Dated: October 05, 2012
The following is ORDERED:

Jennie D. Latta
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

In re
EARL BENARD BLASINGAME and
MARGARET GOOCH BLASINGAME,
Debtors.

Case No. 08-28289-L
Chapter 7

CHURCH JOINT VENTURE,
a Limited Partnership, on behalf of
EDWARD L. MONTEDONICO,
Chapter 7 Trustee,
Plaintiff,
v.
MARTIN A. GRUSIN, JG LAW FIRM,
TOMMY L. FULLEN, and LAW
OFFICES OF TOMMY L. FULLEN,
Defendants.

Adv. Proc. No. 12-00454

ORDER GRANTING VERIFIED MOTION TO RECOVER FEES AND COSTS

BEFORE THE COURT are the Plaintiff's Verified Motion to Recover Fees and Costs Associated with Responding to Joint Motion for Protective Order to Limit Plaintiff's Discovery in

the Bankruptcy Adversary Proceedings (Dkt. No. 37), and written responses filed by the Defendants (Dkt. Nos. 41 and 42). The motion was filed after Magistrate Judge Vescovo denied the Defendants' Motion for Protective Order (Dkt. No. 36). After the motion was filed, this case was referred to the Bankruptcy Court by order of District Judge Anderson (Dkt. No. 39) and assigned an adversary proceeding number because the case arises out of the bankruptcy case of Earl Benard Blasingame and Margaret Gooch Blasingame. The motion seeks reimbursement of attorney fees and costs in the amount of $3,192.50.[1]

I. BACKGROUND FACTS

A number of the background facts are set forth in my "Order Determining Amount of Sanctions to be Paid Pursuant to Order Granting Motion to Compel and For Sanctions," *Church JV v. Blasingame (In re Blasingame),* slip op., Case No. 08-28289, Adv. Proc. No. 09-00482 (Bankr. W.D. Tenn. July 31, 2012). That order arose out of an adversary proceeding that is also related to the bankruptcy case of the Blasingames, and, in fact, relates to the same discovery dispute.

The Blasingames were initially represented in their bankruptcy case by Mr. Fullen and Mr. Grusin, two of the Defendants in this adversary proceeding. Church JV and the Trustee in Bankruptcy filed an adversary complaint against the Debtors and certain other defendants (the "Non-Debtor Defendants"). In that adversary proceeding (No. 09-00482 – the "Alter Ego Suit"), the

[1] I believe that an arithmetical error has been made, however, because the Plaintiff has asked for reimbursement of 8.3 hours at $225 per hour for reviewing and responding to the Motion for Protective order ($1,867.50); expenses in the amount of $100 relating to the Motion for Protective Order, which includes postage, long-distance calls, and copying charges; 5.00 hours at $225 per hour to prepare for and/or attend a hearing on the Motion to Recover Fees and Costs ($1,125.00); and $1,000.00 in expenses related to appearing for the hearing on the Motion to Recover Fees and Costs, including air fare, hotel, and meals. Those items add to $4,092.50. Mr. Akerly apparently reduced the amount of time devoted to the hearing on the Motion to Recover Fees and Costs from 5 hours to 1 hour. When that is done, the items are reduced by $900.00, and add to $3,192.50.

Debtor-Defendants were represented by Mr. Fullen and the Non-Debtor Defendants were represented by Mr. Grusin. In a series of rulings, I held that the Debtors' discharge should be denied and that Mr. Fullen and Mr. Grusin were disqualified from representing the Debtors and the Non-Debtor Defendants. The disqualification order was entered on July 10, 2011. On October 17, 2011, Church JV filed its motion seeking permission to pursue a claim of legal malpractice against the Defendants on a derivative basis on behalf of the bankruptcy estate (Bankr. Dkt. No. 354). Two days later, the Trustee in Bankruptcy was granted permission to sell the alter ego claims to Church JV for a sum certain (Bankr. Dkt. No. 356). Mr. Fullen and Mr. Townsend, as "interested parties," by their counsel, and Grusin, by his counsel, filed objections to Church JV's motion. The Debtors obtained substitute counsel, Mr. David Cocke, who also filed a response in opposition to Church JV's motion on November 2, 2011. After receiving additional briefs, on January 30, 2012, I granted the motion to permit Church JV to pursue a legal malpractice claim against the Defendants derivatively on behalf of the bankruptcy estate (Bankr. Dkt. No. 403). A complaint was filed by Church JV in the United States District Court on February 13, 2012. This complaint is the one that was referred to the Bankruptcy Court and assigned Adversary Proceeding No. 12-00454 (the "Malpractice Suit"). The Malpractice Suit is the proceeding which is the subject of this order.

Church JV served Notices of Intention to Take Oral Deposition of Martin A. Grusin and JG Law Firm, and of Tommy L. Fullen, Joseph Townsend and the Fullen Law Firm in connection with the remaining issues raised in the Alter Ego Suit on November 22, 2011. On December 30, 2011, Grusin and JG Law Firm, by their counsel, Michael H. Johnson, mistakenly filed a Motion to Quash in the main bankruptcy case (Bankr. Dkt. No. 391). They sought to quash subpoenas issued by Church JV pursuant to its Notice and to obtain a protective order barring further discovery for two

reasons: "(1) because this Court [the Bankruptcy Court] has not ruled on Church JV's Motion for Derivative Standing, and (2) because Church JV's Subpoenas do not pass the *Shelton* test [related to taking discovery from opposing counsel] nor may Church JV waive the attorney client privilege of the debtors."

On January 1, 2012, Fullen, Townsend, and the Law Office of Tommy L. Fullen, by their counsel, Charles Exum, filed in the Alter Ego Suit an "Expedited Motion for Protective Order to Prevent, Delay, or Limit the Depositions of Tommy L. Fullen, Joseph T. Townsend, and the Law Office of Tommy L. Fullen," which was set for hearing on January 25, 2012 (Ater Ego Suit, Dkt. No. 230). The grounds stated for the motion were two: "(1) Church JV's discovery seeks privileged information; and (2) requiring Fullen to participate in discovery at this point in the proceedings would be unduly burdensome because this Court [i.e., the Bankruptcy Court] has not yet determined whether Church JV can pursue a legal malpractice action against Fullen." The Plaintiffs in the Alter Ego Suit filed responses to the Motion to Quash and the Motion for Protective Order, and a hearing was scheduled for January 25, 2012.

At the hearing, there was extensive discussion about the posture of the Alter Ego Suit and the two concerns raised by the Motion to Quash and the Motion for Protective Order: (1) the attorney-client privilege and (2) the possibility of a legal malpractice suit being filed against Mr. Fullen and Mr. Grusin. I have carefully reviewed the recording of that hearing. Mr. Johnson, as attorney for Mr. Grusin, and Mr. Exum, as attorney for Mr. Fullen, were present at that hearing. Mr. Cocke, as attorney for the Debtors, and Mr. Michael Coury, as attorney for the Non-Debtor Defendants, were also present, as was Mr. Bruce Akerly, as attorney for Church JV, and Ms. Tracey Malone, as attorney for Farmers & Merchants Bank, a nominal plaintiff. In response to Mr. Fullen's

and Mr. Grusin's concern about the attorney-client privilege, I specifically noted that the Debtors and the Non-Debtor Defendants controlled any attorney-client privilege that survived the Debtors' "advice of counsel defense" in the Alter Ego Suit, and that they were represented by new counsel who would assert the privilege on their behalf if needed. At that hearing, Mr. Exum conceded, "As to attorney client privilege, you [the Court] are correct as to who holds it and who can protect it." As to the potential malpractice action, I noted that the scope of discovery would be controlled by the complaint that was filed in the Alter Ego Suit. I cautioned counsel that the mere possibility that the answer to a question might be damaging to Mr. Fullen and Mr. Grusin in a future action would not provide a ground for refusal to answer a question in the Alter Ego Suit. Mr. Exum acknowledged that there were no circumstances under which his clients could refuse to answer a question in the adversary proceeding based upon the mere possibility that a malpractice complaint would be filed. Mr. Akerly indicated that he would be preparing revised notices of deposition taking into account the comments that I made. I directed that the parties review the renewed notices, and raise any objections to requests that fell outside the scope of the adversary proceeding. Mr. Akerly acknowledged that he had agreed on behalf of his client that the material that Church JV wanted to inspect in connection with the Alter Ego Suit might include documents that would be important to a malpractice action, but that Church JV would only be allowed to use those documents in connection with the Alter Ego Suit. I announced that the motions for protective order were denied insofar as the Defendants sought to assert the attorney-client privilege on behalf of their former clients and insofar as they sought a blanket shield against depositions of Mr. Fullen and Mr. Grusin. I reserved ruling as to any additional or new *specific* objections that might be raised with respect to the renewed notices of deposition. The hearing was continued to February 29, 2012.

By February 29, 2012, the complaint initiating the Malpractice Suit had been filed in the District Court. Mr. Akerly appeared telephonically on February 29, and announced that the parties had reached an agreement on the scope of discovery in the Alter Ego Suit and were preparing a consent order incorporating their agreement. That order was signed and entered on March 5, 2012 (Alter Ego Suit, Dkt. No. 245). The Consent Order specifically provides, "If Deponents withhold any requested documents that are in their custody, possession or control based on a privilege or other reason, **they shall prepare and serve a privilege log relating to the withheld documents** and serve it on counsel for Church JV at or before the time for production of documents set forth in the Amended Notices." (emphasis mine). It also provides that "the scope of production of any Deponent with respect to the Defendant trusts shall be limited in time to the years 1990 to present, except with respect to the Blasingame Family Trust." This is the only reference to limitation of the scope of discovery in the Consent Order.

The depositions were scheduled for March 28 and 29, 2012. Although Mr. Grusin produced his files for inspection by Mr. Akerly, Mr. Fullen did not on the basis that they related only to the Malpractice Suit. Counsel for the Defendants allege that during the depositions, Mr. Akerly began asking questions to elicit information solely related to the Malpractice Suit, questions which violated their agreement concerning the scope of discovery. Mr. Akerly denies that there was any agreement except as set forth in the Consent Order and Notices of Deposition.

On April 21, 2012, the Defendants filed a "Joint Motion for Protective Order to Limit Plaintiff's Discovery in the Bankruptcy Adversary Proceeding" in the District Court (Dkt. No. 29). The Defendants asserted that Church JV was attempting to use discovery in the Adversary Proceeding to discover information that was only related to the legal malpractice action. They gave

three reasons why their motion for protective order should be granted: "(1) Defendants cannot offer testimony regarding the legal malpractice case in the Adversary Proceeding's discovery process because this information is protected by the attorney-client privilege; (2) it would be unduly burdensome for Defendants to be subjected to questions regarding the malpractice action in the Adversary Proceeding, when Defendants will be subject to these same inquiries in the malpractice proceeding and when the information related to the legal malpractice proceeding is irrelevant to the Adversary Proceeding; and (3) discovery in the legal malpractice action is premature at this time."

The Joint Motion for Protective Order was denied by Magistrate Judge Vescovo on the basis that it was filed in the wrong court. Magistrate Judge Vescovo said, "Although the discovery sought in the bankruptcy action relates to the malpractice action before this court, the discovery is being supervised by another court within this very district. It would be improper for this court to resolve this dispute." (Dkt. No. 36). Church JV responded to this ruling by filing the pending Motion to Recover Fees and Costs. Before it could be heard by Magistrate Judge Vescovo, the Malpractice Suit was referred to the Bankruptcy Court for decision (Dkt. No. 40). Although both Mr. Fullen and Mr. Grusin filed responses in opposition to the Motion to Recover Fees and Costs, only counsel for Mr. Fullen appeared at the scheduled hearing on October 3, 2012.

II. ANALYSIS

Church JV correctly asserts that if a motion for protective order is denied, the court "must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party...who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees," unless the court finds that the motion was "substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. Proc. 37(a)(B)(5). The Defendants

argue that the filing of the Motion for Protective Order was substantially justified as the result of a bona fide dispute about the scope of discovery. In light of my prior instructions, it is difficult for me to agree that there was a bona fide dispute about the scope of discovery.

First, the Joint Motion for Protective Order was denied on the basis that it was filed in the wrong court, not on the merits of the motion. Counsel for the Defendants had already heard my thoughts about the scope of discovery in the Alter Ego Suit. They apparently were not happy with that result. They filed their Joint Motion for Protective Order not with the court where the Alter Ego Suit was pending, but with the court where the Malpractice Suit was pending. They have offered no authority for "skipping over" the bankruptcy judge to address the District Court about the scope of discovery in an adversary proceeding pending before a bankruptcy judge. The filing of the Motion for Protective Order in the wrong court was not substantially justified. In fact, it was not justified at all.

Second, even if the motion had been brought before me, it would have been denied on its merits because the issues raised in the Joint Motion had already been decided. I denied the first motions for protective order filed by the Defendants on precisely the same grounds that they urged before Magistrate Judge Vescovo. Before the Malpractice Suit was filed, the Defendants sought protection because they feared that their responses to discovery might breach the attorney-client privilege. I reassured them that the privilege was held by their former clients who are represented by counsel. It is significant that the present counsel for the Debtors and the Non-Debtor Defendants **did not join** in either of the sets of motions for protective order filed by counsel for the Defendants. Nevertheless, even at the hearing before me on October 3, counsel for Mr. Fullen **continued to express concern** about the attorney-client privilege. This was wholly without justification.

The Defendants also argue that the Joint Motion for Protective Order was substantially justified because they were concerned that the discovery in the Alter Ego Suit might reach matters relevant to the potential malpractice action. At the hearing on January 25, I agreed that was a possibility, but told counsel that this possibility would not provide their clients with an excuse not to respond to discovery in the Alter Ego Suit. The Joint Motion for Protective Order was not substantially justified because it raised issues that had already been addressed by me in connection with the adversary proceeding in which discovery was sought.

Third, the Defendants argue that the Joint Motion for Protective Order was substantially justified because there was a genuine dispute about the existence of an agreement between counsel that Church JV would not seek to discover information related to the Malpractice Suit through the discovery depositions and document requests in the Alter Ego Suit. They have pointed to no evidence of such an agreement other than statements in their affidavits. These statements do not agree with each other as to the time when this agreement was reached or the terms of the agreement. Mr Russell Reviere, attorney for Mr. Fullen, states:

> Prior to these depositions and the document production the notices requested, Michael H. Johnson, Bruce Ackerly [sic], and my office agreed that Plaintiff would not seek to discover information related to this legal malpractice case through these depositions and document requests.

Affidavit of Russell E. Reviere, April 2, 2012, Dkt. No.29-1.

Mr. Johnson states:

> Prior to the start of Mr. Grusin's deposition, Mr. Ackerly [sic] agreed with counsel for all Defendants that he would not ask the deponents questions pertaining to this Legal Malpractice action.

Affidavit of Michael H. Johnson, April 2, 2012, Dkt. No. 29-2.

Mr. Reviere, who was not present at the hearing before me on January 25, indicates that the

agreement was reached "[p]rior to these depositions and the document production the notices requested ." Mr. Johnson indicates that the agreement was reached prior to the start of Mr. Grusin's deposition. Since the document production was expected at or before the depositions and since Mr. Fullen did not bring documents to his deposition, it seems clear that Mr. Reviere indicates that an agreement was reached *before* the scheduled depositions, not *at* the deposition of Mr. Grusin. Moreover, Mr. Reviere does not indicate that he has personal knowledge of this agreement. He says that the agreement was reached "with his office." Affidavits should be made on personal knowledge, and statements not based on personal knowledge may be disregarded. *See Brainard v. American Skandia Life Assur. Corp.*, 432 F.3d 655, 667 (6th Cir. 2005); accord *Beyah v. Coughlin*, 789 F.2d 986, 989 (2nd Cir. 1986) (attorney affidavit not based upon personal knowledge was properly disregarded). Finally, Mr. Reviere indicates that an agreement was reached about questions to be asked *and* documents to be produced. Mr. Johnson indicates that the agreement reached only questions to be asked in the course of the deposition. These affidavits simply fail to provide information from which I can deduce the existence and terms of an agreement among counsel.

The Defendants provided no transcript of the depositions of either Mr. Grusin or Mr. Fullen to enable me to determine whether questions asked by Mr. Akerly fell outside the scope of permissible discovery. Mr. Akerly, however, did provide a transcript of Mr. Fullen's deposition and copies of email correspondence between him and Mr. Reviere, with a copy shown to Mr. Exum. This information was provided as an exhibit to his Motion to Compel and for Sanctions filed in the Alter Ego Suit (Alter Ego Suit, Dkt. No. 251). In the course of the deposition of Mr. Fullen, there was conversation back and forth between the attorneys about "an agreement concerning discovery." During the deposition , Mr. Akerly acknowledged that there was an agreement that any documents

that were produced would be used only in connection with the adversary proceeding, but not that he would not look at the documents covered by the Notice of Deposition (*see* Dep. of Tommy L. Fullen, March 29, 2012, which is Ex. 1 to the First Supplement to Plaintiff's Motion to Compel and for Sanctions, Alter Ego Suit, Dkt. No. 256, pp. 20-21, 23-24, 33-34). This is consistent with his statements made to me at the January 25 hearing, and is consistent with his statements in the email to Mr. Reviere sent on March 30, 2012, the day after the attempted deposition of Mr. Fullen.

Mr. Reviere sent two emails to Mr. Akerly concerning the deposition of Mr. Fullen and the document production. Mr. Reviere wrote on February 17:

> From what I understand, and this is subject to change, we will have no documents for Fullen/Townsend responsive to the scope of the deposition notice. I wanted to give you that heads-up. If that changes, we will let you know. Obviously, this relates only to these depositions and the limited scope. I assume your questioning will go no further than this subject matter and we can agree on a protective order to that effect.

There is no response in the record from Mr. Akerly acknowledging or responding to this email. On March 16, Mr. Reviere wrote:

> Please recall that we advised you by email on February 17, 2011 that we will have no documents to produce within the scope of your notice. It appears there is no need for you to come to Memphis.

Again there is no contemporaneous response from Mr. Akerly in the record. Taken at face value, Mr. Reviere's statements indicate no more than a unilateral assertion on his part concerning his interpretation of the scope of discovery, and his decision that his client would not produce documents in connection with his deposition. I find no evidence that the parties entered into an agreement to limit the scope of discovery beyond that already contained in the amended Notices of Deposition. I do find that Mr. Akerly agreed that documents produced in response to his requests would only be used by him in connection with the Alter Ego Suit and that he would keep his

questioning focused on the subject matter of the Alter Ego Suit. That agreement is consistent with the instructions that I gave on January 25.[2] Reliance upon the existence of some agreement beyond that contained in the written documents, including the Consent Order entered as the result of the January 25 hearing and consultation between the parties, was not substantially justified.

Fourth, the Defendants argue that their Joint Motion for Protective Order was substantially justified because they were concerned about the possible impact of the document production and depositions on the Malpractice Suit. At the January 25 hearing on their first motions for protective order, I explained that the mere fact that questions asked in connection with the Alter Ego Suit might prove uncomfortable for the Defendants would not excuse them from answering. It was to be expected that some of the matters to be discovered in connection with the Alter Ego Suit would overlap with material that would be covered in connection with the Malpractice Suit. There is no bright line between them, and nothing to prevent questions being asked in the one suit that would lead to discoverable evidence in the other.

Fifth, at the hearing, Mr. A. Blake Neill, an associate of Mr. Reviere, as counsel for Mr. Fullen, claimed that Magistrate Judge Vescovo found that counsel for Church JV had asked questions solely related to the malpractice claim. I do not find that in Magistrate Judge Vescovo's order. Instead, she says that, "**the defendants claim** that Church is requesting information in the bankruptcy proceeding that is solely related to the malpractice action in this court," and later that, " [a]lthough the discovery sought in the bankruptcy action relates to the malpractice action before

[2] I note that it was Mr. Exum, not Mr. Reviere, who was present on January 25 and acknowledged the instructions that I gave at that time. Perhaps Mr. Reviere's and Mr. Neill's misunderstanding of the scope of discovery results from that fact. It is puzzling and distressing to me that Mr. Exum did not provide an affidavit in connection with the Joint Motion for Protective Order nor participate in the hearing on the Motion for Fees and Costs.

this court, the discovery is being supervised by another court within this very district." It was the Defendants who claimed that the matters sought to be discovered by Mr. Akerly related **solely** to the Malpractice Suit. Magistrate Judge Vescovo made no factual findings about the discovery requested by the Plaintiff. Her ruling was based solely on the failure of the Defendants to file their motion with the Bankruptcy Court, the court which was supervising discovery in the Alter Ego Suit. In fact, she invited the Defendants to seek relief from the Bankruptcy Court. They did not do so and have not done so. I can only conclude from their inaction that they understood then and understand now that I had already discussed with them the scope of the discovery that would be permitted in the Alter Ego Suit at the hearing on January 25. I find this, too, distressing as it tends to indicate an intention on counsels' part to engage in a subtle form of "forum shopping." I can find no justification for counsels' choices in bringing the Joint Motion for Protective Order, nor for the arguments made in connection with the Motion for Fees and Costs.

III. CONCLUSION

For all the reasons stated, I conclude that the Motion for Protective Order was not substantially justified. As a result, Rule 37(a)(5)(B) directs me to award fees and costs to Church JV, which was compelled to respond to the unwarranted motion. Church JV has submitted a verified motion in which its fees and expenses are detailed. Pursuant to the request made by Church JV, I order the Defendants **and their Counsel**, jointly and severally, to pay to the order of Church JV the sum of $3,192.50. I include counsel in this award because I know that counsel was present when I gave instructions on the scope of discovery, and I have no reason to believe that they were not involved in the decision to file the Joint Motion for Protective Order in the District Court.

cc: Debtors
Counsel for Debtors
Plaintiffs
Counsel for Plaintiffs
Defendants
Counsel for Defendants
United States Trustee