UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ZHAOYIN WANG Plaintiff, v. BETA PHARMA, INC., DON ZHANG, AND ZHEJIANG BETA PHARMA CO., LTD., Defendants.	Civil Action No. 3:14-cv-01790-VLB April 7, 2015

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' EMERGENCY MOTION TO QUASH SUBPOENA

On March 12, 2015, plaintiff served defendants with a Notice of Deposition and attached Subpoena Duces Tecum, to depose Teplitzky & Company, defendants' accounting firm in Woodbridge, Connecticut, on March 30, 2015. On March 18, plaintiff served the Subpoena Duces Tecum on Teplitzky, requiring it to attend the deposition and to produce documents[1]. The Teplitzky firm designated John Anastasio, CPA, to respond to the subpoena and testify. He requested a postponement until after "tax season." Also, defendants sought an opportunity

[1] After they received the Notice of Deposition, defendants immediately filed their "Emergency Motion for Entry of Protective Order for Motion to Disqualify Counsel", [Docket Entry 49] announcing for the first time in this case (after they removed the case to Federal Court and defended it aggressively for four months), that they were contemplating filing a Motion to Disqualify undersigned counsel. Plaintiff objected to the "emergency" aspect of the motion. Docket Entry 50. Plaintiffs' response to the Motion for Protective Order is due April 10, but is being filed simultaneously herewith.

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to review the Teplitzky records for potential designation under this Court's Standing Protective Order, Docket Entry 10, and for review for any applicable privileges. After communication among counsel and Mr. Anastasio, the witness provided three dates acceptable to him, namely, May 19, 20 and 21. Defense counsel declined an opportunity to choose one of the three dates. Undersigned counsel then rescheduled the deposition by agreement with the witness for May 20, 2015. Undersigned notified defense counsel of this on March 26. The agreed postponement gave the defense approximately eight weeks to conduct its privilege review.

On March 27, 2015, one day after defendants were notified of the agreed new date, defendants filed an "Emergency Motion to Stay Proceedings", Docket Entry 55, and an "Emergency Motion to Quash Subpoena," Docket Entry 56, both seeking to preclude the Teplitzky-Anastasio deposition. Defendants again asserted their intention to file a Motion to Disqualify after they obtained their emergency protective order. This Court denied the Motion to Stay on March 30, 2015.

Plaintiff now opposes the "Emergency Motion to Quash Subpoena." The Motion to Quash does not seek relief on any of the grounds permitted in F. R. Civ. P. 45 (d) (3), and is unripe because it seeks relief based on a hypothetical series of events that have not occurred and may not occur. For these reasons, it should be denied and the deposition should proceed as noticed.

a. **The Motion to Quash Does Not Seek Relief on Any of the Grounds Permitted in Fed.R.Civ.P. 45 (d) (3).**

Defendants' Motion to Quash does not assert any of the permissible reasons for moving to quash or modify a subpoena under Federal Rule of Civil Procedure 45 (d) (3). Indeed their recitation of facts surrounding issuance of the subpoena, Defendants' Memorandum, at pages 10-11, Docket Entry 56-1, pages 10 and 11, expressly refutes most of the wide range of grounds within the scope of Rule 45 (d) (3). Defendants indicate that the deposition is now rescheduled to occur, by agreement, at a time and date chosen by the witness, about seven weeks from now. Defendants will thus have a full opportunity to review the subpoenaed accounting and tax records, to designate the records as "confidential" or "attorney's eyes only" under this Court's Standing Protective Order, Docket Entry 10, and to assert any applicable privileges. Defendants do not claim that the subpoenaed materials involve trade secrets, or the opinions of undisclosed and unretained experts. Defendants do not seek any modification of the subpoena. Indeed, defendants' sole basis for moving to quash is because they—not the witness—will suffer an "undue burden" from having to turn over discovery materials to an allegedly "conflicted lawyer." However, Rule 45 (d) (3) (A), setting forth required grounds under which a district court "must quash or modify a subpoena" contains no such basis, and defendants have cited no authority to support their request for relief.

The Teplitzky documents (including Beta Pharma's and Dr. Zhang's tax returns, financial statements and audit materials) and Mr. Anastasio's testimony are centrally relevant to both liability and damages in this case. The "Partnership

Offering to Dr. Zhaoyin Wang by Betapharma, Inc.", copy attached to the Complaint, provides that Dr. Wang will be entitled to annual increases in his shares of Beta Pharma at "10 to 25% rate based on company operation and financial situation." The company's financial statements and tax returns are the best record of changes in its financial situation from year to year. Pursuant to the Partnership Offering, plaintiff and defendant Zhang, individually, formed Beta Pharma Canada. Paragraph 10 of the Second Count of the complaint alleges that Dr. Zhang comingled BP corporate assets and individual assets, and upon information and belief, Zhang used Beta Pharma corporate capital to create and fund BP Canada, an asset he held in his individual name. As a result, his own returns are relevant, as are any adjusting entries between Beta Pharma's books and Dr. Zhang's personal books. Additionally, defendant Zhang represented to plaintiff that Beta Pharma's serious tax problems and tax audits excused his and Beta Pharma's failure to honor the financial terms of the partnership agreement. Defendants thus cannot contend that the Teplitzky documents are irrelevant and not likely to lead to the discovery of relevant or admissible evidence. They do not seek to quash the subpoena on this basis.

b. Defendants' Motion to Quash is Unripe Because it is Based on Hypothetical and Speculative Events that May Never Occur.

Defendants' Motion to Quash asserts that the subpoena should be quashed in anticipation of a hypothetical sequence of events that have not occurred and may never occur. These include: (a) that defendants will prevail on their Emergency Motion for Protective Order, Docket Entry 49; (b) that after they obtain the Protective Order they will at some point file a Motion to Disqualify, supported

by otherwise attorney-client privileged documents authored by Attorney Lance Liu and published for the limited and temporary purpose of supporting the Motion to Disqualify; (c) that they will succeed in disqualifying undersigned counsel; and (d) that plaintiff will retain new counsel who will perhaps then be permitted to take the deposition of John Anastasio at Teplitzky & Co. This chain of events is hypothetical and speculative and should not serve as a basis to quash a scheduled deposition – particularly in view of this Court's order denying defendants' request to stay discovery.

Moreover, the contingent nature of defendants' announced course of future conduct is emphasized in their own "Emergency Motion for Entry of Protective Order for Motion to Disqualify Counsel", in which they write, "Prompt action is necessary because *Defendants cannot file their Motion to Disqualify, and the Memorandum and exhibits supporting it, until the Protective Order is issued enabling them to file the documents discussed above without risking waiver of their privileges.*" Document 49, Page 11. The clear implication of their language is that if the protective order is denied, they will not move to disqualify.

Defendants cite no case in which a Motion to Quash is granted in anticipation of the possibility that defendants might in the future file a Motion to Disqualify. In the present posture, defendants' motion to quash is premature and unripe, and should be denied.

c. **Defendants are not entitled to the protective order they are seeking because it violates long-established judicial principles controlling assertion and waiver of the attorney-client privilege.**

Defendants assert that the subpoena should be quashed because they have moved for the entry of a protective order which would permit them to submit attorney-client privileged documents to this Court, without thereby waiving the attorney client privilege, to support their contemplated Motion to Disqualify. They describe their proposed order as follows:

> Defendants intend to submit for the Court's consideration, as exhibits supporting that Motion [to Disqualify], certain documents that contain their confidential and privileged information. The Proposed Order will avoid any waiver of their privileges with respect to such information, and prevent Defendants' privileged information from being used against them in the litigation of this case's merits.

"Emergency Motion for Entry of Protective Order", Document 49 at 2.

But defendants are not entitled to the protective order they have moved for because their position violates Federal Rules of Evidence 502 (a) and (d), and settled law governing waiver of the attorney-client privilege which provides that the privilege may be asserted, or it may be waived, but may not be selectively or partially waived for the purpose of gaining unfair tactical advantage in litigation. Defendants' proposal is precisely the type of "strategic and manipulative use of the attorney-client privilege and work product doctrine [that] has been explicitly rejected by the Second Circuit." Gruss v. Zwirn, No. 09 CIV. 6441, 2013 WL 3481350 *11 (S.D.N.Y. July 10, 2013) (citing In Re Steinhardt Partners, L.P., 9 F.3d 230, 235 (2d Cir. 1993)).[2] As the Steinhardt court observed, "selective assertion of

[2] The Gruss court also recognized that there are "numerous" reasons "to reject selective, manipulative and strategic use of evidentiary privileges," including the

privilege should not be merely another brush on an attorney's palette, utilized and manipulated to gain tactical or strategic advantage." Id. Fundamental principles of attorney-client privilege law establish that a party which deliberately publishes attorney-client privileged documents in evidence waives the privilege as to both the published documents and as to all other privileged documents connected with that subject matter. Accordingly, "[s]ubject matter waiver is reserved for the rare case where a party either places privileged information affirmatively at issue, or attempts to use privileged information as both a sword and a shield in litigation." See Freedman v. Weatherford International Ltd., No 12Civ.2121, 2014 WL 3767034 at *3 (citing Favors v. Cuomo, 285 F.R.D. 187, 198-99 (E.D.N.Y. 2012); Shinnecock Indian Nation v. Kempthorne, 652 F.Supp.2d 345, 365-66 (E.D.N.Y. 2009)). See also Nolan v. City of Yonkers, No. 92 CIV 6067, 1996 WL 120685 (S.D.N.Y. March 19, 1996) ("The Second Circuit has stated that because the subject matter waiver rests on these fairness considerations, it 'has been invoked most often where the privilege-holder has attempted to use the privilege as both "a sword" and "a shield" or where the attacking party has been prejudiced at trial.'") (quoting In re Von Bulow, 828 F.2d 94, 103 (2d Cir. 1987)).

Defendants cite no case law in support of their Motion for Protective Order. Without authority, they seek to justify their position by relying on Federal Rule of Evidence 502 (d). Rule 502(d) is intended to apply to inadvertent disclosures of privileged information during exchange of discovery – not to voluntary, selective

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fact that "because all evidentiary privileges impede the truth-finding process, they must be narrowly construed." Id. at *11.

disclosures under Rule 502(a). See, e.g. Jeanbaptiste v. Wells Fargo Bank, N.A., Civil No., 3:14 CV 0264, 2014 WL 6790737 (N.D.Tex. Dec. 1, 2014) (holding that ". . . the cases that have interpreted Rule 502 in the discovery context also note that Rule 502(d) protects parties against 'inadvertent' disclosure of privileged information."); Hostetler v. Dillard, No. 3:13cv351, 2014 WL 6871262 (S.D.Miss. Dec. 3, 2014) (noting that "[a]lthough Fed.R.Evid. 502(d) is not expressly limited to unintentional disclosures, the purpose and intent of Rule 502 is to protect litigants from inadvertent disclosures.").

Plaintiff files simultaneously herewith his Substantive Memorandum in Opposition to Defendants' Emergency Motion for Entry of Protective Order for Motion to Disqualify Counsel, Docket Entry 49, and incorporates by reference the detailed arguments in opposition to the entry of that order.

Defendants have never asserted that they will deliberately waive their attorney-client privilege in order to file a Motion to Disqualify. On the contrary, they've said that they will file their Motion to Disqualify only if they can do so while preserving their attorney-client privilege. Therefore, defendants' expressed intention to move to disqualify plaintiff's counsel is hypothetical and speculative and does not justify or require quashing the Teplitzky subpoena.

d. The Record Demonstrates that Defendants' Emergency Motion is Likely Infected by Ulterior Motive.

This is the second "Emergency Motion" defendants have filed in an effort to block discovery of defendants' Federal tax records.[3] In addition to being relevant, as argued above, defendants' tax records may well be prejudicial to them because those records may disclose that defendants have failed to comply with applicable United States tax laws. In an email communication to plaintiff, defendant Zhang admitted that Beta Pharma was under audit and that he was concerned about criminal penalties. He wrote:

> As managers of U.S. corporation, as long as stay outside of jails, we are under restricted tightly by the IRS laws and enforced to handle every transaction and report everything (even small transactions) to the IRS. And though stay outside of jail, cash penalty is pretty sever [sic] sometimes from the IRS and Jirong and Gary are handling penalty payments for our company for those wrong transactions related with those deals.

Email Communication, Don Zhang to Zhaoyin Wang, May 14, 2014, set forth in full and in context in Docket Entry 51 at 2. Defendant Zhang's admissions provide a strong inference that the present Motion to Quash and defendants' threatened Motion to Disqualify constitutes a litigation tactic intended to block discovery of Zhang and Beta Pharma's potentially incriminating tax documents.

For the foregoing reasons, plaintiff respectfully submits that defendants'

[3] The first is the "Emergency Motion to Stay Proceedings Pending Disposition of Defendants' Motion to Disqualify Opposing Counsel", Docket Entry 55, denied by this Court on March 30, 2015. This Court has now twice ordered discovery to proceed in this matter (Docket Entries 23 and 57).

Emergency Motion to Quash Subpoena should be denied.

PLAINTIFF ZHAOYIN WANG,

By: /s/

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CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2015, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

/s/

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