20(.3); 5-20(1.4); 5-21(3.4); 5-21(.4); and 5-21(.2).

Conclusion

***4** Therefore, the Request for Fees Associated With Parsons' Motion to Quash Subpoena and for Protective Order is **GRANTED, in part,** and **DENIED, in part.** Plaintiff shall pay the sum of Six Thousand Eighty-five Dollars and Fifty Cents ($6,085.50) within thirty (30) days of the date of this Order.

SO ORDERED.

S.D.Ind.,2010.
Rodriquez v. Parsons Infrastructure & Technology Group, Inc.
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