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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, et al., Plaintiffs, v. ORACLE CORPORATION, Defendant.	CASE NO. C 04-0807 VRW Filed: June 10, 2004 Hearing Date: TBA **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO CAPGEMINI'S MOTION TO QUASH THE UNITED STATES OF AMERICA'S SUBPOENA FOR TESTIMONY DIRECTED TO LYNN E. ANDERSON**

INTRODUCTION

CapGemini, Ernst & Young U.S. LLC ("CGEY") is petitioning this Court to quash a subpoena duly served upon Lynn Anderson, Vice President of Technology Services, CGEY, because she was deposed during discovery and a videotape of her deposition is available. CGEY's motion should be denied because CGEY fails to meet its burden under Rule 45 to quash a subpoena. CGEY has not demonstrated why Ms. Anderson's situation is materially different from any other witness listed to appear live in this matter. Moreover, CGEY's motion is deficient and untimely.

The testimony of Ms. Anderson will assist the Court's ultimate decision in this matter. Ms. Anderson will provide unique testimony unavailable from any other witness in this matter. By proffering Ms. Anderson's testimony live in court, the Court will more readily be able to assess Ms. Anderson's demeanor and veracity. This is consistent with the federal courts' strong preference for receiving

testimony live and in open court before the finder of fact. Additionally, Ms. Anderson's live appearance will provide the Court the opportunity to question the witness directly, if the Court chooses to do so.

JURISDICTION

This Court has jurisdiction over CGEY's motion to quash by virtue of the subpoena *ad testificandum* issued out of this Court pursuant to 15 U.S.C. § 23 and the Case Management Order ("CMO"). *See* CMO ¶ 12 (3/15/04). Section 23 of Title 15 states:

> In any suit, action, or proceeding brought by or on behalf of the United States subpoenas for witnesses who are required to attend a court of the United States in any judicial district in any case, civil or criminal, arising under the antitrust laws may run into any other district: Provided, That in civil cases no writ of subpoena shall issue for witnesses living out of the district in which the court is held at a greater distance than one hundred miles from the place of holding the same without the permission of the trial court being first had upon proper application and cause shown.

15 U.S.C. § 23. Prior approval, as required by the second sentence of Section 23, was granted by the Court on March 15, 2003. *See* CMO ¶ 12 (3/15/04) ("Good cause having been shown in view of the geographic dispersion of potential witnesses in this action, the parties are permitted, pursuant to 15 U.S.C. § 23, to issue trial subpoenas that may run into any other federal district requiring witnesses to attend this Court.").

STATEMENT OF FACTS

On September 23, 2003, the United States issued Civil Investigative Demand ("CID") 22580 on CGEY, pursuant to the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314. The CID required oral testimony from a Fed. R. Civ. P. 30(b)(6) designee. Over four months later, in lieu of testifying in compliance with CID 22580, CGEY provided a twenty-three page declaration of Ms. Anderson on February 4, 2004.

On May 6, 2004, Plaintiffs noticed the discovery deposition of and served a subpoena on Ms. Anderson for May 13, 2004. The deposition exclusively covered topics presented in Ms. Anderson's February 4, 2004 Declaration.

On May 6, 2004, Defendant noticed the discovery deposition of and served a subpoena on Ms. Anderson for May 14, 2004. Again, the deposition covered topics presented in Ms. Anderson's Declaration. At the beginning and end of Ms. Anderson depositions, CGEY's counsel stated that it would oppose any effort to call Ms. Anderson to testify at trial.

On May 21, 2004, Plaintiffs served a trial subpoena on Ms. Anderson pursuant to the Court's order allowing nationwide service under 15 U.S.C. § 23. The subpoena required Ms. Anderson's attendance at trial beginning on June 7, 2004. The cover-letter accompanying the subpoena noted that trial was to begin on June 7, 2004 and that Ms. Anderson was likely to testify within the first two weeks of trial. Pursuant to Rule 45(a)(1)(D), the subpoena "set forth the text of subdivisions (c) and (d)" of Rule 45 which warn subpoenaed persons that they may "timely" move to quash or modify the subpoena.

With full knowledge that CGEY had previously stated its intent to oppose the subpoena, Plaintiffs repeatedly requested during telephone conversations that CGEY respond quickly to the subpoena so that its motion would not interfere with the Court's and the parties' tight trial schedule.

Trial opened on June 7, 2004. CGEY moved to quash the subpoena on June 8, 2004. CGEY argues that the Plaintiffs have not demonstrated adequate "cause" under 15 U.S.C. § 23, and that edited portions of Ms. Anderson's videotaped deposition will fulfill the Court's need for her testimony.

ARGUMENT

CGEY's motion should be denied because: (1) it has not attempted to meet its burden under Rule 45; (2) it cannot meet its Rule 45 burden to quash the subpoena; (3) there is a strong preference for live testimony; (4) the parties have established "cause" under 15 U.S.C. § 23 for permitting nationwide service upon trial witnesses; (5) Ms. Anderson will not be subjected to any "undue hardship;" and (6) its motion was untimely.

I. CGEY Does Not Meet Rule 45's Threshold Requirement for Quashing a Subpoena

Subpoenas issued and served pursuant to Rule 45 and 15 U.S.C. § 23 may be challenged under Rule 45, in the same manner as any subpoena issued on a non-party in a civil action. *See In re Fish & Neave*, 519 F.2d 116, 118 (8th Cir. 1975) (holding non-parties in contempt under Rule 45(e) when they violated a subpoena issued under 15 U.S.C. § 23 and Rule 45); *cf. United States v. IBM*,

90 F.R.D. 377, 380-82 (S.D.N.Y. 1981) (discussing interplay of 15 U.S.C. § 23 and Rules 26, 32 & 45; applying all four).

A. The Burden of Proof is on CGEY to Quash the Subpoena

CGEY incorrectly asserts that Plaintiffs have the burden of proof to enforce the subpoena and to demonstrate that Ms. Anderson's declaration and videotaped deposition are not sufficient for trial purposes. *See* CGEY's Mot. at 3:9 & 3:19-22 ("[T]he United States simply has not shown and cannot demonstrate . . . ."). However, "the party seeking to quash a subpoena bears a heavy burden of proof . . . ." *Irons v. Karceski,* 74 F.3d 1262, 1264 (D.C. Cir. 1995); *see Diamond State Ins. Corp. v. Rebel Oil Co.*, 157 F.R.D. 691, 698-700 (D. Nev. 1994) (placing burden on movant under Rule 45(c)(3)(A)(iv)); 9 *Moore's Federal Practice* § 45.04[3][a] (Supp. 2003). CGEY improperly attempts to place the burden on the Plaintiffs, when the burden is clearly CGEY's and, having failed to provide any justification for quashing the subpoena under the enumerated list provided in Rule 45(c)(3), CGEY cannot meet that burden.

B. CGEY Has Not Met Any of Rule 45's Requirements for Quashing a Subpoena

Rule 45(c)(3) provides the exclusive mechanism in the rules for quashing non-party subpoenas. *See Continental Coatings Corp. v. Metco, Inc.* 50 F.R.D. 382, 384 (N.D. Ill. 1970) (holding other rules inapplicable when Rule 45 is exclusive mechanism for non-party subpoenas). CGEY does not contend that the subpoena should be quashed under Rule 45(c)(3), nor does it allege sufficient facts in its memorandum to satisfy Rule 45(c)(3)'s standard. CGEY's motion should, therefore, be denied.

A subpoena *must* be modified or quashed under Rule 45(c)(3)(A) when it: (i) "fails to allow reasonable time for compliance;" (iii) requires the disclosure of privileged information; or (iv) subjects the witness to "undue burden." *See* Fed. R. Civ. P. 45(c)(3)(A)(i), (iii) & (iv).[1] The trial subpoena issued for Ms. Anderson is not one that must be modified or quashed under Rule 45(c)(3)(A) because: (1) it provides adequate time for compliance since it was issued eighteen days before trial and at least twenty-five days before the possible date of Ms. Anderson's testimony during the week of June 14; (2)

[1]Rule 45(c)(3)(A)(ii) is inapplicable because 15 U.S.C. § 23 provides broader jurisdictional limits.

Ms. Anderson will not testify regarding privileged information; and (3) CGEY does not allege that it or Ms. Anderson will bear any "substantial burden." *See id.*

A subpoena *may* be modified or quashed under Rule 45(c)(3)(B) when it: (i) requires the disclosure of trade secrets; (ii) requires disclosure of an unretained expert's opinion or conclusions; or (iii) requires a "substantial expense" due to travel. *See* Fed. R. Civ. P. 45(c)(3)(B)(i)-(iii). The trial subpoena at issue is not one that requires quashing under Rule 45(c)(3)(B) because: (1) it does not require the disclosure of confidential information in open court since there are procedures in place to protect such an occurrence; (2) Ms. Anderson is not an unretained expert; and (3) Ms. Anderson will not incur a "substantial expense" since the Plaintiffs will pay Ms. Anderson's travel expenses. *See id.*

CGEY does not argue that the duly served subpoena should be quashed under any provision of Rule 45(c)(3), the exclusive mechanism under the Federal Rules of Civil Procedure for quashing a non-party subpoena. For this reason alone, CGEY's motion should be denied.

II. There Is a Strong Preference for Live Testimony and the Presentation of Certain Witnesses by Video Is Irrelevant to Enforcing the Subpoena at Issue

CGEY claims that the videotapes of Ms. Anderson's deposition—which primarily focused on her four-month old declaration—will be sufficient to fulfill the Court's need for information in Ms. Anderson's possession. *See* CGEY Mot. at 3:26-28. CGEY also claims that Ms. Anderson's testimony should be received by videotape rather than live because other witnesses testimony will be submitted by videotape presentation. *See id.* at 3:25-26. Plaintiffs should be permitted to proffer Ms. Anderson's live testimony in open court, so as to provide the Court an opportunity to experience Ms. Anderson's testimony directly, and to question her if the Court is so inclined.

There is a strong preference for the presentation of live testimony. *See* Fed. R. Civ. P. 43(a) ("In every trial, the testimony of witnesses shall be taken in open court . . . ."); *In re Adair*, 695 F.2d 777, 780 (9th Cir. 1992) ("The Primary purposes of Rule 43(a) are to ensure that the accuracy of witness statements may be tested by cross-examination and to allow the trier of fact to observe the appearance and demeanor of the witness."); *see also Planned Parenthood of Columbia/Willamette, Inc. v. American Coalition*, 290 F.3d 1058, 1118-19 (9th Cir. 2002) (Rule 32 "reflects the historical belief that live testimony better enables the jury to adjudge the credibility of a witness and therefore to

determine the weight and import ascribed to the witness's testimony.")*; Murphy v. Tivoli Enters.*, 935 F.2d 354, 359 (8th Cir. 1992) ("The federal rules strongly favor the testimony of live witnesses wherever possible, so that the jury may observe the demeanor of the witness to determine the witness's veracity."). Plaintiffs' examination and Defendant's cross-examination of Ms. Anderson in open court will provide the Court an opportunity to judge Ms. Anderson in person. Videotaped depositions, while extremely useful in modern court practice, are considered only to be a second-best option. *See Planned Parenthood of Columbia/Willamette, Inc.*, 290 F.3d at 1118-19 ("Deposition testimony is itself only second-best."); *Rice's Toyota World, Inc. v. Southeast Toyota Distributors, Inc.*, 114 F.R.D. 647, 649 (N.D.N.C. 1987) (finding videotaped depositions second-best to live witnesses); *cf*. *Traylor v. Husqvarna Motor*, 988 F.2d 729, 734 (7th Cir. 1993) (Posner, J.) (preferring live witness because "a living person generally conveys a stronger impression" than deposition transcript).

CGEY asserts that a non-party witness should not be questioned in open court if the witness has been deposed during discovery. But, taken to its logical conclusion, CGEY's argument would bar all parties from presenting live witness testimony in large commercial trials, because nearly every witness is deposed during discovery in such matters. Instead of viewing witnesses and hearing live testimony, the finder of fact would be subjected to hours upon hours of edited videotaped deposition testimony. *Cf. Murphy*, 935 F.2d at 359 (preference for live testimony intended to preclude former practice of submitting edited depositions). CGEY has not demonstrated why Ms. Anderson's situation is materially different from the other witnesses, many of them non-parties, who will appear live in this matter after having their depositions taken. CGEY has not met its burden to have the subpoena quashed, thus forcing the parties to proffer less desirable videotaped testimony to the Court.

Indeed, CGEY's comparison to videotape presentations of other discovery deponents is irrelevant. Although a substantial portion of testimony will be presented to the Court by videotape, the parties have done so out of practical necessity, and not preference. As the Court is aware, this case is a complex matter where numerous individuals have been deposed because the parties and the Court, in a diligent effort to reach a reasoned outcome, require information from multiple sources. However, the CMO allows the parties each to present a maximum of twenty-five live witnesses. *See* CMO ¶ 10 ("In no event may the total number of witnesses on the final list of witnesses to be called live exceed 25.").

In light of these limitations, each party carefully selected the witnesses whom it believes should be proffered live in court.

Plaintiffs' partially rely on the submission of videotaped witness depositions out of practical necessity and because the CMO limits the number of live witnesses, and not because Plaintiffs believe that this is a preferable way in the testimony to be presented to the Court.

III. Plaintiffs and Oracle Have Shown "Cause" To Serve Subpoenas Nationwide

CGEY argues that Plaintiffs have failed to show "cause" under 15 U.S.C. § 23. CGEY does not have standing under 15 U.S.C. § 23 to challenge "cause" shown prior to issuance of the subpoena. Even if the Court finds that 15 U.S.C. § 23 subsumes the later enacted Rule 45's standing for non-parties to challenge a subpoena, Plaintiffs demonstrate "cause."

The parties have shown "cause" for the permission to serve all witnesses nationwide, and plaintiff can demonstrate "cause" as to Ms. Anderson individually. No opinion, published or unpublished, known to the Plaintiffs defines "cause" under 15 U.S.C. § 23. As such, it is an issue of first impression. There are at least two interpretations of "cause" under Section 23.[2]

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[2] CGEY cites to an unpublished opinion discussing RICO's "good cause" requirement for the proposition that 15 U.S.C. § 23 requires a party to make a "cause" showing as to each individual subpoenaed witness. *See* CGEY Mot. at 2:26-3:8. In *A. Kush & Assocs, Ltd. v. Weingeroff Enters., Inc.*, the district court held that 18 U.S.C. § 1965(c)'s "good cause" was not shown because it was not overcome when the subpoenaing party claimed that the jury needed to view the witness's testimony live in open court. *See* No. 85 C 493, 1988 WL 64082 (N.D. Ill. June 8, 1988). Several factors warrant against applying *A. Kush & Assocs.*'s holding in the present case. First, the district court failed to weigh the federal court's strong preference for live witness testimony against the "good cause" demonstration by the party seeking to issue the subpoena when it found that presenting a witness before the jury failed to justify 18 U.S.C. § 1965(c)'s "good cause" requirement. Second, *A. Kush & Assocs.* is inapplicable to the present motion because it discusses a different, albeit similar, statute. *Compare* 18 U.S.C. § 1965(c) (enacted 1970) ("good cause requirement); *with* 15 U.S.C. § 23 ("cause" requirement) (enacted 1914). Finally, the opinion is faulty unpublished precedence because the court incorrectly applied 18 U.S.C. § 1965(c) to the facts of the case before it. Section 1965(c) of Title 18, like 15 U.S.C. § 23, only applies when the United States is a party. *See Ritchie v. Carvel Corp.*, 714 F. Supp. 700, 706 (S.D.N.Y. 1989) (noting that 18 U.S.C. § 1965(c) applies to actions brought by the United States). Although in dispute, the jurisdictional limits of private plaintiff RICO actions are governed by 18 U.S.C. § 1965(a), (b), or (d)—not subsection (c). *See Sadighi v. Daghighfekr*, 36 F. Supp. 2d 267 (D.S.C. 1999) (detailing circuit split on the issue). The court misapplied 18 U.S.C. § 1965(c) because the United States was not a party in *A. Kush & Assocs*. *See* 18 U.S.C. § 1965(c) ("In any civil or criminal action . . . instituted by the United States . . . subpenas issued by [the]court to compel the attendance of witnesses may be served in any other judicial district, except that in any civil action . . . no such subpena shall be issued for service . . .

First, the parties may be permitted to serve subpoenas upon any witness after a general showing of "cause." This is the literal interpretation of Section 23's second sentence because the statute provides that "*witnesses*" may be served after a single showing of "cause." The provision does not require a "cause" showing for each subpoena served upon each witness. Plaintiffs assert that this is the correct interpretation of 15 U.S.C. § 23's provision.

The parties have demonstrated "cause" as to issuing subpoenas nationwide upon all United States-based witnesses because the present action is a complex matter of high import where the relevant witnesses are dispersed throughout the United States. *See* CMO ¶ 12 ("Good cause having been shown in view of the geographic dispersion of potential witnesses in this action . . . ."). Nationwide service is the only practical method for Plaintiffs and Oracle Corporation ("Oracle") to summon witnesses beyond the territorial limit of the Court.

Second, Section 23 may require an individual showing of "cause" for each challenged subpoena, as alleged in CGEY's memorandum. *See* Mot. at 2:27-3:8. This is the implication of *Pacific Gas & Elec. Co. v. Howard P. Foley Co.*, an unpublished opinion where the district court noted that it is unclear how RICO's nationwide service of process statute interacts with Rule 45. Although the trial court stated its skepticism about conducting a "good cause" inquiry as to an individual witness based on the witness's motion prior to the subpoena's issuance or service, the court proceeded to conduct the inquiry. The Court analyzed the single subpoena to be issued under RICO's nationwide service provision. *See Pacific Gas & Elec. Co. v. Howard P. Foley Co.*, 1993 WL 299219, at *9-10 (finding "good cause" when plaintiff demonstrated that the jury needed to view a particular witness to raise inferences from his testimony). Plaintiffs do not believe that the text of Section 23 permits this explication. However, Plaintiffs also demonstrate cause under this interpretation.

Plaintiffs demonstrate "cause" as to Ms. Anderson because she possesses unique information not available from other witnesses that will testify live before the Court. Ms. Anderson gained considerable knowledge regarding the implementation and selection of high-function enterprise software through her nineteen-years of experience in the industry. Specifically, Ms. Anderson can provide

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without approval given by a judge of such court upon a showing of good cause.").

information on the selection and implementation of enterprise software by CGEY's customers that is unavailable from any other witness. As the head of CGEY's Technology Services Practice, Ms. Anderson devotes her career to this very subject. Her highly informed perspective will aid the Court's inquiry.

IV. Ms. Anderson Will Not Suffer an Undue Hardship

CGEY does not allege—nor can it—that Ms. Anderson may suffer an undue hardship. Although Rule 45(c)(3)(A)(iv) does not specify what constitutes "undue burden," the Advisory Committee's notes focus on the travel expenses and preventing the enforcement of irrelevant subpoenas issued for vexatious reasons. *See* Fed. R. Civ. P. 45 advisory committee's note subdivision (c) (amend. 1991). Ms. Anderson will not be subjected to travel expenses, as the Plaintiffs will be paying them. Plaintiffs have not issued the subpoena for any unethical or vexatious reason. Ms. Anderson is tentatively scheduled for one and one-half hours of live examination. Assuming an equal portion of time for cross-examination, Ms. Anderson will likely testify for three hours. Ms. Anderson's duration on the stand will not be unduly burdensome.

CGEY has not asserted any specific undue burden that Ms. Anderson will suffer if required to testify. CGEY fails to meet its heavy burden to quash the subpoena and its motion should be denied.

V. CGEY's Motion Should Be Denied Because it Is Untimely

CGEY's motion to quash is untimely because CGEY moved eighteen days after the subpoena was served, and one and one-half days after the trial commenced. CGEY has been on notice that one of the parties would likely subpoena Ms. Anderson as a trial witness. This is evident by the fact that CGEY's counsel referenced the topic numerous times in telephone conversations with Plaintiffs and twice on the record during Ms. Anderson's deposition. Rule 45(c)(3) requires motions to quash or modify a subpoena be "timely," *i.e.* before the return date on the subpoena. *See Innomed Labs, LLC v. Alza Corp.*, 211 F.R.D. 237, 240 (S.D.N.Y. 2002) ("Although Rule 45(c)(3)(A)(iv) requires that the motion to quash be timely without defining what 'timely' is, it is reasonable to assume that the motion to quash should be brought before the noticed date of the scheduled deposition."); 9 *Moore's Federal Practice* § 45.04[3][a] (Supp. 2003); *compare Nova Biomedical Corp. v. i-STAT Corp.*,

182 F.R.D. 419 (S.D.N.Y. 1998) ("[S]ervice anytime before the subpoenas' return date should be considered timely."); *with Application of Johnson and Johnson*, 59 F.R.D. 174, 177 (D. Del. 1973) (denying motion to quash deposition subpoena filed after the appearance date as moot). The Subpoena's effective return date, as stated on the face of the subpoena, was the first day of trial, June 7, 2004. Therefore, CGEY's motion is untimely because it moved to quash on June 8, 2004.

Moreover, Plaintiffs continually pressed CGEY to move the Court as soon as possible so that its motion would not disrupt the Court's or the parties' trial schedule. Plaintiffs continued to work with CGEY during the pre-trial period to schedule Ms. Anderson's trial testimony and to address CGEY's intent to opposed the trial subpoena. Plaintiffs were unable to move to compel attendance at trial in advance based on the speculation that CGEY planned to oppose the motion because the Federal Rules of Civil Procedure do not provide such a mechanism. An earlier filing by CGEY would have provided Plaintiffs with additional time to make contingency arrangements.

CONCLUSION

For the foregoing reasons, CGEY's motion should be denied.

Respectfully Submitted,

Dated: June 8, 2004

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