



IN THE DISTRICT COURT OF CLEVELAND COUNTY  
STATE OF OKLAHOMA

STATE OF OKLAHOMA, ex rel., )  
MIKE HUNTER, )  
ATTORNEY GENERAL OF OKLAHOMA, )  
 )  
Plaintiffs, )

Case No. CJ-2017-816

v. )

- (1) PURDUE PHARMA L.P.; )
- (2) PURDUE PHARMA, INC.; )
- (3) THE PURDUE FREDERICK COMPANY; )
- (4) TEVA PHARMACEUTICALS USA, INC.; )
- (5) CEPHALON, INC.; )
- (6) JOHNSON & JOHNSON; )
- (7) JANSSEN PHARMACEUTICALS, INC.; )
- (8) ORTHO-MCNEIL-JANSSEN )  
PHARMACEUTICALS, INC., n/k/a )  
JANSSEN PHARMACEUTICALS, INC.; )
- (9) JANSSEN PHARMACEUTICA, INC., n/k/a )  
JANSSEN PHARMACEUTICALS, INC.; )
- (10) ALLERGAN, PLC, f/k/a/ ACTAVIS PLC, )  
f/k/a/ ACTAVIS, INC., f/k/a ACTAVIS PLC, )  
f/k/a ACTAVIS, INC., f/k/a WATSON )  
PHARMACEUTICALS, INC.; )
- (11) WATSON LABORATORIES, INC.; )
- (12) ACTAVIS LLC; and )
- (13) ACTAVIS PHARMA, INC., )  
f/k/a WATSON PHARMA, INC., )

STATE OF OKLAHOMA }  
CLEVELAND COUNTY } S.S.

FILED

APR 17 2018

In the office of the  
Court Clerk MARILYN WILLIAMS

Defendants.

**NON-PARTY STEPHEN A. IVES' OBJECTION AND MOTION TO QUASH  
PLAINTIFF'S SUBPOENA FOR DEPOSITION TESTIMONY**

Non-Party, Stephen A. Ives, hereby specially appears, objects, and moves the Court, pursuant to 12 Okla. Stat. § 2004.1, for an Order quashing the Subpoena for Deposition Testimony to a Non-Party issued by Plaintiff, State of Oklahoma, *ex rel.* Mike Hunter, Attorney General of

Oklahoma, to him on April 9, 2018.<sup>1</sup> In support of this Objection and Motion to Quash, Mr. Ives states the following.

### INTRODUCTION

Plaintiff has sued 13 Defendants that manufacture and sell prescription opioid drugs. Plaintiff alleges that the Defendants have engaged in deceptive marketing of the drugs and caused harm to Oklahomans by, among other things, downplaying or misrepresenting the addiction potential of opioid medications. Plaintiff asserts claims under the Oklahoma Medicaid False Claims Act, Oklahoma Medicaid Program Integrity Act, Oklahoma Consumer Protection Act, and state law claims for public nuisance, fraud, and unjust enrichment.

Mr. Ives is not a current or former employee or officer of any party. He is the President of Cheyenne Petroleum Company, an oil and gas company unaffiliated with the Defendants in this case. Prior to joining Cheyenne Petroleum, Mr. Ives served as a Certified Public Accountant (CPA) for Arthur Young & Company. Mr. Ives retains his CPA license and, from time to time, performs and oversees tax and accounting work for certain other entities. Some of these entities have partial common ownership with one of the Defendants.

Mr. Ives has no information relevant to the claims or defenses presented in this case and has not performed services, accounting or otherwise, for any of the Defendants in this case. Despite this lack of relevant knowledge, on April 9, 2018, Plaintiff issued a Subpoena for Deposition Testimony to a Non-Party (the "Subpoena", attached as Exhibit A) demanding the videotaped deposition of Mr. Ives on April 18, 2018. Plaintiff has not provided Mr. Ives with any notice or

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<sup>1</sup> Pursuant to § 2004.1(C), the filing of this Objection and Motion to Quash stays any enforcement of the Subpoena. In the abbreviated time given to respond to the Subpoena, the undersigned counsel attempted to confer with counsel for Plaintiff regarding the Motion to Quash, but as of this filing counsel were not able to confer.

explanation (apart from the Subpoena), either before or since the issuance of the subpoena, as to why his deposition is sought in the case.

Plaintiff's Subpoena should be quashed for two reasons, irrelevance and privilege. *First*, the Subpoena necessarily seeks irrelevant testimony because Mr. Ives has no knowledge of facts relevant to the claims and defenses asserted in this case. Further, any CPA-related work performed by Mr. Ives for entities that are not parties to this case is well beyond the scope of permissible discovery. *Second*, to the extent Plaintiff seeks to depose Mr. Ives in connection with work he does as a CPA, the Subpoena implicates the accountant-client privilege. Mr. Ives' clients do not waive this privilege, an independent and mandatory basis to quash the Subpoena—even assuming it sought relevant information (which it does not).

Because Plaintiff's Subpoena seeks testimony unrelated to the claims and defenses in this case and potentially privileged information, it should be quashed and Mr. Ives should not be required to sit for deposition.

### **ARGUMENT AND AUTHORITIES**

#### **A. Mr. Ives has no Relevant Knowledge to Offer in Discovery.**

When examining a subpoena issued to a non-party, the initial inquiry is to determine if the information sought is relevant to the subject matter of the litigation. *See Cannon v. Correctional Medical Care, Inc.*, 2017 WL 2790531 (N.D. N.Y. 2017) (motion to quash deposition subpoena granted given sound discretion of district court to determine whether party issuing subpoena demonstrated information sought was relevant to allegations and claims at issue in proceedings).<sup>2</sup>

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<sup>2</sup> Published Oklahoma decisions offer little guidance regarding the application and interpretation of Section 2004.1 of the Pleading Code. In these circumstances, Oklahoma Courts may—and often do—look to the Federal Rules, comments, and cases, for guidance. *Young v. Macy*, 2001 OK 4, ¶ 13, 21 P.3d at 44; *see also* The Introductory Committee Comment to the Oklahoma Pleading Code.

The purpose of a civil subpoena *duces tecum* or a subpoena *ad testificandum* (at issue here) is to compel the information or production of documents or things *relevant to a fact at issue* that is a part of a pending judicial proceeding. Wright & Miller, 9A FED. PRAC. & PROC. CIV. 3D §§ 2455, 2456 (2009). The Court must therefore examine the information sought in the Subpoena in light of the claims at issue in the current litigation. “[T]he party issuing the subpoena must demonstrate that the information sought is relevant and material to the allegations and claims at issue in the proceedings.” *Libaire v. Kaplan*, 760 F. Supp. 2d 288, 291 (E.D.N.Y. 2011).

Mr. Ives has no knowledge of facts relevant to this case. He is not a current or former employee of any Defendant or any of their parent or subsidiary entities. He has not performed services as a CPA or consultant for any of the Defendants. Mr. Ives currently serves as President of Cheyenne Petroleum, and has been an officer since 1981. His company does not have business dealings with any of the Defendants. Mr. Ives has no knowledge regarding the claims made in this case. For instance, he does not have any information about the Defendants’ marketing practices or the drugs they manufacture and sell. Nor does he have any knowledge about the Medicaid payments made by the State of Oklahoma to the Defendants (i.e., information related to the False Claims Act). Given this lack of relevant knowledge, his deposition would necessarily involve questioning regarding facts that are unrelated to the claims and defenses in this case.

Mr. Ives’ only conceivable connection to any of the parties in this case is that from time to time he performs and oversees tax and accounting work for certain entities only tangentially related to one group of the Defendant companies – a relationship due solely to partial common ownership. His accounting work never touches upon the operations of any Defendant. His accounting work does not provide him any relevant insight or knowledge into the business dealings of any Defendant. He simply can provide no insight into the facts that may support or defend against

potential liability and damages in this action. Questioning by Plaintiff regarding Mr. Ives' work as a CPA or advisor would be tantamount to inquiring about assets owned by a non-party, partial shareholder of one of the Defendants—an issue way beyond the permissible scope of prejudgment discovery. *See, e.g., Hope For Families & Cmty. Serv., Inc. v. Warren*, No. 3:06-CV-1113-WKW, 2009 WL 174970, at \*14 (M.D. Ala. Jan. 26, 2009) (“the extent of shareholders' holdings is quite another matter. Lucky Palace has failed to show that this private information about non-party shareholders is relevant in any sense.”).

Even assuming Mr. Ives' work as a CPA for non-party entities who share some common ownership with one Defendant were somehow relevant, there is no conceivable basis for believing Mr. Ives to be the proper deponent in this case. Rather, principals and employees of Defendants should be the source of relevant information regarding each Defendant's accounting and financial functions. Hence, assuming it were relevant and not subject to privilege (which, as explained below, it is), Mr. Ives' testimony is, at best, redundant and needlessly cumulative. *See Quinn v. City of Tulsa*, 1989 OK 112, 777 P.2d 1331, 1342 (stating that the scope of relevance should be “firmly applied” and holding that it was not error to deny discovery where the information requested from a non-party could have been obtained from a party in the case).<sup>3</sup>

Given the lack of relevant knowledge on the part of Mr. Ives, the Subpoena compelling his deposition testimony should be quashed.

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<sup>3</sup> Non-parties with no particular relationship to the case at issue are typically afforded deference and protection from courts in discovery. *See* § 22:9, *Enforcing Subpoenas and Non-Party Discovery*, *Fundamentals of Litigation Practice* § 22:9 (2017 ed.); *see also Laxalt v. McClatchy*, 116 F.R.D. 455, 458 (D. Nev. 1986) (“The standards for nonparty discovery, as stated above, require a stronger showing of relevance than for simple party discovery.”).

**B. The Subpoena Should be Quashed on the Basis of Accountant-Client Privilege.**

Mr. Ives is a CPA, and under Oklahoma law, his communications with clients are subject to the accountant-client privilege. Section 2004.1 states that a subpoena shall be quashed where it “requires disclosure of privileged or other protected matter and no exception or waiver applies”. 12 Okla. Stat. § 2004.1(C)(3)(a)(3).

The accountant-client privilege is set forth in 12 Okla. Stat. § 2502.1, which states that “[a] communication between an accountant and a client of the accountant is ‘confidential’ if not intended to be disclosed to third persons”. This privilege is *broad* and attaches not just to communications, but also to “**other confidential information obtained by the accountant from the client for the purpose of rendering accounting advice.**” *Id.* at 2502.1(A)-(B) (emphasis added). The accountant-client privilege belongs to the client, but can be asserted by the accountant on behalf of the client. *Id.* at 2502.1(C).

Communications and other information received by Mr. Ives in connection with his work as a CPA—the only conceivable subject matter upon which the Subpoena could be based—is subject to a privilege held by the individuals and/or entities for whom Mr. Ives performed work. He therefore cannot be compelled to testify in a deposition about that subject matter in the absence of some waiver or relinquishment of the privilege by his clients. Mr. Ives is not aware of any facts that would give rise to such a waiver and Plaintiff has not made any such assertion. Given the privilege issues implicated in a potential deposition of Mr. Ives, Plaintiff’s Subpoena should be quashed.

**CONCLUSION**

For the foregoing reasons, non-party Stephen A. Ives prays that the Subpoena compelling his deposition be quashed.

Respectfully Submitted,

**CONNER & WINTERS, LLP**



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*Attorneys for Non-Party Stephen A. Ives*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 17th day of April 2018, a true and correct copy of the within and foregoing document was emailed and mailed via first class mail, postage prepaid, addressed as follows:

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R. Richard Love, III



GREETINGS:

YOU ARE HEREBY COMMANDED on behalf of Plaintiff in the above-captioned case, to appear for oral deposition on April 18, 2018 at 9:00 a.m. at the law offices of Whitten Burrage at 512 N. Broadway, Suite 300, Oklahoma City, OK 73102. The deposition testimony will be reported by a duly authorized court reporter and certified videographer.

You are further advised that other parties to the action in which this subpoena has been issued have the right to be present at the time of such deposition.

This subpoena is authorized pursuant to 12 O.S. § 2004.1 and all parties to this case are being given notice of the issuance of this subpoena.

The provisions of 12 O.S. § 2004.1(C), relating to your protection as a person subject to a subpoena, and 12 O.S. § 2004.1(D) & (E), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

HEREOF FAIL NOT, UNDER PENALTY OF LAW.

DATED: April 9<sup>th</sup>, 2018.



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Oklahoma Session Law, 2010 O.S.L. 50, 2004.1 (c), (d), (e)

SECTION 2. AMENDATORY 12 O.S. 2001, Section 2004.1, as last amended by Section 5, Chapter 12, O.S.L. 2007 (12 O.S. Supp. 2009, Section 2004.1), is amended to read as follows:

Section 2004.1.

C. PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

1. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney, or both, in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney fee.

2. a. A person commanded to produce and permit inspection, copying, testing or sampling of designated books, papers, documents, electronically stored information or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

b. Subject to paragraph 2 of subsection D of this section, a person commanded to produce and permit inspection, copying, testing or sampling or any party may, within fourteen (14) days after service of the subpoena or before the time specified for compliance if such time is less than fourteen (14) days after service, serve written objection to inspection, ~~or~~ copying, testing or sampling of any or all of the designated materials or of the premises, or to producing electronically stored information in the form or forms requested. An objection that all or a portion of the requested material will or should be withheld on a claim that it is privileged or subject to protection as trial preparation materials shall be made within this time period and in accordance with subsection D of this section. If the objection is made by the witness, the witness shall serve the objection on all parties; if objection is made by a party, the party shall serve the objection on the witness and all other parties. If objection is made, the party serving the subpoena shall not be entitled to inspect, copy, test or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. For failure to object in a timely fashion, the court may assess reasonable costs and attorney fees or take any other action it deems proper; however, a privilege or the protection for trial preparation materials shall not be waived solely for a failure to timely object under this section. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

3. a. On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:

- (1) fails to allow reasonable time for compliance,
- (2) requires a person to travel to a place beyond the limits allowed under paragraph 3 of subsection A of this section,
- (3) requires disclosure of privileged or other protected matter and no exception or waiver applies,
- (4) subjects a person to undue burden, or
- (5) requires production of books, papers, documents or tangible things that fall outside the scope of discovery permitted by Section 3226 of this title.

b. If a subpoena:

- (1) requires disclosure of a trade secret or other confidential research, development, or commercial information, or
- (2) 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,

the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena. However, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

#### D. DUTIES IN RESPONDING TO SUBPOENA.

1. a. A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

b. If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena shall produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

c. A person responding to a subpoena is not required to produce the same electronically stored information in more than one form.

d. A person responding to a subpoena is not required to provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. If such showing is made, the court may order discovery from such sources if the requesting party shows good cause, considering the limitations of subparagraph c of

paragraph 2 of subsection B of Section 3226 of this title. The court may specify conditions for the discovery.

2. a. When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

b. If information is produced in response to a subpoena that is subject to a claim or privilege or of protection as trial preparation material, the person making the claim may notify any party that received the information of the claim and the basis for such claim. After being notified, a party shall promptly return, sequester, or destroy the specified information and any copies the party has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, such shall take reasonable steps to retrieve the information. The person who produced the information shall preserve the information until the claim is resolved. This mechanism is procedural only and does not alter the standards governing whether the information is privileged or subject to protection as trial preparation material or whether such privilege or protection has been waived.

#### E. CONTEMPT.

Failure by any person without adequate excuse to obey a subpoena served upon him or her may be deemed a contempt of the court from which the subpoena issued.