

FILED
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AUG 09 2012
Linda Clayton
DEPUTY

HON. JAMES A. HAYNES
District Judge - Dept. 2
Twenty-First Judicial District
Ravalli County Courthouse
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Hamilton, Montana 59840
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MONTANA TWENTY-FIRST JUDICIAL DISTRICT COURT, RAVALLI COUNTY

VESTER A. WILSON, III, and, JULIA R.
WILSON,

Plaintiffs,

vs.

JOHN POWERS, individually, JOHN
POWERS, JR., individually, RYAN
CONSTRUCTION RETIREMENT FUND,
Michael Ryan, Trustee, MICHAEL RYAN,
individually, and DOE DEFENDANTS 1-
100,

Defendants.

Cause No. DV-09-627 /145
Department No. 2

**ORDER RE: RULE 37 ATTORNEY
FEES AND COSTS**

On February 16, 2012, pursuant to Rule 37, M. R. Civ. P., the Court granted Plaintiffs' *Motion to Compel* (Doc. # 99) with respect to 52 items, denied Plaintiffs' *Motion to Compel* (Doc. # 99) with respect to one item, and granted in part and denied in part Plaintiffs' *Motion to Compel* (Doc. # 99) with respect to one item. (Doc. # 126). Plaintiffs, therefore, prevailed on approximately 97% of the relief requested in their *Motion to Compel* (Doc. # 99).

Montana Rule of Civil Procedure 37(a)(5) provides in pertinent part:

(5) Payment of Expenses; Protective Orders.

(A) If the Motion is Granted or Disclosure or Discovery is Provided After Filing. If the motion is granted -- or if the requested discovery is provided after the motion was filed -- **the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney fees.** But the court must not order this payment if:

- (i) the movant filed the motion before attempting in good faith to obtain the discovery without court action;
- (ii) the opposing party's response or objection was substantially justified; or
- (iii) other circumstances make an award of expenses unjust.

...

(C) If the Motion is Granted in Part and Denied in Part. If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and **may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.**

(Emphasis added).

Upon review of the file and the substance of this Court's February 16, 2012 *Opinion and Order* (Doc. # 126), the Court concludes preliminarily that Plaintiffs attempted in good faith to obtain the subject discovery without court action; that Defendants' response and objections were not substantially justified except with respect to the portions of Plaintiffs' motion that were denied; and that no circumstances would make an apportionment of 97% of the reasonable expenses of Plaintiffs' *Motion to Compel* (Doc. # 99) to Defendants and Defendants' attorneys unjust.

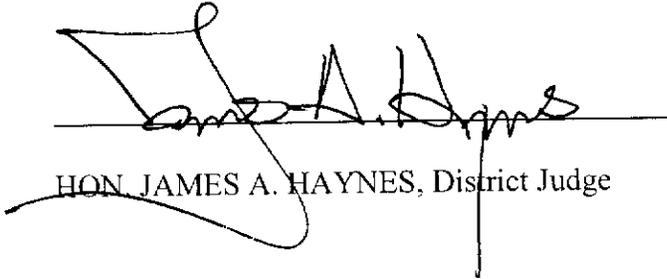
Now, therefore, it is **ORDERED**:

1. Plaintiffs shall file and serve upon Defendants by **August 24, 2012** an affidavit itemizing Plaintiffs' reasonable expenses incurred in making and arguing Plaintiffs' *Motion to Compel* (Doc. # 99), including attorney fees;

2. Within ten (10) days after Plaintiffs file and serve the affidavit specified in item (1) above, Defendants and Defendants' attorneys shall, if they desire, file a request for a hearing with respect to the apportionment of reasonable expenses pursuant to Rule 37(a)(5), M. R. Civ. P.; and

3. The failure to request the hearing specified in item (2) above within the ten (10) day period shall be deemed a waiver of the right to a hearing on the apportionment of reasonable expenses.

DATED this 7th day of August, 2012.


HON. JAMES A. HAYNES, District Judge

8-8-12 cc
cc: counsel of record