

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MARY K. JONES, Individually and on Behalf
of All Others Similarly Situated,

Plaintiff,

v.

PFIZER INC., et al.,

Defendants.

Civil Action No. 1:10-cv-03864-AKH

Hon. Alvin K. Hellerstein

ORAL ARGUMENT REQUESTED

**MEMORANDUM OF LAW OF DEE MAHONEY
IN SUPPORT OF MOTION TO QUASH PLAINTIFF'S TRIAL SUBPOENA**

Third-party witness Dee Mahoney respectfully moves this Court pursuant to Rule 45(d) of the Federal Rules of Civil Procedure to quash a subpoena commanding her to provide testimony at the Daniel Patrick Moynihan United States Courthouse on the ground that the subpoena purports to require her to comply beyond the applicable geographical limits specified by Rule 45(c).

Ms. Mahoney resides in Bethesda, Maryland and runs a consulting practice from her home. *Declaration of Dee Mahoney*, dated January 23, 2015 at ¶ 5 (“*Mahoney Decl.*”) Ms. Mahoney’s only business-related contact within the geographical limitations of Rule 45 is: (1) the establishment in 2010 of a New Jersey LLC with her business partner -- which entity is not the subject of a subpoena in this action; (2) telephone, electronic and occasional in-person meetings with her business partner who works from her home in New Jersey; and (3) telephone, electronic and occasional in-person meetings to pitch new business or provide services to clients. In 2014, the above categories of in-person meetings totaled nine days but only two of those days involved in-person work for paying clients. *Mahoney Decl.* at ¶ 5-7. In 2015, Ms. Mahoney has had no in-person contact within the geographical limitations of Rule 45. *Mahoney Decl.* at ¶ 6-7. As set forth below, the few business transactions she personally conducted in the area are legally insufficient to meet the requirements of Rule 45.

ARGUMENT

Rule 45(c)(1) places familiar limits on how far a third party witness may be forced to travel to give testimony at a trial:

A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

(A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or

- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
- (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

Fed. R. Civ. P. 45(c)(1) (2014). Rule 45(d) directs that courts must quash a subpoena that transgresses these limits:

On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

* * *

- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- * * *; or
- (iv) subjects a person to undue burden.

Fed. R. Civ. P. 45(d)(3)(A) (2014).

Ms. Mahoney has lived outside the geographical limit of Rule 45 since 2010 and maintains an LLC in New Jersey, her business partner's home state for the purpose of organizing her consulting business. If counsel had sought to serve legal process on DMH BioPharm Advisors, LLC, there are mechanisms in place for such service in New Jersey where it is registered. However, Ms. Mahoney's company is not a party to or witness in this action. The New Jersey registration of this entity which has a legal identity separate from Ms. Mahoney does not mean that Ms. Mahoney, as its principal, is physically present within the geographical limit of Rule 45. See, e.g., In re Microsoft, 428 F. Supp. 2d 188, 193 (S.D.N.Y. 2006) (Dutch national did not reside in the Southern District for purposes of § 1782 where he was a partner at Cleary, Gottlieb and a member of the New York bar but resided in Brussels and worked full time at Cleary, Gottlieb's Brussels office).

Moreover, the fact that Ms. Mahoney may communicate via telephone or Internet into the geographically-defined area while providing services to clients is also irrelevant. "Rule

45(c)(3)(A)(ii) specifies that one must be doing business ‘in person’ in a given location.

Therefore, business transactions [the witness] conducted via telephone, email and fax between England, where his office is located, and New York does not demonstrate that New York is a place where he regularly transacts business.” M’Baye v. N.J. Sports Prod., 246 F.R.D. 205, 207 (S.D.N.Y. 2007) (Chin, J.); see also Dietz v. Spangenberg, No. 11-2600-cv, 2014 WL 537753, at *4 (D. Minn. Feb. 11, 2014) (witness who “transacts all business by telephone” with client based in district is not employed there nor regularly transacts business there).

Most significantly, Ms. Mahoney personally visited the applicable area for work with clients who had retained her services for only two days in 2014. Two days in thirteen months is insufficient in-person contact to meet the test. The result would be no different if the additional seven days she spent here in 2014 - in meetings with her partner or with prospective clients - were counted in the total. In M’Baye, Judge Chin found that “[t]raveling to an area within a 100-mile radius for fourteen to eighteen days [on five different occasions] in two years is insufficient to render a person amenable to a subpoena.” 246 F.R.D. at 208; see also Dietz, 2014 WL 537753, at *5 (witness who spent two business trips in district lasting less than 24 hours and a third that lasted two days did not regularly transact business in district); Bostian v. Suhor Indus., Inc., No. 07-151-cr, 2007 WL 3005177, at *1 (N.D. Okla. Oct. 12, 2007) (two visits per year for previous four years are “infrequent” and “do not qualify as regularly transacting business”); In re Application for Order Quashing Deposition Subpoenas, dated July 16, 2002, No. M8-85, 2002 WL 1870084, *2-3 (S.D.N.Y. Aug. 14, 2002) (Lynch, J.) (finding it “perfectly clear” that Japanese national did not “regularly transact[] business in person” in New York when he had visited employer’s New York office four times within the previous five years); Regents of Univ. of California v. Kohne, 166 F.R.D. 463, 465 (S.D. Cal. 1996) (“‘regularly’ does not mean ten

times in seven years”). Courts have instead required far more substantial and frequent visits before finding that an individual has regularly transacted business in person. Cf. Halliburton Energy Servs., Inc. v. M-I, LLC, No. H06MC00053, 2006 WL 2663948, at *2 (S.D. Tex. Sept. 15, 2006) (“ten-year average of forty days each year” constitutes regular transaction of business in person). Under all applicable precedent, Ms. Mahoney’s in person paid engagements for two days in 2014 are insufficient to meet this threshold.

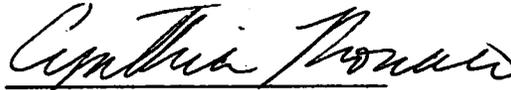
In addition, Ms. Mahoney has already travelled to New York City and given an extensive video deposition in this matter to plaintiffs on July 19, 2013. *Mahoney Decl.* at ¶ 1. Neither she nor any of the parties should have expected that she would or could be called to testify at trial. In fact, the parties have already designated those portions of her testimony, which they wish to introduce at trial. Accordingly, quashing the subpoena results in no prejudice to any of the parties seeking to present her testimony.

CONCLUSION

For the foregoing reasons, Dee Mahoney respectfully requests that the Court grant her motion to quash Plaintiff's subpoena, dated December 30, 2014.

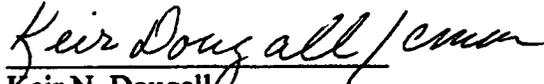
Dated: January 24, 2015

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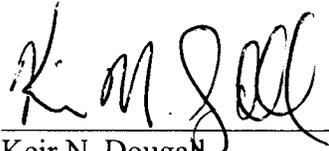


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CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2015, I caused the foregoing to be electronically filed with the Clerk of the Court using the CM/ECF system and thereby served to all parties of record.

A handwritten signature in black ink, appearing to read "Keir N. Dougall", written over a horizontal line.

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