UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

In re:	)	Case No. 13-17204
	)	
MINNIE M. BOWERS SMITH and JAMES SMITH,	)	Chapter 11
	)	
	)	Chief Judge Pat E. Morgenstern-Clarren
Debtors.	)	
	)	**ORDER**

This discovery dispute between Minnie Bowers Smith and James Smith, chapter 11 debtors, and their creditor the United States of America on behalf of its agent the Internal Revenue Service involves a subpoena issued by the IRS to Amos Mahsua, an individual named as an expert witness by the debtors.

The debtors and Mr. Mahsua move to quash the subpoena, arguing that the debtors have not yet retained Mr. Mahsua and that he has not written a report, but will do so before the June 2, 2015 evidentiary hearing. Alternatively, they argue that the IRS must pay Mr. Mahsua his regular rate of $250.00 an hour for any deposition time.[1] For the reasons discussed below, the motion to quash is denied. The request for compensation is granted in part.

Discussion

The movants rely on Federal Rules of Civil Procedure 26(b)(4)(A) and 45(c)(3)(B)(ii), made applicable by Federal Rules of Bankruptcy Procedure 7026 and 9016. They have the burden of proof on their motion to quash. *See Systems Prods. & Solutions, Inc. v. Scramlin*, 2014 WL 3894385 at *7 (E.D. Mich. 2014); *Fed. Trade Comm'n v. Trudeau*, 2012 WL 6100472 at *2 (S.D. Ohio 2012).

The Civil Rules identify two kinds of expert witnesses: those who are retained to testify at trial and those who are retained solely to assist counsel in trial preparation. Civil Rule 26

[1] Docket 98.

requires a party to disclose the identity of each expert witness it may use at trial, together with any report written by the expert if the party retained the witness to provide expert testimony. FED. R. CIV. P. 26(a)(2). If the witness is not required to provide a written report, the disclosure must state the subject matter of the testimony, together with a summary of the facts and opinions to which the expert is expected to testify. A party may depose anyone identified as a testifying expert; if the expert is required to provide a report, the deposition may only be taken after the report is provided. FED. R. CIV. P. 26(b)(4). A non-testifying expert may only be deposed under "exceptional circumstances under which it is impractical for the party to obtain facts or opinions on the same subject by other means." FED. R. CIV. P. 26(b)(4)(D). In both instances the deposing party must pay a "reasonable fee" to the deponent for the time spent in responding to the discovery request. FED. R. CIV. P. 26(b)(4)(E).

The debtors state that Mr. Mahsua "has not yet been retained," but that he is an expert witness who will be writing a report. This creates something of a conundrum as to how to analyze the issue. Mr. Mahsua either is or is not an expert retained by the debtors. If he has been retained, the next question is whether he has been retained as a testifying or non-testifying expert.

A movant has the burden of showing that the subpoena should be quashed because it does not comply with the rules. The movants have failed to state facts to establish Mr. Mahsua's status. The debtors appear to be saying that they retained Mr. Mahsua as a non-testifying expert, but intend to convert his status to a testifying one–and that they plan to have him provide a written report sometime between May 20, 2015 and June 1, 2015, the day before the evidentiary hearing.

The court finds, in the exercise of its discretion over this discovery dispute, that the movants' position is not reasonable. The debate between the debtors and the IRS, which has been ongoing since October 11, 2013, was specifically addressed first in an adversary

proceeding and then in a claims objection. The debtors have had more than enough time to decide what Mr. Mahsua's role will be on June 2, 2015.

If the debtors intend to have Mr. Mahsua testify at the trial, they are to make him available for deposition on May 27, 2015 as identified in the subpoena. His trial testimony will be limited to the topics addressed in the deposition. If he does not appear, his testimony will be excluded at trial.

If the debtors decide not to permit the deposition so as to retain whatever status Mr. Mahsua may have as a non-testifying expert, they are to file a notice to that effect on or before **May 25, 2015** so that the IRS does not incur unnecessary travel expense. If the debtors do not do that and yet fail to produce Mr. Mahsua, they will be responsible for any travel expense incurred by the IRS that could not reasonably be avoided.

As to compensation: if the debtors elect to produce Mr. Mahsua, the IRS is to pay for his time at his regular hourly rate for the amount of time he spends responding to the subpoena. If the debtors choose to examine Mr. Mahsua at deposition, they will be responsible for the amount of time their counsel uses.

For those reasons, the motion to quash is denied. The request to compensate Mr. Mahsua is granted in part.

Additionally, because counsel do not seem able to communicate effectively by telephone, they are to limit themselves to emails and are to respond to any such email within 24 hours.

IT IS SO ORDERED.

Pat E. Morgenstern-Clarren
Chief Bankruptcy Judge