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APR 07 2003

TRIBAL COURT
OF THE
SHAKOPEE MDEWAKANTON SIOUX (DAKOTA) COMMUNITY
JEANNE A. KRIEGER
CLERK OF COURT

COUNTY OF SCOTT

STATE OF MINNESOTA

Little Six, Inc., a corporation chartered
Pursuant to the laws of the Shakopee
Mdewakanton Sioux (Dakota) Community,

Court File No. 436-00

Plaintiff,

vs.

Leonard Prescott, individually, and as
current and former officer and/or director
of Little Six, Inc.

Defendant.

MEMORANDUM OPINION AND ORDER

This memorandum memorializes rulings made on this date from the bench following a hearing on a Motion to Quash or, in the Alternative, Modify Deposition Subpoenas Directed to Nonparty Witnesses, filed on March 17, 2003 by Douglas A. Kelley, Esq., Ms. Kitty Gamble, and Steven E. Wolter, Esq. (collectively, "the Non-Party Witnesses").

Mr. Kelley and Mr. Wolter are attorneys working for the law firm of Douglas A. Kelley, P.A. ("the Kelley Law Firm"), and Ms. Gamble is the person in the Kelley Law Firm that is in charge of billing the firm's work. During the period at issue in this litigation, the Kelley Law Firm performed legal work for the Plaintiff, Little Six, Inc. ("LSI"), and also, with the consent of LSI, performed legal work for the Defendant, Leonard Prescott. During the discovery process in this litigation, LSI sought an affidavit from Mr. Kelley that described the legal work that the Kelley Law Firm performed for LSI and the Defendant. Counsel for LSI prepared a draft

affidavit that contained a number of legal conclusions; upon reviewing that document, Mr. Kelley responded by modifying the affidavit to, *inter alia*, eliminate those conclusions. Dissatisfied with the modified product, LSI subpoenaed the Non-Party Witnesses; and they, in turn, filed the Motion that was the subject of today's hearing.

In the materials filed in support of their motion, the Non-Party Witnesses contended (i) that all three subpoenas should be quashed because the information sought by LSI could be obtained from other sources; (ii) that if all subpoenas were not quashed, then only one subpoena should be allowed, since LSI had made no showing that all requisite information from the Kelley Law Firm could not be obtained from any one of the three Non-Party Witnesses; and (iii) that if Mr. Wolter or Mr. Kelley were required to testify, they should be entitled to fees as expert witnesses, under Rule 27 of this Court, which incorporates the provisions of Rule 45 of the Federal Rules of Civil Procedure.

After reviewing briefs and supporting materials and hearing argument from the parties, the Court quashed two of the three subpoenas, and denied the motion to allow expert fees for any of the Non-Party Witnesses, for the following reasons.

This Court's Rule 27 incorporates the provisions of Federal Rule of Civil Procedure 45(c)(3)(A)(iv), which permits the Court to quash or modify a subpoena that "subjects a person to undue burden". The facts before the Court indicate that the billings of the Kelley Law Firm – and the identity of the client for whom the billings were generated – is a central issue in litigation; and it seems unlikely that any person outside the Kelley Law Firm would be as familiar with those matters as any of the three Non-Party Witnesses. Therefore, it does not seem to create an undue burden to require testimony from a responsible person in that firm, to clarify any questions that may arise from the billing documents themselves. However, there has been

no need demonstrated, on the face of the materials before the Court, for such testimony to be solicited from more than one of the Non-Party Witnesses. See generally, In re Tutu Water Wells Contamination, 184 F.R.D. 266 (D.V.I. 1999). LSI itself, when it originally sought affidavit testimony from the Kelley Law Firm, sought only one affidavit – from Mr. Kelley. Accordingly, the Court will direct that only one of the subpoenas may be enforced – the choice of witnesses to be made by LSI. If, but only if, events prove that that witness is unable to provide critical testimony, and that the testimony of another Non-Party Witness is absolutely essential, will the Court consider a motion to permit the issuance of additional subpoenas to the Non-Party Witnesses.

This Court's Rule 27 also incorporates the provisions of Federal Rules of Civil Procedure 45(c)(3) which states, *inter alia*, that if a subpoena –

...requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party...

then the party must insure that the witness is "reasonably compensated". The Non-Party Witnesses contend that this Rule describes their situation: they point out, correctly, that in the aforementioned exchange of draft affidavits, LSI sought legal opinions as well as factual statements. LSI now has responded by arguing that the legal opinions of Mr. Kelley or Mr. Wolter would have no standing as expert testimony in this litigation, and by conceding that the portions of the affidavit which LSI had provided to Mr. Kelley that called for legal opinions were inappropriate.

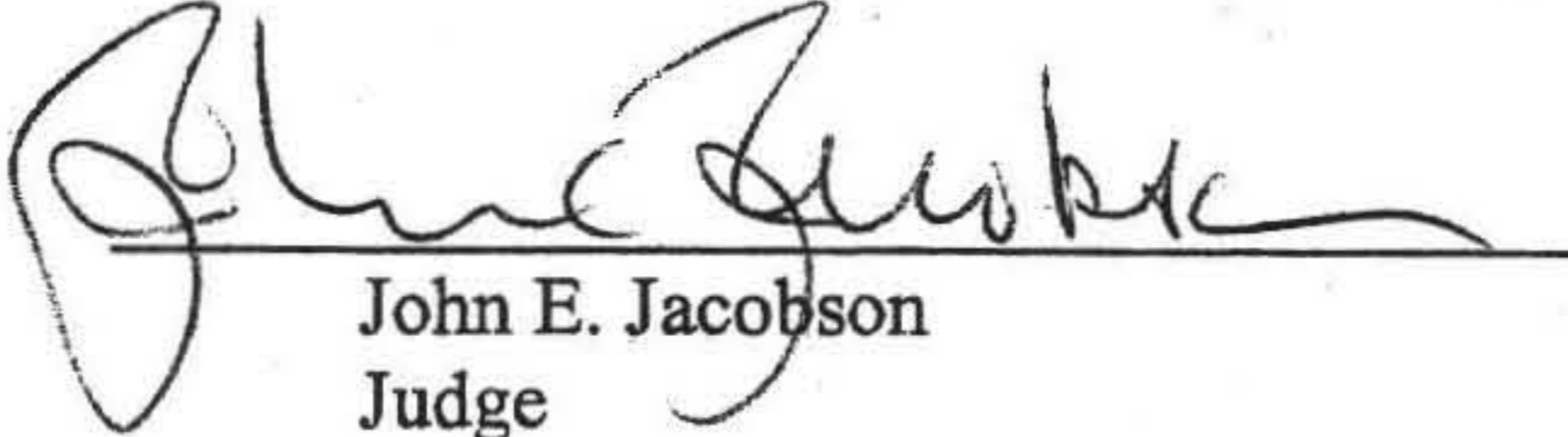
In this regard, the Court agrees with LSI. Federal Courts are nicely split over the question of whether, under FRCP Rule 45, a non-party professional that is subpoenaed to testify concerning facts that the professional is familiar with (e.g., non-party physicians that have

treated a party in litigation, who are called to describe the party's treatment and condition) should receive expert witness fees. *Compare, Hoover v. United States*, 2002 WL 1949734 (N.D. Ill. Decide Aug. 22, 2002)(holding that expert fees were payable), *with Demar v. United States*, 199 F.R.D. 617 (N.D. Ill. 2001)(holding that expert fees were not payable). But no counsel has cited a case in any Federal Court dealing with testimony of a non-party attorney that provided services to a party, and the Court has been unable to locate one. In the Court's view, this void may well exist because the testimony of an attorney, as to matters of law, in all likelihood would not qualify as expert testimony under Rule 702 of the Federal Rules of Evidence – that is, it is highly unlikely that such testimony would “assist the trier of fact to understand the evidence or to determine a fact in issue”. Hence, I conclude that the “expert compensation” provisions of Rule 45 simply are inapposite to the facts here at issue, and that the witness selected by LSI should be compensated only by the fee normally paid to non-expert witnesses.

For the foregoing reasons, it herewith is ORDERED:

1. That LSI shall be entitled to enforce, after reasonable notice, one of the three subpoenas it issued to the Non-Party Witnesses, and that the remaining two subpoenas are herewith quashed; and
2. That the motion of the Non-Party Witnesses to be compensated as expert witnesses, under this Court's Rule 27, is denied.

Dated: April 7, 2003


John E. Jacobson
Judge