SO ORDERED,

Judge Neil P. Olack
United States Bankruptcy Judge
Date Signed: August 21, 2017

The Order of the Court is set forth below. The docket reflects the date entered.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF MISSISSIPPI

IN RE:

KEVIN BARNETT,	**CASE NO. 07-02299-NPO**
DEBTOR.	**CHAPTER 7**
EDW INVESTMENTS, LLC AND EDWIN WELSH	**PLAINTIFFS**
VS.	**ADV. PROC. 08-00086-NPO**
KEVIN BARNETT AND DEREK HENDERSON, TRUSTEE	**DEFENDANTS**

ORDER GRANTING IN PART AND DENYING IN PART MOTION AND MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY RESPONSES AND RESPONSE TO PLAINTIFFS' MOTION TO QUASH AND GRANTING IN PART AND DENYING IN PART PLAINTIFFS' MOTION FOR PROTECTIVE ORDER RE: SUBPOENAS FOR PRODUCTION OF DOCUMENTS FROM ATTORNEYS: RAWLINGS, PITRE, AND KELLY

This matter came before the Court for hearing on July 31, 2017 (the "Discovery Hearing"), on the Motion and Memorandum in Support of Motion to Compel Discovery Responses and Response to Plaintiffs' Motion to Quash (the "Motion to Compel") (Adv. Dkt. 61)[1] filed by the

[1] Citations to the docket of the above-referenced chapter 7 bankruptcy case (the "Bankruptcy Case") are referred to as "(Bankr. Dkt. ____)"; citations to the docket of the above-referenced adversary proceeding (the "Adversary") are referred to as "(Adv. Dkt. ____)".

debtor, Kevin Barnett ("Barnett"); the Plaintiffs' Response in Opposition to Motion to Compel Discovery Responses (the "Response to Motion to Compel") (Adv. Dkt. 73) filed by Edwin Welsh ("Welsh") and EDW Investments, LLC ("EDW"), and the Reply in Support of Motion to Compel Discovery Responses (the "Reply in Support of Motion to Compel") (Adv. Dkt. 78) filed by Barnett in the Adversary. Also before the Court at the Discovery Hearing were the Plaintiffs' Motion for Protective Order Re: Subpoenas for Production of Documents from Attorneys: Rawlings, Pitre, and Kelly (the "Motion to Quash") (Adv. Dkt. 83) filed by Welsh and EDW; and the Response in Opposition to Plaintiffs' Motion for Protective Order Re: Subpoenas for Production of Document from Attorneys: Rawlings, Pitre, and Kelly (the "Response to Motion to Quash") (Adv. Dkt. 96) filed by Barnett. At the Discovery Hearing, C. Victor Welsh, III represented Welsh and EDW, and Dorsey R. Carson, Jr. represented Barnett. At the end of the Discovery Hearing, the Court ruled from the bench, granting in part and denying in part both the Motion to Compel and the Motion to Quash. This Order memorializes and supplements that bench ruling.

Jurisdiction

The Court has jurisdiction over the parties to and the subject matter of the Bankruptcy Case pursuant to 28 U.S.C. § 1334. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), (I), (J) and (O). Notice of the Discovery Hearing was proper under the circumstances.

Facts

1. In 2002, Barnett formed a company that later became Techtronics, Inc. ("Techtronics") (Adv. Dkt. 68 at 3). In 2005, Techtronics signed two (2) Master Line of Credit Promissory Notes (the "Promissory Notes") in favor of EDW, one for $500,000.00 dated April 7, 2005 (Adv. Dkt. 68-2 at 3-4), and the other for $200.00.00 dated June 27, 2005 (Adv. Dkt. 68-2 at

5-6). The Promissory Notes are secured "by all receivables and inventory held by [Techtronics]." (*Id*. at 3). Also, Barnett personally guaranteed repayment of the Promissory Notes. (Dkt. 68-2 at 7-10). On May 15, 2006, Barnett, Welsh, and Joseph Taro ("Taro"), a Kenyan native, formed Jambo Computer International, LLC ("Jambo") for the purpose of selling computers in Africa. (Adv. Dkt. 68 at 5). Barnett, Welsh, and Taro each owned a one-third interest in Jambo. (*Id.*).

2. In 2006, Techtronics bought $196,481.35 worth of computers on loan from OutletComputer.com/Intechra Holding Company ("Intechra") (Claim #5-1). Barnett personally guaranteed repayment of the loan. (Adv. Dkt. 43 at 10). Shortly thereafter, Techtronics sold the computers to Jambo.[2] Jambo purchased a policy of property insurance from ACE American Insurance Company ("ACE") to cover its inventory of computers. Jambo shipped the computers purchased from Techtronics to a warehouse in Kenya. The computers allegedly were stolen, and Barnett submitted a claim on Jambo's behalf in the amount of $195,000.00, less the deductible, to ACE (the "Jambo Insurance Claim").

3. On April 2, 2007, Welsh and EDW sued Techtronics and Barnett in the Circuit Court of Madison County, Mississippi (the "Circuit Court"), in Civil Action No. CI2007-cv-00125 (the "Techtronics Suit"), seeking $849,226.51, the balance due on the Promissory Notes. (Adv. Dkt. 68).

4. On July 27, 2007, Barnett commenced the Bankruptcy Case by filing a voluntary petition for relief under chapter 11 of the U.S. Bankruptcy Code (Bankr. Dkt. 1). In his bankruptcy schedules, Barnett listed among his other personal property his one-third interest in Jambo (Bankr.

[2] Barnett asserts that Intechra sold the computers directly to Jambo and that Intechra sent an invoice for the computers to Techtronics by mistake. (Adv. Dkt. 68 at 5 n.7 & 78 at 6). That issue is not relevant to the current dispute.

Dkt. 38 at 5). He also listed his debt to Intechra in the amount of $196,500.00 based on his personal guaranty. (Bankr. Dkt. 38 at 13). The formation of Jambo, Jambo's acquisition of the computers from Techtronics, the purchase of the insurance policy from ACE, the loss of the computers, and Barnett's submission of the Jambo Insurance Claim occurred before the commencement of the Bankruptcy Case.

5. The commencement of the Bankruptcy Case operated as an automatic stay of the Techtronics Suit against Barnett but not Techtronics.[3] On September 17, 2007, the Circuit Court entered a default judgment solely against Techtronics in the amount of $849,226.51 plus interest at the rate of 8% per annum (the "Techtronics Judgment") (Adv. Dkt. 68-3).

6. On October 2, 2007, EDW filed a proof of claim (Claim #9-1) in the Bankruptcy Case in the amount of $849,226.51, based on the Techtronics Judgment and Barnett's execution of a personal guaranty of the Promissory Notes in favor of EDW. On that same date, Welsh filed a proof of claim (Claim #10-1) in the amount of $128,947.03, based on an alleged assignment of a commercial financing note that Barnett personally guaranteed. Barnett did not file an objection to either of these proofs of claims.

7. On March 24, 2008, this Court converted the chapter 11 Bankruptcy Case to a chapter 7 case. (Bankr. Dkt. 135).

8. Jambo and ACE agreed to settle the Jambo Insurance Claim for a total payment of $160,000.00 (Adv. Dkt. 37-1 at 30), but an issue arose as to whom ACE should pay since Jambo and Techtronics had ceased doing business. Jambo and ACE agreed that ACE would interplead the insurance proceeds of $160,000.00 (the "Insurance Proceeds"). Consistent with that agreement, Jambo initiated on April 21, 2008, an interpleader action in Circuit Court in Civil

[3] Techtronics did not file a bankruptcy case.

Action No. CI-2008-cv-00132, naming Techtronics' creditors, EDW, Intechra, LLC, Ironwood Capital, LLC ("Ironwood"), and Welsh, as defendants and depositing the Insurance Proceeds with the Circuit Clerk's office (the "Jambo Suit") (Adv. Dkt. 37-1 at 39-44). Dana E. Kelly ("Kelly") represented Jambo in the Jambo Suit. According to Welsh and EDW, Techtronics' creditors were named as defendants because Jambo owed the Insurance Proceeds to Techtronics as payment for the computers and Techtronics owed more to its creditors than the amount of the Insurance Proceeds. The Circuit Court entered an order accepting the interpleader and discharging ACE from liability on May 30, 2008 (Adv. Dkt. 43-3).

Adversary

9. On August 1, 2008, Welsh and EDW initiated the Adversary in this Court. (Adv. Dkt. 1). In the Amended Complaint Objecting to Discharge and to Determine Dischargeability of Debt (Adv. Dkt. 27), filed on July 1, 2009, Welsh and EDW alleged, *inter alia*, that Barnett "failed to schedule as assets [in his bankruptcy schedules] one or more limited liability companies and/or corporations" and that Barnett "misrepresented the financial condition of Techtronics in order to induce EDW to make loans to Techtronics." (Adv. Dkt. 27. at 4, 6). As relief, Welsh and EDW asked the Court to deny Barnett a discharge of all his debts under 11 U.S.C. § 727(a)(2), (3) and (4)[4] or, in the alternative, declare as nondischargeable under § 523(a)(6) the full amount of their proofs of claims. (*Id*. at 10-11). In the Separate Answer and Defenses of Defendant Kevin Barnett (the "Answer") (Adv. Dkt. 28) filed on July 8, 2009, Barnett denied any liability and asserted numerous affirmative defenses. He did not assert as an affirmative defense in the Answer that he was entitled to any credit or setoff arising from the Insurance Proceeds.

[4] From this point forward, all section references are to the U.S. Bankruptcy Code found at title 11 of the U.S. Code unless otherwise noted.

10. In the Jambo Suit, the Circuit Court on July 28, 2009, awarded summary judgment in favor of Welsh and EDW (the "Jambo Judgment"), finding that their claims to the interpled funds was superior to that of the other creditors, Intechra and Ironwood.

11. The trial of the Adversary was set to begin on January 13, 2010. (Adv. Dkt. 25). At the pretrial conference on January 11, 2010, the parties announced a settlement of all claims. On January 14, 2010, an Agreed Nondischargeable Judgment (the "Agreed Judgment") (Adv. Dkt. 35) was entered granting Welsh and EDW a nondischargeable judgment against Barnett in the amount of $70,000.00 pursuant to § 523 and dismissing with prejudice the dischargeability claim under § 727. The Agreed Judgment, therefore, was entered after the Jambo Judgment. The Adversary was closed on January 26, 2010.

12. In the Bankruptcy Case, the Court on November 23, 2010, granted Barnett a discharge of all his pre-petition debts, except the $70,000.00 Agreed Judgment. That same day, the Bankruptcy Case was closed. (Bankr. Dkt. 234).

13. Shortly after entry of the Agreed Judgment, Welsh and EDW enrolled the Agreed Judgment in Circuit Court. (Adv. Dkt. 43-1 at 1).

Fraudulent Transfer Suit

14. On May 16, 2011, EDW sued Barnett's wife, Michelle Barnett ("Michelle Barnett"), and three (3) limited liability companies owned only by her, including Spectrumwireless, LLC, MWB Holdings, LLC and L4, LLC (the "LLCs") in Circuit Court, Civil Action No. CI2011-cv-00188, alleging that Techtronics owed EDW, pursuant to the Techtronics Judgment, the balance of $1,128,736.50 and that Barnett, the sole shareholder of Techtronics, formed the LLCs in his wife's name to fraudulently conceal Techtronics' assets (the "Fraudulent

Transfer Suit").[5] (Adv. Dkt. 68-6). Jeff D. Rawlings of the law firm Rawlings & MacInnis, P.A. ("Rawlings") represented EDW in the Fraudulent Transfer Suit. The Circuit Court dismissed EDW's claims as being barred by the statute of limitations, and on October 23, 2014, the Mississippi Supreme Court affirmed the dismissal on those grounds. *EDW Invs., LLC v. Barnett*, 149 So. 3d 489, 491-92 (Miss. 2014).

Post-Judgment Discovery & Filing of Garnishment Action

15. On December 10, 2013, Welsh and EDW initiated an action in Circuit Court in Civil Action No. CI2013-00359, for the issuance of a post-judgment subpoena duces tecum to be served on Barnett under MISS. CODE ANN. § 13-1-261 (Bankr. Dkt. 263-1 at 1-5). In that same civil action, Welsh and EDW filed a writ of garnishment (the "Garnishment Action") (Adv. Dkt. 259-5 at 15-16) against Northwest Mutual Life Insurance Company on October 10, 2014. On November 5, 2014, Barnett filed a Notice of Claim of Exemption (Adv. Dkt. 43-1), alleging that the Agreed Judgment was satisfied when his one-third share of the Insurance Proceeds was paid to Welsh and EDW. (Adv. Dkt. 37-1 at 22-23 n.1).

Malpractice Suit

16. On June 19, 2015, EDW sued Rawlings in Circuit Court in Civil Action No. CI2015-cv-00127 (the "Malpractice Suit") for legal malpractice for his alleged failure, in general, to pursue legal action against Michelle Barnett and the LLCs in a timely manner. (Adv. Dkt. 68-8). David Pitre ("Pitre") represented EDW in the Malpractice Suit. EDW settled the Malpractice Suit for an undisclosed amount (the "Settlement Proceeds"). (Adv. Dkt. 37-1 at 34-35). At some

[5] In a separate adversary (Adv. Proc. 08-00087-NPO), Ironwood sued Barnett and Michelle Barnett, alleging similar conduct. After a settlement was reached, a Final Judgment (Adv. Proc. 08-00087-NPO, Adv. Dkt. 97) was entered in favor of Ironwood against Barnett in the amount of $476,007.77 on October 19, 2010.

point during the litigation, the Circuit Court placed the entire Malpractice Suit, including the settlement agreement, under seal. (Adv. Dkt. 68 at 2).

Hearing on Garnishment Action

17. On September 7, 2016, the parties appeared before the Circuit Court (Bankr. Dkt. 263) for a hearing on the Garnishment Action. The Circuit Court determined that it lacked authority to consider Barnett's allegations that the Agreed Judgment had been satisfied and suggested that the parties return to this Court. (Bankr. Dkt. 263-1 at 22-24). No monies were paid to Welsh and EDW as a result of the Garnishment Action.

18. In summary, Welsh and/or EDW initiated four (4) civil actions in Circuit Court related, directly or indirectly, to the debt owed them by Techtronics and Barnett, as shown below:

Name	Civil Action No.	Plaintiff(s)	Defendant(s)
Techtronics Suit	CI2007-cv-00125	Welsh & EDW	Barnett & Techtronics
Fraudulent Transfer Suit	CI2011-cv-00188	EDW	Michelle Barnett & LLCs
Garnishment Action	CI2013-cv-00359	Welsh & EDW	NW Mutual Life Ins. Co.
Malpractice Suit	CI2015-cv-00127	EDW	Rawlings

Reopening of Bankruptcy Case & Adversary

18. On March 1, 2017, Welsh and EDW filed the Motion to Reopen Chapter 7 Proceeding (Bankr. Dkt. 238) and Motion to Reopen Adversary Proceeding (Adv. Dkt. 37) for the limited purpose of filing a motion for declaratory relief in the Adversary. On May 16, 2017, the Court entered an Order reopening the Bankruptcy Case (Bankr. Dkt. 256) and Adversary (Adv. Dkt. 42).

Declaratory Relief Action

19. In the Adversary, Welsh and EDW filed on May 17, 2017, the Motion for Declaratory Relief, Injunctive Relief, Civil Contempt, and Other Relief (the "Motion for Declaratory Relief") (Adv. Dkt. 43), in which Welsh and EDW ask the Court: (a) to declare that

Barnett never had a prepetition claim to the Insurance Proceeds, but if Barnett had such a claim, declare that he is judicially estopped from asserting a credit or setoff to the Agreed Judgment because of his failure to disclose any such claim to this Court and the chapter 7 trustee (*Id*. at 12-16); (b) to enjoin Barnett from raising a credit or setoff of the Agreed Judgment for any reason that arose prior to Barnett's discharge (*Id*. at 16); and (c) to hold Barnett in civil contempt of the Agreed Judgment (*Id.* at 16-18). On June 22, 2017, Barnett filed Kevin Barnett's Cross-Motion for Declaratory Relief, and Other Relief; and Response to Edwin Welsh and EDW Investments, LLC's Motion for Declaratory Relief, Injunctive Relief, Civil Contempt, and Other Relief (the "Response to Motion for Declaratory Relief" or "Cross-Motion for Declaratory Relief") (Adv. Dkt. 67 & 68),[6] in which he seeks a declaratory judgment that the Agreed Judgment has been satisfied in full by payment of the Insurance Proceeds and/or the Settlement Proceeds. He alleges that he was entitled to one-third of the Insurance Proceeds (or $53,333.33 plus accrued interest at eight percent (8%), for a total of $81,666.67) based on his one-third membership interest in Jambo. (Adv. Dkt. 43 at 3). The record does not show when the interpled funds were disbursed to Welsh and EDW, but the parties agreed at the Discovery Hearing that it occurred close to the time the Bankruptcy Case and Adversary were closed. Barnett also alleges that the Settlement Proceeds satisfied the Agreed Judgment. According to Barnett, if Welsh and EDW prevail in their Motion for Declaratory Relief, they will enjoy a double recovery or a triple recovery of the Agreed Judgment. On June 23, 2017, Welsh and EDW filed the Plaintiffs' Answer and Defenses in Opposition to Defendant's Cross-Motion for Declaratory and Other Relief (the "Response to Cross-Motion for Declaratory Relief") (Adv. Dkt. 70). Barnett filed the Reply in Support of Cross-Motion for Declaratory Relief, and

[6] Barnett docketed the same pleading twice, first as the Response to Motion for Declaratory Relief (Adv. Dkt. 67) and then as the Cross-Motion for Declaratory Relief (Adv. Dkt. 68).

Other Relief (the "Reply in Support of Cross-Motion for Declaratory Relief") (Adv. Dkt. 79) on July 18, 2017. In response to Welsh and EDW's argument that Barnett is judicially estopped from raising a setoff as a defense because of his failure to disclose it in the Adversary or Bankruptcy Case, Barnett contends in the Reply in Support of Cross-Motion for Declaratory Relief that he was unaware until recently of the Jambo Judgment and the disbursement of Insurance Proceeds to Welsh and EDW. Together, the Motion for Declaratory Relief, the Response to Motion for Declaratory Relief, the Cross-Motion for Declaratory Relief, the Response to Cross-Motion for Declaratory Relief, and the Reply in Support of Cross-Motion for Declaratory Relief are referred to as the "Declaratory Relief Action." The hearing on the Declaratory Relief Action has been reset and continued to October 2 and 3, 2017. (Adv. Dkt. 99).

Requests for Production

20. Barnett propounded the First Set of Request for Production (the "Requests for Production") (Adv. Dkt. 58 & 61 at Ex. B) on June 7, 2017. The Requests for Production seek documents that can be grouped together into four (4) categories. In the first category, consisting of Requests for Production Nos. 1-5, Barnett seeks "any and all documents in your possession or control related to [Jambo]" ("Request for Production No. 1"); "any and all deposition transcripts from any and all litigation involving [Jambo], [Welsh], and/or [EDW] or any other company in which [Welsh] was a member (including . . . [EDW])" ("Request for Production No. 2"); "any and all documents in your possession or control . . . related to Jambo's receipt and/or distribution [of] settlement proceeds from any insurance carrier for any claims made by [Jambo], [EDW], and/or [Welsh]" ("Request for Production No. 3"); "any and all documents in your possession or control related to the Complaint in Interpleader filed by [Jambo] in the Circuit Court of Madison County, Mississippi, being Cause of Action Number CI-2008-0132C" ("Request for Production No. 4");

and "any and all documents in your possession or control related to ACE American Insurance Company policy #PHFD36756871, including . . . all documents related to submission, negotiation, and/or settlement of any and all claims under this policy" ("Request for Production No. 5") (collectively, Requests for Production Nos. 1-5, the "Jambo Documents"). In the second category, consisting of Requests for Production Nos. 6-8, Barnett seeks "any and all documents in your possession or control related to the legal malpractice suit [EDW] and/or [Welsh] filed against [Rawlings]" ("Request for Production No. 6"); "all documents comprising the settlement agreement, and all checks, wires, or other evidences of payments sent to and/or received by [Welsh], [EDW], and/or attorneys representing one or both of them" ("Request for Production No. 7"); and "any and all documents in your possession or control related to the claims and/or settlement between [Rawlings], on one hand, and [EDW] and/or [Welsh], on the other hand" ("Request for Production No. 8") (collectively, Requests for Production Nos. 6-8, the "Malpractice Documents"). In the third category, consisting only of Request for Production No. 9, Barnett seeks production of "any and all documents in your possession or control related to any other malpractice claim involving [Rawlings'] attempts on behalf of [Welsh], [EDW], and/or [Jambo] to claim, to recover and/or to convert funds . . . belonging to [Barnett], Michelle Barnett, their companies, and any other person or entity related to them, including . . . [Rawlings'] prior representations of [Jambo], [Welsh], [EDW], and/or any other entity owned in whole or in part by [Barnett], Michelle Barnett, [Welsh] and/or [EDW]" ("Request for Production No. 9" or the "Other Malpractice Documents"). In the fourth category, consisting only of Request for Production No. 10, Barnett seeks production of "any and all non-privileged documents in your possession or control related to [Welsh] and/or any other company in which he was a member, and/or [EDW]" ("Request for Production No. 10" or the "Business Documents").

21. Welsh and EDW objected to each one of the Requests for Production (Adv. Dkt. 60) on grounds of relevancy and proportionality. Additionally, EDW objected to the production of the Malpractice Documents and the Other Malpractice Documents on the ground they are subject to a confidentiality provision and contain privileged information. They refused to produce any documents. EDW, however, agreed to disclose to the Court the amount of the Settlement Proceeds for *in camera* review for the limited purpose of confirming that Barnett would not be entitled to a credit given the total amount of the debt owed Welsh and EDW.[7] The parties were unable to resolve their discovery dispute.

Motion to Compel

22. On June 20, 2017, Barnett filed the Motion to Compel. Barnett contends that the documents responsive to the Requests for Production will show that the Agreed Judgment has been satisfied and, thus, are necessary to support his position in the Declaratory Relief Action. He further contends that Welsh and EDW failed to meet their burden of showing that the Requests for Production are unduly burdensome, irrelevant, or disproportionate to the needs of the Declaratory Relief Action. He asserts that none of the documents are protected by the attorney-client or work-product privilege. With regard to Request for Production No. 1 and Welsh's prior deposition testimony, Barnett cites Federal Rule of Civil Procedure 26(b)(3)'s requirement that a party's statement be produced upon request. Welsh and EDW filed the Response to Motion to Compel on July 10, 2017. In the Response to Motion to Compel, Welsh and EDW reiterated the individual objections they raised to the Requests for Production but also alleged, for the first time, that it was improper for Barnett to engage in any discovery before the entry of a scheduling order. They seek

[7] In the Response to Motion to Compel, Welsh and EDW alleged that Barnett would be entitled to a credit only if the Settlement Proceeds were more than $1,458,613.50. (Adv. Dkt. 73 & Adv. Dkt. 83 at 8 & n.8).

an award of attorneys' fees and costs. Barnett filed the Reply in Support of Motion to Compel on July 17, 2017.

23. On July 20, 2017, Barnett filed Kevin Barnett's Motion for Discovery Conference and Entry of Scheduling Order (Adv. Dkt. 85), which the Court thereafter granted (Adv. Dkt. 89). The discovery conference was held on the same date and time as the Discovery Hearing, and a scheduling order will be entered contemporaneously with this Order.

Subpoenas

24. Barnett arranged for the service of Subpoenas to Produce Documents, Information, or Objects or to Permit Inspection of Premises in a Bankruptcy Case (or Adversary Proceeding) on Kelly (the "Kelly Subpoena") (Adv. Dkt. 93) on July 20, 2017; Rawlings (the "Rawlings Subpoena") (Adv. Dkt. 94) on July 19, 2017, and Pitre (the "Pitre Subpoena or, together with the Kelly Subpoena and the Rawlings Subpoena, the "Subpoenas") (Adv. Dkt. 95) on July 19, 2017. In the Subpoenas, Barnett seeks to obtain from three (3) non-party attorneys documents prepared and/or obtained by them during their representation of Welsh, EDW, and/or Jambo. In that regard, Kelly represented Jambo in the Jambo Suit; Rawlings represented Welsh and EDW in the Bankruptcy Case and also EDW in the Fraudulent Transfer Suit; and Pitre represented EDW in the Malpractice Suit. In addition, it appears that they represented Welsh in other business and litigation matters. To each of the Subpoenas, Barnett attached "Exhibit A," which is a list of documents similar to those described in the Requests for Production ("Rawlings Exhibit A") (Adv. Dkt. 74-1 at 4-5); ("Pitre Exhibit A") (Adv. Dkt. 75-1 at 4-5); ("Kelly Exhibit A" (Adv. Dkt. 76-1 at 4-5). Neither Kelly, Rawlings, nor Pitre has entered an appearance in the reopened Adversary.

Motion to Quash

25. Welsh and EDW filed the Motion to Quash on July 19, 2017. In the Motion to Quash, Welsh and EDW ask the Court to quash the Subpoenas in their entirety, asserting the same objections that they alleged in their responses to the Requests for Production. In the Motion to Quash, Welsh and EDW seek recovery of their attorneys' fees and costs. (Adv. Dkt. 83 at 10). Barnett filed the Response to Motion to Quash on July 27, 2017. Barnett reiterates the arguments he made in the Motion to Compel but adds the allegation, without further explanation, that he "assigned [the Insurance Proceeds] to Welsh for the express purpose of satisfying the $70,000 [A]greed [J]udgment, when received." (Adv. Dkt. 96 at 3).

Discussion

Rule 34 of the Federal Rules of Civil Procedure ("Rule 34")[8] provides that "[a] party may serve on any other party a request within the scope of Rule 26(b): (1) to produce and permit the requesting party or its representative to inspect [or] copy . . . the following items in the responding party's possession, custody, or control: (A) any designated documents or electronically stored information . . .; or (B) any designated tangible things." FED. R. CIV. P. 34(a)(1)(A)-(B). Any discovery request under Rule 34(a), therefore, is subject to the scope and limitations of Federal Rule of Civil Procedure 26 ("Rule 26").[9]

In a response to a request under Rule 34, "[f]or each item or category, the response must either state that inspection and related activities will be permitted as requested or state with specificity the grounds for objecting to the request, including the reasons." FED. R. CIV. P.

[8] Rule 34 is made applicable to adversary proceedings by Rule 7034 of the Federal Rules of Bankruptcy Procedure.

[9] Rule 26 is made applicable to adversary proceedings by Rule 7026 of the Federal Rules of Bankruptcy Procedure.

34(b)(2)(B). "An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest." FED. R. CIV. P. 34(b)(2)(C). A party resisting discovery must show how the requested discovery was overly broad, burdensome, or oppressive by submitting affidavits or offering evidence revealing the nature of the burden. *See McLeod, Alexander, Powel & Apffel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990)*; Merrill v. Waffle House, Inc*., 227 F.R.D. 475, 477 (N.D. Tex. 2005).

Under Rule 26, discovery, to be permissible, must be both relevant and proportional to the needs of the case. *Rocha v. S.P. Richards Co*., No. 5:16-CV-411, 2016 WL 6876576, at *1 (W.D. Tex. Nov. 17, 2016). Rule 26(b)(1), as amended effective December 1, 2015, provides:

> Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

FED. R. CIV. P. 26(b)(1). In short, the party seeking discovery is generally required to comply with Rule 26(b)(1)'s proportionality limits on discovery requests but a party resisting discovery bears the burden of making a specific objection and showing that the discovery fails the proportionality calculation. Under Rule 26(b)(3), however, a party may obtain her or her own statement about the matter in dispute without showing any need for it. FED. R. CIV. P. 26(b)(3); *Miles v. MV Miss. Queen*, 753 F.2d 1349, 1350 (5th Cir. 1985).

Rule 37 of the Federal Rules of Civil Procedure ("Rule 37")[10] grants enforcement powers upon courts to ensure parties' cooperation in the discovery process. *Crosswhite v. Lexington Ins. Co.*, 321 F. App'x 365, 368 (5th Cir. 2009). Rule 37(a)(3)(B) provides that a party seeking discovery may move for an order compelling production when the other party has failed to produce documents as requested under Rule 34. *See* FED. R. CIV. P. 37(a)(3)(B)(iv). For purposes of a Rule 37 motion, "an evasive or incomplete disclosure" is treated as a failure to answer. FED. R. CIV. P. 37(a)(4). Rule 37(a)(5)(C) further provides that if a motion to compel is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c). Moreover, a court may decline to grant a motion to compel and, instead, issue a protective order. FED. R. CIV. P. 26(c)(1)(D).

Rule 26(c)(1) confers broad discretion on a court to decide when a protective order is appropriate. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). Specifically, Rule 26(c)(1) authorizes protective orders for good cause shown, "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c)(1).

Under Rule 45 of the Federal Rules of Civil Procedure ("Rule 45"),[11] a party may serve a subpoena commanding a non-party "to whom it is directed to . . . produce designated documents, electronically store information, or tangible things in that person's possession, custody, or control" FED. R. CIV. P. 45(a)(1)(A)(iii). Objections to a document request in a subpoena are subject to the same requirements as objections to a Rule 34 request. *Am. Fed. of Musicians v. SKODAM Films, LLC*, 313 F.R.D. 39, 42 (N.D. Tex. 2015); FED. R. CIV. P. 34(c). Thus, objections to discovery

[10] Rule 37 is made applicable to adversary proceedings by Rule 7037 of the Federal Rules of Bankruptcy Procedure.

[11] Rule 45 is made applicable to adversary proceedings by Rule 9016 of the Federal Rules of Bankruptcy Procedure.

requests in a subpoena "must be made with specificity, and the responding party has the obligation to explain and support its objections." *Heller v. City of Dallas*, 303 F.R.D. 466, 483 (N.D. Tex. 2014) (quotation omitted).

Under Rule 45(d)(3)(A), a court "must quash or modify a subpoena that . . . requires disclosure of privileged or other protected matter, if no exception or waiver applies; or . . . subjects a person to undue burden." FED. R. CIV. P. 43(d)(3)(A)(iii)-(iv). The moving party has the burden of proof. *See Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3d 812, 818 (5th Cir. 2004). In response to a motion to quash a subpoena, the party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue. Relevance, for purposes of a subpoena when it is issued as a discovery device, is measured according to the standard of Rule 26(b)(1). *Williams v. City of Dallas*, 178 F.R.D. 103, 110 (N.D. Tex. 1998). "Generally, modification of a subpoena is preferable to quashing it outright." *Wiwa*, 392 F.3d at 818.

As the Court noted in the Order Striking Response to Plaintiffs' Motion to Quash and Granting Plaintiffs' Motion to Quash Subpoena for the Production of Documents (Adv. Dkt. 65), a party ordinarily has no standing to seek to quash a subpoena issued to a non-party. *Brown v. Braddick*, 595 F.2d 961, 967 (5th Cir. 1979). The Fifth Circuit Court of Appeals, however, has recognized that a party has standing to oppose a subpoena issued to a non-party when the objecting party asserts a personal right or privilege with respect to the materials subpoenaed. *Id*. Because the three (3) individuals served with the Subpoenas are all non-party attorneys who previously represented Welsh, EDW, and/or Jambo and because Welsh and/or EDW challenge the Subpoenas on the ground they seek documents that are privileged and/or confidential, the Court is satisfied that they have demonstrated a sufficient interest in these documents to support standing. *See*

Butcher v. Allstate Ins. Co., No. 1:06-cv-423-KS-MTP, 2008 WL 4965288, at *1 (S.D. Miss. Nov. 18, 2008) (holding that plaintiffs had standing to challenge subpoenas issued to plaintiff's designated experts).

With these standards in mind, the Court considers the objections of EDW and Welsh to the Requests for Production and Subpoenas by the category of documents requested by Barnett. Then the Court applies its conclusions to the Motion to Compel and Motion to Quash. Finally, the Court considers Welsh and EDW's request for attorney's fees and costs. As a preliminary matter, the Court disposes of Welsh and EDW's argument in their Response to Motion to Compel that Barnett may not seek any discovery in the Adversary in the absence of a scheduling order. (Resp. to Mot. to Compel at 2).

A. Scheduling Order

Rule 26(d) prohibits parties from seeking discovery until they have conducted a conference and submitted a discovery plan to the Court. FED. R. CIV. P. 26(d). Welsh and EDW point out that the previous Scheduling Order (Adv. Dkt. 25) entered by the Court in the Adversary on June 16, 2009, has expired. Indeed, it was entered by the Court in anticipation of a trial of the Adversary on January 13-14, 2010, which was cancelled after the parties announced that they had reached a settlement. Welsh and EDW insist that in the absence of a new scheduling order, the Requests for Production and Subpoenas were premature.

The Court rejects this argument. First, Welsh and EDW failed to raise this objection in their initial responses to the Requests for Production. *See Cardenas v. Dorel Juvenile Grp, Inc*., 230 F.R.D. 611, 621 (D. Ka. 2005) (holding that when a party raises an objection for the first time in response to a motion to compel, the objection is deemed waived). Second, the extent to which Rule 26(d) applies in the reopened Adversary is unclear given its unusual procedural posture and

the entry of a previous scheduling order. Moreover, assuming Rule 26(d) does apply, subsection (2) expressly allows the early delivery of requests under Rule 34. Finally, the Court has entered a scheduling order contemporaneously with this Order which moots the concerns raised by Welsh and EDW regarding the timing and sequence of discovery.

B. Jambo Documents

In Requests for Production Nos. 1-5, numbered paragraphs 2-6 of Rawlings Exhibit A, numbered paragraphs 7-10 of Pitre Exhibit A, and numbered paragraphs 1-5 of Kelly Exhibit A, Barnett seeks the Jambo Documents to show that the Insurance Proceeds received by Welsh and EDW in the Jambo Suit satisfied the Agreed Judgment. The Court agrees with Welsh and EDW that the Jambo Judgment forecloses Barnett's claim to the Insurance Proceeds. Under the Mississippi Limited Liability Company Act then in effect, neither Barnett, Welsh, nor Taro was entitled to any share of the Insurance Proceeds as members of Jambo until all of Jambo's liabilities had been satisfied. MISS. CODE ANN. § 79-29-602 (repealed 2010). The Circuit Court awarded Welsh and EDW the Insurance Proceeds because of their priority status as secured creditors of Techtronics and not because of Welsh's membership in Jambo. Moreover, the Agreed Judgment was entered after the Circuit Court entered the Jambo Judgment. How can money paid in satisfaction of the Jambo Judgment offset the Agreed Judgment, when the Agreed Judgment did not yet exist?

More important, there is no dispute that the events giving rise to the Insurance Proceeds took place pre-petition. Therefore, even if Barnett had a pre-petition claim to the Insurance Proceeds, the claim would have constituted property of the bankruptcy estate. 11 U.S.C. § 541(a)(1). Under these facts, Barnett's fluid allegations that he did not know about the Jambo

Suit and/or that he did not know about the Jambo Judgment, do not render the Jambo Documents relevant.

Barnett also suggests that he is entitled to Welsh's deposition testimony in the Jambo Suit without having to show its relevance because of Rule 26(b)(3)'s requirement that a party's statement be produced upon request. Rule 26(b)(3), however, applies only when a party seeks his own statement. Here, Barnett does not seek his own statement but the deposition testimony of Welsh. For all of the above reasons, the Court finds that Barnett failed to meet his burden of showing that the Jambo Documents are relevant to his claims or defenses. *See Crosby v. La. Health & Indem. Co.*, 647 F.3d 258, 262 (5th Cir. 2011) (holding that for purposes of Rule 26(b)(1), relevant is when a request is reasonably calculated to lead to the discovery of admissible evidence).

C. Malpractice Documents

In Requests for Production 6-8, numbered paragraphs 1 and 7-9 of Rawlings Exhibit A, and numbered paragraphs 1-2, 4, and 6 of Pitre Exhibit A, Barnett seeks the Malpractice Documents to show that the Settlement Proceeds satisfied the Agreed Judgment in whole or in part. Welsh and EDW contend that the Malpractice Documents are irrelevant. They are only relevant, according to Welsh and EDW, if the Settlement Proceeds would reduce the total debt owed EDW, as reflected in Claim #9-1 and the Techtronics Judgment, and Welsh, as reflected in Claim #10-1, to an amount less than $70,000.00, as shown in the chart below:

EDW Debt (Claim #9-1)	$1,528,666.50
Welsh Debt (Claim #10-1)	$128,947.03
Insurance Proceeds	($129,000.00)
TOTAL	**$1,528,613.50**

(Adv. Dkt. 73 at 11). Welsh and EDW are willing to stipulate that the settlement amount was less than $1,458,613.50 or, in the alternative, they are willing to disclose to the Court, for its *in camera* review, the precise amount of the settlement.

Welsh and EDW also argue that the terms and conditions of the settlement are subject to a confidentiality provision and point out that the Circuit Court sealed the pleadings in the Malpractice Suit. Finally, they maintain that Rawlings produced more than 2,500 documents in the Malpractice Suit and it would cost thousands of dollars to review and determine which ones are protected from disclosure by the attorney-client or work-product privilege. As evidentiary support, they rely on a letter dated May 25, 2017, from J. Wyatt Hazard, counsel for Rawlings in the Malpractice Suit, to Welsh (Adv. Dkt. 73 at Ex. 2), in which he sets forth these contentions. Welsh and EDW assume that EDW produced an equally large number of documents in the Malpractice Suit. They maintain that the total number of documents requested is not proportional to the needs of the Declaratory Relief Action.

Without deciding whether the Settlement Proceeds offset the Agreed Judgment, the Court finds that Barnett is entitled to some of the Malpractice Documents, as they may contain information that could support his position that the Agreed Judgment has been satisfied in whole or in part. Welsh and EDW's offer to stipulate to the amount of the Settlement Proceeds for this Court's *in camera* review does not render the Malpractice Documents irrelevant. There is a question as to whether the scope of the Malpractice Suit included conduct that took place during Rawlings' representation of Welsh and EDW against Barnett in the Adversary and, more to the point, whether the Settlement Proceeds included compensation for damages arising out of such conduct that should offset the Agreed Judgment. For example, in the complaint filed in the

Malpractice Suit (the "Malpractice Complaint") (Adv. Dkt. 68-8),[12] EDW alleged, *inter alia*, that it was given "flawed legal advice and factual misrepresentations leading to the acceptance of a $70,000 bankruptcy settlement with Kevin Barnett." (Adv. Dkt. 68-8 at 8). Although the Settlement Proceeds may be less than the amount of the total debt owed EDW and Welsh, a simple mathematical calculation does not bar Barnett's attempt to determine the nature of the Settlement Proceeds. (Adv. Dkt. 73 at 11). The Court turns next to Welsh and EDW's assertions of privilege.

Rule 26(b)(1) limits the permissible scope of discovery to non-privileged matters. Barnett asserts that his requests for the Malpractice Documents fall within the scope of Rule 26(b)(1) by virtue of the language that appears at the bottom of each "Exhibit A," attached to the Subpoenas: "Production under this Subpoena should include copies of any and all documents that may have once been subject to attorney-client privilege where the privilege was thereafter waived when [EDW] and/or [Welsh] filed a legal malpractice suit against [Rawlings]." (Adv. Dkt. 74-1 at 5; Adv. Dkt. 75-1 at 5; Adv. Dkt. 76-1 at 5). In support of his contention that EDW waived the attorney-client privilege, Barnett cites Mississippi cases and law. The Court finds, however, that the federal common law of privilege applies. *Willy v. Admin. Review Bd.*, 423 F.3d 483, 495 (5th Cir. 2005).

Under Federal Rule of Evidence 501,[13] privilege is "governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law applies the rule of decision, the privilege of a witness . . . shall be

[12] Barnett purportedly obtained a copy of the Malpractice Complaint before the Circuit Court sealed the file. (Adv. Dkt. 67 at 20).

[13] The Federal Rules of Evidence are made applicable in bankruptcy cases by Rule 9017 of the Federal Rules of Bankruptcy Procedure.

determined in accordance with State law." FED. R. EVID. 501. The Agreed Judgment, which is the subject of the Declaratory Relief Action, is based on federal substantive law, 11 U.S.C. § 523. For that reason, federal common law determines whether the attorney-client privilege applies and if so, whether some exception to the privilege applies.

The Fifth Circuit has held that the federal common law attorney-client privilege applies if:

> (1) the asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is (the) member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

United States v. Kelly, 569 F.2d 928, 938 (5th Cir. 1978) (quotations omitted). In short, the privilege protects communications made in confidence by a client to his lawyer for the primary purpose of obtaining legal advice. *United States v. Robinson*, 121 F.3d 971, 974 (5th Cir. 1997). The privilege also protects communications by a lawyer to his client "at least if they would tend to disclose the client's confidential communications." *Hodges, Grant & Kaufmann v. United States*, 768 F.2d 719, 720-21 (5th Cir. 1985). Not all communications between a client and his or her attorney, however, are protected by the attorney-client privilege. *United States v. Pipkins*, 528 F.2d 559, 562 (5th Cir. 1976). The party invoking the attorney-client privilege bears the burden of proving that his or communications are privileged and, therefore, protected from disclosure. *In re Santa Fe Int'l Corp.*, 272 F.3d 705, 710 (5th Cir. 2001).

The pleadings filed in the Malpractice Suit and/or the settlement agreement itself do not fall within the scope of the federal common law attorney-client privilege, and the parties have not argued otherwise. Confidentiality, an essential element of the attorney-client privilege, is generally defined as a communication not intended to be disclosed to third parties. 3 WEINSTEIN'S

FEDERAL EVIDENCE § 503.15[1] (2010). The pleadings filed in the Malpractice Suit and the settlement agreement itself, however, were shared with third parties. *See Pipkins*, 528 F.2d at 563 ("[c]ourts have refused to apply the privilege to information that the client intends his attorney to impart to others."). Although the Circuit Court sealed the Malpractice Suit prohibiting public access to the file, these documents, nevertheless, were shared with third parties. Other materials that comprise the Malpractice Documents, however, may fall within the scope of the privilege. For example, confidential communications between Rawlings and his clients, Welsh and EDW, regarding the Bankruptcy Case, the Adversary, and the Fraudulent Transfer Suit likely are protected by the attorney-client privilege, as are the confidential communications between Pitre and his client, EDW, regarding the Malpractice Suit. In Request for Production No. 6, Barnett seeks documents from Welsh and EDW that are "related to" the Malpractice Suit, and in Request for Production No. 8, Barnett seeks documents that are "related" to the claims and/or settlement reached in the Malpractice Suit. These requests are sufficiently broad to include the production of documents that likely contain attorney-client privileged communications.

Barnett contends that Welsh and/or EDW waived the attorney-client privilege when EDW filed the Malpractice Suit. *See Hartford Fire Ins. Co. v. Garvey*, 109 F.R.D. 323, 327 (N.D. Cal. 1985) ("The confidentiality element and waiver are closely related inasmuch as any voluntary disclosure inconsistent with the confidential nature of the attorney client relationship waives the privilege."). "The mere institution of suit against a lawyer, however, is not a waiver of the privilege for all subsequent proceedings, however unrelated." *United States v. Ballard*, 779 F.2d 287, 292 (5th Cir. 1986). A waiver of the privilege occurs when the client reveals privileged information in pleadings filed in the malpractice case and in other aspects of the litigation and also when the attorney discloses confidential information to establish his defense to the malpractice

action. *Indus. Clearinghouse v. Browning Mfg.*, 953 F.2d 1004, 1007 (5th Cir. 1992). A client's waiver of his attorney-client privilege by suing his former lawyer, therefore, is limited to confidential information related to the determination of the malpractice lawsuit.

The allegations of the Malpractice Complaint contain numerous disclosures of otherwise privileged information: "In early 2009, Plaintiff, through its owner, instructed [Rawlings] to pursue legal action against Michelle Barnett" (Mal. Compl. ¶ 7); "Rawlings repeatedly assured [EDW] that he would add Michelle Barnett and the transferee companies in the litigation" (Mal. Compl. ¶ 8); and "Rawlings communicated to [EDW] that he should accept a five figure settlement with [Barnett] because it would not 'affect later efforts to find Techtronic assets or recover[] any of them from [Barnett's] wife or other 3rd parties'" (*Id.*). The Court finds that EDW has waived the attorney-client privilege with respect to those communications between Welsh and Rawlings placed at issue in the Malpractice Suit. The Court further finds that the attorney-client privilege that protects confidential communications between Welsh and Pitre regarding the litigation of the Malpractice Suit has not been waived and should not be produced.

Finally, simply because a settlement agreement is subject to a confidentiality provision and that the pleadings filed in the Malpractice Suit were filed under seal does not mean that they are protected from discovery. Given Federal Rule of Evidence 408 and its public policy of encouraging settlements, the Court will include the settlement agreement and pleadings filed in the Malpractice Suit in its protective order.

D. Other Malpractice Documents

In Request for Production No. 9, numbered paragraphs 10-11 of Rawlings Exhibit A, numbered paragraph 3 of Pitre Exhibit A, and numbered paragraph 6 of Kelly Exhibit A, Barnett seeks Other Malpractice Documents. The Court finds that Barnett has failed to show the relevance

of Other Malpractice Documents. Assuming that any such documents exist, Barnett has not shown how they are relevant to his contention that the Agreed Judgment was offset by the Insurance Proceeds and/or Settlement Proceeds. *Micro Motion, Inc. v. Kane Steel Co.*, 894 F.2d 1318, 1327 (Fed. Cir. 1990) (holding that "discovery rules are designed to assist a party to prove a claim it reasonably believes to be viable *without discovery*, not to find out if it has any basis for a claim").

E. Business Documents

In Request for Production No. 10, numbered paragraph 12 of Rawlings Exhibit A, numbered paragraph 5 of Pitre Exhibit A, and numbered paragraph 7 of Kelly Exhibit A, Barnett seeks Business Documents. According to Welsh and EDW, the Business Documents are thousands of pages, and many of them contain financial, proprietary, and/or personally confidential material. Welsh and EDW suggest that Barnett requested the Business Documents in order to harass them.

The Court finds that Barnett has not met his burden of showing the relevance of the Business Documents in resolving the issues raised in the Declaratory Relief Action. His request for the Business Documents appears to be a "fishing expedition" in an attempt to expose some additional defense to the Agreed Judgment. "The role of discovery . . . is to find support for properly pleaded claims, not to find the claims themselves." *Torch Liquidating Trust ex rel. Bridge Assocs. L.L.C. v. Stockstill*, 561 F.3d 377, 392 (5th Cir. 2009). Beyond the question of relevance, the Court finds that the burden and expense of responding to the Requests for Production outweighs any likely benefit. *Crosby*, 647 F.3d at 262. The Business Documents are overly broad on their face. A request for any document "related to" Welsh, any other company in which he is a member, and EDW, with no temporal limitation and no more specific description, is too broad a range of documents and could conceivably require Welsh and EDW to produce thousands of

documents that are unlikely to serve any purpose in the Adversary. Courts have found that a subpoena for documents is facially overbroad when the subpoena seeks "all documents concerning the parties to [the underlying] action, regardless of whether those documents relate to that action and regardless of date." *In re O'Hare*, No. H-11-0539, 2012 WL 1377891, at *2 (S.D. Tex. Apr. 19, 2012). The Business Documents are disproportionate and fail to comply with Rule 26(b).

F. Motion to Compel

As to the Jambo Documents, the Other Malpractice Documents, and the Business Documents, the Court denies the Motion to Compel, and, therefore, the Court finds that Welsh and EDW should not be required to supplement their responses to Requests for Production Nos. 1-5 and 9-10. As to those Malpractice Documents that do not contain privileged communications between Pitre and Welsh, the Court grants the Motion to Compel and finds that Welsh and EDW should be required to supplement their responses to Requests for Production Nos. 6-8, insofar as they are in their possession, custody, or control, subject to the entry of a protective order.

G. Motion to Quash

1. Rawlings Subpoena

As to the Rawlings Subpoena, the Court finds that the Motion to Quash should be denied in part and granted in part. Rawlings Exhibit A, attached to the Rawlings Subpoena, consists of twelve (12) numbered paragraphs describing various documents (Adv. Dkt. 74-1 at 4-5). The Court grants the Motion to Quash as to the Jambo Documents, Other Malpractice Documents, and Business Documents, and, therefore, Rawlings will not be required to produce any of the documents described in numbered paragraphs 2-6 and 10-12 in Rawlings Exhibit A. The Court denies the Motion to Quash as to the Malpractice Documents, and, therefore, Rawlings must

produce any documents in his possession, custody, or control responsive to numbered paragraphs 1 and 7-9 in Rawlings Exhibit A, within seven (7) days of entry of a protective order.

2. Pitre Subpoena

As to the Pitre Subpoena, the Court finds that the Motion to Quash should be denied in part and granted in part. Pitre Exhibit A, attached to the Pitre Subpoena, consists of ten (10) numbered paragraphs describing various documents (Adv. Dkt. 75-1 at 4-5). The Court grants the Motion to Quash as to the Jambo Documents, Business Documents, and Other Malpractice Documents, and, therefore, Pitre will not be required to produce any of the documents described in numbered paragraphs 3, 5, and 7-10 in Pitre Exhibit A. The Court denies the Motion to Quash as to those Malpractice Documents that do not contain privileged communications between Pitre and Welsh, and, therefore, Pitre must produce any documents in his possession, custody, or control responsive to numbered paragraphs 1, 2, 4, and 6 in Pitre Exhibit A, within seven (7) days of entry of a protective order.

3. Kelly Subpoena

As to the Kelly Subpoena, the Court finds that the Motion to Quash should be granted. Kelly Exhibit A, attached to the Kelly Subpoena, consists of seven (7) numbered paragraphs describing various documents (Adv. Dkt. 76-1 at 4-5). The Court grants the Motion to Quash as to the Jambo Documents, Other Malpractice Documents, and Business Documents, and, therefore, Kelly will not be required to produce any documents in response to the Kelly Subpoena.

H. Attorneys' Fees

Welsh and EDW request an award of attorneys' fees under Rule 37(a)(5) and/or Rule 45(d) (Resp. to Mot. to Compl at 13; Mot. to Quash at 10). Under Rule 37(a)(5)(C), if a discovery motion is granted in part and denied in part, the court may award reasonable expenses, including

attorneys' fees to the prevailing party. FED. R. CIV. P. 37(a)(5)(C). Under Rule 45(d), an attorney has a duty to avoid imposing an undue burden or expense on a person subject to the subpoena, and a court may enforce this duty by imposing an appropriate sanction. FED. R. CIV. P. 45(d)(1). The Court denies Welsh and EDW's request for attorneys' fees under Rule 37(a)(5) and Rule 45(d) since Barnett's position was well founded as to some of the Malpractice Documents.

Conclusion

For the reasons stated above, the Court finds that the Motion to Compel should be granted in part and denied in part. Welsh and EDW should be compelled to produce some of the Malpractice Documents in response to Requests for Production Nos. 6-9 of the Requests for Production within seven (7) days of entry of a protective order. In all other respects, the Motion to Compel should be denied. The Court also finds that the Motion to Quash should be granted in part and denied in part. The Motion to Quash should be granted as to the Kelly Subpoena. Kelly should not be required to produce any of the documents requested in the Kelly Subpoena. The Motion to Quash should be granted in part and denied in part as to the Rawlings Subpoena and Pitre Subpoena. Rawlings and Pitre should be required to produce some of the Malpractice Documents but should not be required to produce any other documents requested in the Rawlings Subpoena and Pitre Subpoena.

IT IS, THEREFORE, ORDERED that the Motion to Compel is granted in part and denied in part as set forth herein.

IT IS FURTHER ORDERED that the Motion to Compel is hereby granted in part and Welsh and/or EDW shall supplement their responses to Requests for Production Nos. 6-8, to the extent required by this Order, within seven (7) days of entry of a protective order.

IT IS FURTHER ORDERED that the Motion to Compel is hereby denied in part and Welsh and/or EDW shall not be required to supplement their responses to Requests for Productions Nos. 1-5 and 9-10.

IT IS FURTHER ORDERED that the Motion to Quash is denied in part and granted in part as stated herein.

IT IS FURTHER ORDERED that the Motion to Quash is hereby granted in part as to the Rawlings Subpoena and Rawlings shall not be required to produce any of the documents described in numbered paragraphs 2-6 and 10-12 in Rawlings Exhibit A.

IT IS FURTHER ORDERED that the Motion to Quash is hereby denied in part and Rawlings shall produce the Malpractice Documents responsive to numbered paragraphs 1 and 7-9 in Rawlings Exhibit A, insofar as they are in his possession, custody, or control, within seven (7) days of entry of a protective order.

IT IS FURTHER ORDERED that the Motion to Quash is hereby granted in part as to the Pitre Subpoena and Pitre shall not be required to produce any of the documents described in numbered paragraphs 3, 5, and 7-10 in Pitre Exhibit A.

IT IS FURTHER ORDERED that the Motion to Quash is hereby denied in part as to the Pitre Subpoena and Pitre shall produce the Malpractice Documents responsive to numbered paragraphs 1, 2, 4, and 6 in Pitre Exhibit A, with the exception of those materials that contain privileged communications between Pitre and Welsh, insofar as they are in his possession, custody, or control, within seven (7) days of entry of a protective order.

IT IS FURTHER ORDERED that the Motion to Quash is hereby granted as to the Kelly Subpoena and Kelly shall not be required to produce any documents.

##END OF ORDER##