IN THE COURT OF COMMON PLEAS
SUMMIT COUNTY, OHIO

MEMBER WILLIAMS, et al.,

Plaintiffs,

v.

KISLING, NESTICO & REDICK, LLC, et al.,

Defendants.

Case No. CV-2016-09-3928

Judge James Brogan

Defendant Sam Ghoubrial, M.D.'s Reply to Plaintiffs' Response to Motion to Quash Subpoena

Defendant Sam Ghoubrial, M.D. ("Dr. Ghoubrial") hereby replies to Plaintiffs' Response of May 24, 2024 (the "Response") to his Motion to Quash.

In the Motion to Quash, Dr. Ghoubrial correctly argued that Plaintiffs improperly sought to compel testimony or documentary production from a party, through the use of a Civ.R. 45 subpoena. In the Response, Plaintiffs admit that they attempted to subpoena Dr. Ghoubrial. Plaintiffs attempt to justify their improper subpoena by *correctly* identifying the *prohibition*, found in Civ.R. 45(A)(1)(c), on the use of a subpoena to obtain information from a party in discovery. *See* Response, Page 1. Plaintiffs then speciously suggest that Dr. Ghoubrial's documents and testimony are not "discovery." *See id.*, Page 3. In reality, the material described in the improper subpoena presented to Dr. Ghoubrial self-evidently consists of discovery matters. *See, e.g.*, *Shire LLC v. Mylan Pharms, Inc.*, N.D. W. Va. No. 1:11cv55; 1:11cv201, 2013 U.S. Dist. LEXIS 5569 (Jan. 14, 2013) (Courts have generally found that Rule 45 subpoenas fit into the definition of discovery).

Also in the Response, Plaintiffs substantially admit that they require additional fact discovery to advance their claim: that spousal privilege should not apply to certain contested

deposition testimony of Dr. Ghoubrial's wife. *See* Response, Pages 2-3 ("Thus, Plaintiffs must be allowed to question Sam Ghoubrial regarding the extent to which any of his allegedly privileged communications or acts were made or done in the presence of a third party…"). Plaintiffs thereby defeat their own position in support of the subpoena, considering the deadline for fact discovery in this case has long past. "A subpoena used for discovery (as opposed to trial appearance) is subject to the discovery deadline relevant to the party issuing the subpoena and can be quashed where it is filed after the deadline." *Hanick v. Ferrara*, 2020-Ohio-5019, 161 N.E.3d 1, ¶ 66 (citing *inter alia McWreath v. Cortland Bank*, 11th Dist. Trumbull No. 2010-T-0023, 2012-Ohio-3013, ¶ 95).

Ohio law plainly forbids the use of a subpoena to extract discovery from a party, and the self-described subpoena improperly served to Dr. Ghoubrial must therefore be quashed. *Wells v. Wells*, 9th Dist. Summit No. 25557, 2012-Ohio-1392, ¶ 53 ("Civ.R. 45(A) provides that 'a subpoena may not be used to obtain *** the production of documents by a party in discovery'"). Furthermore, the discovery attempt is untimely. The Response does not cite to any precedent that permits Plaintiffs to pursue their apparent strategy, which is to construe this Court's April 19, 2024 Order as a mandate for Dr. Ghoubrial to appear and provide testimony. Plaintiffs' dubious and intentional misinterpretation of this Court's Order must be rejected, and Dr. Ghoubrial's well-reasoned Motion to Quash must be granted – including his request for the costs of filing and defending the Motion to Quash. This Court has access to the disputed testimony, and it is fully equipped to rule on the arguments of counsel, as presented at the forthcoming hearing.

Respectfully submitted,

/s/ Bradley J. Barmen
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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing was filed electronically and will be served upon all parties by operation of the Court's e-filing system on this 31st day of May, 2024.

/s/ *Bradley J. Barmen*
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