IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

K.S., Plaintiff, v. DETROIT PUBLIC SCHOOLS, CHARLES PUGH, ROY ROBERTS, ROBERT BOBB, BERRY GREER, and MONIQUE MCMURTRY, Defendants.	Case No.: 14-cv-12214 Hon: David M. Lawson

MOTION OF NON-PARTY ROSS JONES TO QUASH SUBPOENA, OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER

Non-party Ross Jones ("Jones") hereby moves for an order quashing the subpoena for testimony served upon him in this matter, or in the alternative for a protective order. The bases for this motion are set forth in the attached brief.

Concurrence in the relief sought was requested on October 19, 2015 but could not be obtained. Jones requests oral argument on the issues discussed herein.

Dated: October 19, 2015

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ AND COHN LLP

/s/James E. Stewart

James E. Stewart (P23254)
Sarah E. Waidelich (admitted in New York)
315 E. Eisenhower Parkway, Suite 100
Ann Arbor, MI 48108
Tel: (734) 418-4200
Fax: (734) 418-4201
jstewart@honigman.com
swaidelich@honigman.com

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN

K.S., Plaintiff, v. DETROIT PUBLIC SCHOOLS, CHARLES PUGH, ROY ROBERTS, ROBERT BOBB, BERRY GREER, and MONIQUE MCMURTRY, Defendants.	Case No.: 14-cv-12214 Hon: David M. Lawson

BRIEF IN SUPPORT OF MOTION OF NON-PARTY ROSS JONES TO QUASH SUBPOENA, OR IN THE ALTERNATIVE FOR A PROTECTIVE ORDER

TABLE OF CONTENTS

I. INTRODUCTION 5

II. ARGUMENT 6

III. IN THE ALTERNATIVE, THE COURT SHOULD ENTER A PROTECTIVE ORDER FOR JONES' VOLUNTARILY APPEARANCE AT TRIAL 9

IV. CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

CASES

Brooks v. Charter Township of Clinton, No. 12-cv-12880,
No. 12-cv-12880, 2014 WL 1304624 7

Comm-Tract Corp. v. Northern Telecom, Inc.,
168 F.R.D. 4, 7 (D. Mass. 1996) 7

Daimler Chrysler AG Securities Litigation,
216 F.R.D. 395, 397,402-406 (E.D. Mich. 2003) 7, 8, 9

E.E.O.C. v. Ford Motor Credit Co.,
26 F.3d 44, 47 (6th Cir. 1994) 8

Hansen Beverage Co. v. Innovation Ventures, LLC,
No. 09-50630, 2009 WL 2351769 8

Hansen Beverage,
2009 WL 1543451 9

Yukos Hydrocarbons Investments Ltd.,
No. 5:09-mc-0078, 2009 WL 5216951 7

RULES

FED. R. CIV. P. 45 ..... 6, 7, 8, 9

ISSUE PRESENTED

Whether the non-party professional journalist who has relocated more than 100 miles from the federal courthouse in Detroit should be required to provide trial testimony subject to plaintiff's subpoena, where the proposed testimony would be cumulative and duplicative of other testimony to be proffered at trial, or whether, in the alternative, the court should enter a protective order limiting the circumstances in which the journalist must testify and the scope thereof.

I. INTRODUCTION

Non-party Ross Jones ("Jones") is a professional journalist who now lives and works for The E.W. Scripps Company ("Scripps") in the District of Columbia. Before relocating from Detroit around October 1st of this year, Jones was employed by WXYZ-TV, a subsidiary of Scripps and an affiliate of the ABC Network that is also known as Channel 7 in Detroit ("WXYZ"). As such, he was one of the many journalists who covered the bizarre events that led to the filing of this case. Despite the lengthy pendency of this case, it was only several days before Jones left Detroit that Plaintiff served him with a subpoena to testify at trial. This, despite Plaintiff's knowledge that Jones would not be living or working in Detroit at the time of trial.

During the course of the events giving rise to this litigation, Jones – in his role as a reporter for WXYZ – was present for a telephone conversation between Defendant Charles Pugh ("Pugh") and Plaintiff's mother. As Jones and his counsel understand things, Plaintiff seeks Jones' testimony to confirm the testimony of Plaintiff's mother as to what Pugh said to her during this conversation. Plaintiff also seeks that Jones authenticate a video on the WXYZ web site of Jones' interview of Pugh in New York in May 2014. Neither of these is a valid basis to disrupt Jones' life, especially in these circumstances. Any testimony about Pugh's statements on the telephone call with Plaintiff's mother would be cumulative of the

mother's testimony, and, if and when Pugh testifies he may well concede the conversation and confirm the mother's testimony himself. Additionally, a local WXYZ representative can testify competently to authenticate the New York interview tape posted on the WXYZ site. For at least these reasons, the subpoena should be quashed pursuant to Federal Rule of Civil Procedure 45.

Alternatively, Jones seeks the court's protection from unnecessary disruption to his life by an order that the court will consider whether Jones must testify only after hearing the testimony of Plaintiff's mother and Pugh, and will limit the scope of any such testimony accordingly.

II. ARGUMENT

Courts have long known that special concerns arise when a litigant issues a subpoena to the press seeking testimony regarding that news organization's newsgathering efforts. Thus, courts often acknowledge that special protections should accordingly apply in those circumstances. "Given the important role that newsgathering plays in a free society, courts must be vigilant against attempts by civil litigants to turn non-party journalists or newspapers into their private

discovery agents." *In re DaimlerChrysler AG Securities Litigation*, 216 F.R.D. 395, 406 (E.D. Mich. 2003).[1]

Plaintiff cannot meet its burden to show that Jones should be compelled to testify at trial in Detroit.[2, 3] Federal Rule of Civil Procedure 45 sets forth the circumstances in which discovery may be limited or precluded. It provides in relevant part that a court "must quash or modify" a subpoena that "subjects a

---

1 In *DaimlerChrysler*, Magistrate Whalen quashed a discovery subpoena issued to a professional journalist based not on any reporters' privilege but on the inherent power of the court under the Federal Rules to protect the witness. *See, e.g.*, *DaimlerChrysler*, 216 F.R.D. at 397. However, his analysis under Rule 26 is equally applicable to the Rule 45 analysis here.

2 The subpoena to testify in Detroit violates a basic provision of the Federal Rules of Civil Procedure: a subpoena may command a person to attend a trial ***only*** "within 100 miles of where the person resides, is employed, or regularly transacts business in person." Fed. R. Civ. P. 45(c)(1)(A). As mentioned above, Jones no longer resides, is employed, or regularly transacts business within 100 miles of the federal courthouse in Detroit. As the Court is aware, Washington, D.C. is located approximately 500 miles from Detroit, Michigan. As such, the only proper mechanism for plaintiff to take Jones' testimony is a *de bene esse* deposition in the District of Columbia.

3 It is of no moment that Jones was served with the subpoena while present in Detroit. Courts have routinely held that the time frame for judging whether a witness must travel more than 100 miles is the time when the witness is to ***appear***, not the time when he is served. *E.g.*, *Comm-Tract Corp. v. Northern Telecom, Inc.*, 168 F.R.D. 4, 7 (D. Mass. 1996); *In re Application of Yukos Hydrocarbons Investments Ltd.*, No. 5:09-mc-0078, 2009 WL 5216951, at *4-6 (N.D.N.Y. Dec. 30, 2009); *Brooks v. Charter Township of Clinton*, No. 12-cv-12880, 2014 WL 1304624, at *2-4 (E.D. Mich. Mar. 31, 2014) (declining to quash the subpoena only where the move appeared to be a sham to avoid the subpoena). There are no allegations that Jones' relocation to D.C. was a sham motivated by a desire to avoid the subpoena. Indeed, Jones' relocation was arranged prior to his being served with the subpoena.

person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). In making this determination, the court must weigh the relevance of the requested material against the burden of producing the material. *E.E.O.C. v. Ford Motor Credit Co.*, 26 F.3d 44, 47 (6th Cir. 1994). Non-party status is a significant factor to be weighed in an undue burden analysis. *E.g.*, *Hansen Beverage Co. v. Innovation Ventures, LLC*, No. 09-50630, 2009 WL 2351769, at *2 (E.D. Mich. July 28, 2009). In addition, courts in this District have admonished that inquiries under Rule 26(b)(2) "must also take [the witness's] status as news-gatherers into account." *DaimlerChrysler*, 216 F.R.D. at 403.[4]

Requiring Jones to testify to the conversation between Plaintiff's mother and Pugh would subject him to an undue burden under Rule 45 because this testimony is, by definition, cumulative and duplicative. Plaintiff's mother was the person communicating with Pugh during the phone call. She can testify firsthand to the conversation she had with Pugh; and Plaintiff's attorney has indicated his intent to call her as a witness in this matter. Any testimony offered by Jones on this conversation between Plaintiff's mother and Pugh would necessarily be duplicative of Plaintiff's mother's testimony on the same topic. Moreover, Pugh himself may

---

4 As mentioned in footnote 1, *supra*, this reasoning is equally applicable to Rule 45 trial subpoenas.

very well confirm Plaintiff's mother's testimony, if and when he testifies in this case. Because cumulative, duplicative testimony is disfavored, particularly when sought from members of the press, Plaintiff's subpoena should be quashed. *See, e.g.*, *Daimler Chrysler*, 216 F.R.D. at 402-06; *see also Hansen Beverage*, 2009 WL 1543451, at *2 ("Obtaining information available by less-obtrusive means is preferable to involving a non-party").

Moreover, Jones is not needed to authenticate the video of his interview of Pugh that is posted to the WXYZ website. As an initial matter, the authenticity of this video should be able to be agreed upon by the parties, thus sparing the jury unnecessary testimony. But even if an agreement between the parties is not possible, a local WXYZ representative can authenticate the video and spare Jones the substantial disruption to his life.

For at least the reasons discussed above, the subpoena to testify at trial should be quashed.

III. IN THE ALTERNATIVE, THE COURT SHOULD ENTER A PROTECTIVE ORDER FOR JONES' VOLUNTARILY APPEARANCE AT TRIAL

Should this Court decline to quash the subpoena, at the very least Jones requests that this Court enter a protective order under Federal Rule of Civil Procedure 45(d). Jones will be subjected to a significant burden if required to

testify, and should not be required to do so unless absolutely necessary. This court and the parties do not now know whether Jones' testimony will be necessary; such necessity will depend on Plaintiff's mother's testimony regarding the call with Pugh. In addition, Pugh may very well confirm Plaintiff's mother's account of the call, further rendering Jones' testimony unnecessary.

Plaintiff will likely argue that he cannot make the decision to call Jones during trial and then inconvenience everyone by stopping trial to go to the District of Columbia to take Jones' deposition. Jones' counsel understands this and has been working with Plaintiff's counsel in a collegial manner to attempt to resolve this issue. Jones believes that the Court's protection of him in the event he does have to testify is very important due to the highly charged atmosphere of this case. Jones has very serious concerns that the parties will not limit themselves to the issues identified but will attempt a full scale and completely unnecessary foray into all of Jones' newsgathering efforts and sources. Because Jones does not wish to inconvenience the Court and jury, if the court does not feel it can quash the subpoena at this time, Jones requests that the court consider whether he must testify and the proper scope of any such testimony only after the Court has the benefit of the testimony of plaintiff's mother and Pugh. If the Court rules at that time that Jones must testify, Jones will agree to come to Detroit to testify rather

than put the parties, the court, and the jurors through the inconvenience of a deposition in the District of Columbia.

IV. CONCLUSION

For the reasons set forth herein, non-party Jones respectfully requests that the Court quash the subpoena to testify or, in the alternative, to issue a protective order as requested above.

Dated: October 19, 2015

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ
AND COHN LLP

/s/ James E. Stewart

James E. Stewart (P23254)
Sarah E. Waidelich (admitted in New York)
315 E. Eisenhower Parkway, Suite 100
Ann Arbor, MI 48108
Tel: (734) 418-4200
Fax: (734) 418-4201
jstewart@honigman.com
swaidelich@honigman.com

CERTIFICATE OF SERVICE

This is to certify that on October 19, 2015, a copy of the foregoing was electronically filed with the Clerk of the Court using the ECF system which will send notification of such filing to the attorneys of record.

Respectfully submitted,

HONIGMAN MILLER SCHWARTZ
AND COHN LLP

/s/ James E. Stewart
James E. Stewart (P23254)
Sarah E. Waidelich (admitted in New York)
315 E. Eisenhower Parkway, Suite 100
Ann Arbor, MI 48108
Tel: (734) 418-4200
Fax: (734) 418-4201
jstewart@honigman.com
swaidelich@honigman.com