UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA, EX REL. DR. HELENE Z. HILL, Plaintiff, - against - UNIVERSITY OF MEDICINE & DENTISTRY OF NEW JERSEY, DR. ROGER W. HOWELL and DR. ANUPAM BISHAYEE, Defendants.	CIVIL ACTION NO. 03-4837(DMC).

MEMORANDUM OF LAW IN SUPPORT OF NON-PARTY TOM K. HEI'S MOTION TO QUASH DEPOSITION SUBPOENA

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July 25, 2008

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Non-Party Tom K. Hei, PhD. ("Dr. Hei") respectfully submits this memorandum of law in support of his motion to quash the subpoena (the "Subpoena") served on him by plaintiff, Dr. Helene Z. Hill.

Dr. Hei has no personal knowledge of any facts relevant to this case. Because of Dr. Hei's recognized expertise in the field of oncology, however, Dr. Hill asked Dr. Hei to serve as her expert witness in this case. Dr. Hei respectfully declined.

Undeterred, Dr. Hill now seeks to force Dr. Hei to serve as her expert against his will. Because plaintiff has not and cannot demonstrate a substantial need for

Dr. Hei's testimony, which would be wholly irrelevant to any issue in this lawsuit, his motion to quash the Subpoena should be granted.

STATEMENT OF FACTS

A. Dr. Tom K. Hei, PhD.

Tom K. Hei, PhD. is a Professor of Radiation Oncology and Environmental Health Sciences at the College of Physicians & Surgeons and the Mailman School of Public Health of Columbia University. *See* Declaration of Tom K. Hei, dated July 11, 2008 ("Hei Decl."), at ¶ 1. He is also Vice-Chairman for Research in the Department of Radiation Oncology; Associate Director of the Center for Radiological Research, and Deputy Director of the Center for Environmental Research of the National Institute of Environmental Health Sciences. *Id.* Dr. Hei's research focuses on environmental carcinogenesis/mutagenesis at the cellular and molecular levels. *Id.*

Because Dr. Hei is a recognized expert in his field, he has been asked to serve as an expert witness in litigation many times, but he has always declined. *Id.* ¶ 10. In fact, Dr. Hei has *never* testified as an expert witness in any case. *Id.*

B. Dr. Hill's Request for Dr. Hei's Expert Testimony

In June 2007, Dr. Hill called Dr. Hei and asked him to meet with her about a research project of hers. *See* Hei Decl. ¶ 3. She also asked about the availability of two of Dr. Hei's colleagues at Columbia University, Drs. Eric Hall and Honging Zhou. *Id.* In response, Dr. Hei agreed to meet with Dr. Hill, and arranged a meeting at Columbia. *Id.* At the time, Dr. Hei believed that Dr. Hill was interested in proposing to the Columbia professors a collaborative research project in their common field of radiation biology/oncology. *Id.*

On August 23, 2007, Drs. Hei, Hall, and Zhou, met with Dr. Hill at Columbia University as arranged. *See* Hei Decl. ¶ 4. At that meeting, Dr. Hill told the professors that she had a "whistleblower" lawsuit against the University of Medicine and Dentistry of New Jersey, Dr. Roger W. Howell, and Dr. Anupam Bishayee. *Id.* Prior to this meeting, Dr. Hei did not know about Dr. Hill's lawsuit, and did not know that Dr. Hill wanted to meet with the Columbia professors about it. *Id.* ¶ 5.[1] Dr. Hei has no personal knowledge of, and did not participate in, the research, experiments, or grant applications referred to in plaintiff's Complaint. *See* Hei Decl. ¶ 9.

During the August 23, 2007 meeting, Dr. Hill asked Dr. Hei to assist with her case by agreeing to serve as an expert witness. *See* Hei Decl. ¶ 6. Dr. Hill also gave the professors some written materials she had prepared. *Id.* & Ex. B (copy of materials). In those materials, Dr. Hill explained the issues involved in her case, and said that she was in need of "expert witnesses." Hei Decl. Ex. B at 6. At the conclusion of the meeting, Dr. Hei told Dr. Hill that he was not interested in becoming involved with her lawsuit and would not agree to serve as an expert witness. *Id.* ¶ 7.

Sometime after this August 23, 2007 meeting, Dr. Hei received in the mail a letter and package of materials from Dr. Hill. *See* Hei Decl. ¶ 8 & Ex. C (copy of letter and materials).[2] In her letter, Dr. Hill requested Drs. Hei and Hall's "input and

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[1] Indeed, once Dr. Hill mentioned her lawsuit, Dr. Hall immediately left the meeting. *See* Hei Decl. ¶ 5.

[2] Although Dr. Hill's letter is dated August 16, 2007, Dr. Hei had not received it before the August 23 meeting. Hei Decl. ¶ 8. Accordingly, while those materials discuss the nature of the allegations in her suit, Dr. Hei was not aware of those materials or the true reason why Dr. Hill wanted to meet with him until the meeting itself.

assistance" with her lawsuit. *Id.*, Ex. C. at 1 ("I believe that your lab could help to resolve the question regarding hypoxia in the Helena tubes and I expect that you might have more information regarding the plateau for survival in the 100% experiments and the effects of 3HdThd on the cell cycle."). Dr. Hill's letter concludes that she would "understand" if the professors could not, or did not want to, assist with her case. *Id.*

C. The Subpoena

On June 18, 2008, with no prior notice to Dr. Hei, plaintiff served a subpoena on Dr. Hei at his personal office at Columbia University, commanding him to testify in her case on July 9, 2008. *See* Hei Decl. Ex. A. By agreement of counsel, Dr. Hei's deposition was adjourned without date so that Dr. Hei could make this motion to quash.

The Subpoena does not identify the subject matter of Dr. Hei's testimony. In her responses to defendants' interrogatories, however, plaintiff has stated that Dr. Hei "has performed research and writing on the bystander effect and/or tritiated thymidine." *See* Plaintiffs' Answers to Defendants' Initial Interrogatories, dated May 29, 2008, at 17. Plaintiff also stated that Dr. Hei has knowledge of "discussions with Plaintiff" in which Dr. Hei supposedly "expressed suspicion with Dr. Howell's findings regarding the bystander data reported in Dr. Howell's papers." *Id.* Plaintiff also claims that "[t]he results of [Dr. Hei's study are] at variance with the results of Dr. Howell and Bishayee." *Id.*

Because Dr. Hei has no personal knowledge of any facts at issue in this case, has never testified as an expert witness in any case, and has no desire to testify as an expert witness in this case, he now moves to quash the Subpoena.

ARGUMENT

THE COURT SHOULD QUASH THE SUBPOENA

The Court should quash the Subpoena served on Dr Hei. Rule 45 expressly authorizes the Court to quash a subpoena that requires "disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from an expert's study that was not requested by a party." Fed. R. Civ. P. 45(c)(3)(B)(ii). This Rule was designed precisely to address the "growing problem" of litigants using subpoenas "to compel the giving of evidence and information by unretained experts." *Id.*, advisory committee's note. Such an expert may not be compelled to testify against his will unless the requesting party can demonstrate a "substantial need" for the testimony or would suffer an "undue burden" without it. Fed. R. Civ. P. 45(c)(3)(C)(i).[3]

A. Plaintiff Seeks the Testimony of Dr. Hei as an Expert

In this case, plaintiff plainly seeks Dr. Hei's testimony as an expert. As Dr. Hei attests in his declaration, he has no personal knowledge of, and did not participate in, the research, experiments, or grant applications referred to in the complaint. *See* Hei Decl. ¶ 9. Thus, he cannot possibly qualify as a fact witness. Indeed, by plaintiff's own account, Dr. Hei's "knowledge" of the facts at issue in this case is limited to his "discussions with plaintiff" herself, presumably those that occurred during their meeting at Columbia on August 23, 2008. Testimony by Dr. Hei about what Dr. Hill said to him

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[3] Even upon such a showing, the requesting party would also be required to compensate the expert. Fed. R. Civ. P. 45(c)(3)(C)(ii). For Dr. Hei, however, the issue is not compensation: He would not agree to serve as an expert witness in Dr. Hill's case even if Dr. Hill were prepared to compensate him for his time. *See* Hei Decl. ¶ 10.

would not only be irrelevant; it would be inadmissible hearsay if offered by Dr. Hill. *See* Fed. R. Evid. 803.

Apart from calling Dr. Hei to recount the substance of their irrelevant and inadmissible conversation, it appears that plaintiff is seeking Dr. Hei's testimony not about defendants' research, which is the subject of this lawsuit, but about Dr. Hei's research, which is not. Apparently, plaintiff intends to ask Dr. Hei about the results of Dr. Hei's own "research and writing" on the "bystander effect and/or tritiated thymidine" to contrast Dr. Hei's methods and findings with those of Drs. Howell and Bishayee. But testimony by an expert, even if elicited solely for such comparative purposes, is still expert testimony.

Chavez v. Board of Education of Tularosa Muncipal School, No. CIV 050-380, 2007 WL 1306734 (D. N.M. Feb. 16, 2007), illustrates the point. In that case, the parents of an autistic child sued a New Mexico school claiming that the school provided inadequate educational services to autistic students. The parents sought to compel an expert in special education, who did not have any knowledge about their son or his school's programs, to testify about *other* schools' programs (which were not at issue) to provide a basis for comparison to the defendants' programs. The Court quashed the subpoena as one seeking the opinion of an unretained expert: "Asking a special education specialist from one school district to describe how her school district develops and implements special educational programs and services for autistic children for the purpose of developing standards by which to measure the appropriateness of educational supports and services of a defendant school district, amounts to seeking expert testimony." *Id.* at * 5. Here, Dr. Hill seeks to do precisely the same thing: she intends to

ask Dr. Hei about his own experiments (which are not at issue) to contrast those experiments with defendants' experiments (which are).

Counsel for plaintiff has also suggested that Dr. Hei will not be asked for his opinions, but rather will be asked only fact questions about Dr. Hei's own methods and findings. But simply limiting the deposition to "fact" questions does not transform an expert like Dr. Hei into a "fact" witness; nor does it change the Rule 45 analysis. Rule 45(c)(3)(B)(ii) applies, by its plain terms, not only to "opinion" testimony, but also to "information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party." Fed. R. Civ. P. 45(c)(3)(B)(ii). Here, Dr. Hei's study on the bystander effect is not in dispute and was not requested by any party to this case. *See GlaxoSmithkline Consumer Healthcare, L.P. v. Merix Pharmaceutical Corp.*, No. 2:05-mc-436-TS-DN, 2007 WL 1051759, at *3 (D. Utah Apr. 2, 2007) (quashing subpoena on professor who had published about scientific issue in dispute) ("He is sought as an authority, based on his expertise and independent study, not as an observer of any facts giving rise to liability."). That counsel would ask only "fact" questions rather than opinion questions thus makes no difference. *See Chavez*, 2007 WL at * 5 ("While Matthew's parents assert that they will not ask Trott to make the ultimate comparison of APS' programs with those of Tularosa's, and therefore that they do not seek expert testimony from Trott, they still seek to elicit expert evidence through Trott's testimony to establish the standards by which others will make a final comparison."); *GlaxoSmithkline*, 2007 WL at * 3 (rejecting argument that party sought only "fact" deposition of expert). Accordingly, the Subpoena seeks to compel Dr. Hei's testimony as an expert, notwithstanding the scope limitations suggested by plaintiff.

B. Plaintiff Cannot Demonstrate Any Substantial Need for Dr. Hei's Testimony

Because Dr. Hei is entitled, as an unretained expert, to the protections afforded by Rule 45(c)(3)(b)(ii), plaintiff can defeat his motion to quash only upon a showing that she has a "substantial need" for his testimony or that she would suffer an "undue hardship" were she denied it. Fed. R. Civ. P. 45(c)(3)(C)(i). *See Chavez*, 2007 WL at * 6 (proof of "undue hardship" is "necessary to overcome a motion to quash by an un-retained expert"). "Thus, a party seeking disclosure of information protected by this provision must meet a standard that 'is the same as that necessary to secure work product under Rule 26(b)(3).'" *Friedland v. Tic-The Industrial Co.*, No. 04-cv-01263, 2006 WL 258113, at *2 (D. Colo. Sept. 5, 2006) (quoting Rule 45, advisory committee's note.). Plaintiff cannot make that required showing.

First, plaintiff cannot show that Dr. Hei's testimony would have any bearing on her lawsuit. *See, e.g., GlaxoSmithkline*, 2007 WL at *4 ("the low relevance of the deposition testimony supports the finding that the burden of the deposition is excessive"). According to the Complaint, this False Claims Act case turns on whether certain grant applications submitted to the federal government were false because they relied on falsified data derived from an experiment defendant Dr. Bishayee performed in 1999. Dr. Hei, however, has no personal knowledge of, and did not participate in, the research, experiments, or grant applications referred to in the complaint. *See* Hei Decl. ¶ 9. While Dr. Hei has performed his own experiments and published his own study on the "bystander effect" (which was also the subject of defendants' 1999 research, *see* Compl. ¶ 14), testimony about Dr. Hei's subsequent experiments would not be remotely relevant to any issue in this case, whether for comparative purposes or otherwise.

Second, even if plaintiff could somehow show that Dr. Hei's research on the bystander effect were relevant to any issue in this case, plaintiff has not demonstrated why she needs Dr. Hei in particular, or any of the other participants in Dr. Hei's research, to testify about it. *See, e.g., Chavez*, 2007 WL at 6 ("Matthew's parents do not show that other means cannot be used to secure a substantial equivalent of Trott's testimony."). Dr. Hei's study on the bystander effect was published and is publicly available. *See* Persaud, Zhou, Baker, Hei, and Hall, *Assessment of Low Linear Energy Transfer Radiation – Induced Bystander Mutagenesis in a Three-Dimensional Culture Model*, 65 Cancer Res. 9876 (2005). Thus, if Dr. Hei's study is in fact useful for any purpose in this case, plaintiff is free to retain a willing expert to review that study and testify about it. *See, e.g., Intervet Inc. v. Merial Ltd.*, No. 8:07CV194, 2007 WL 1797643, at *2 (D. Neb. June 20, 2007) (quashing subpoena) ("There is no reason why Merial cannot present Dr. Osorio's declaration to its own experts for perusal and comment."). But the mere fact that Dr. Hei authored a study on a related scientific issue should not be enough to justify compelling his testimony. Otherwise, all research scientists who author studies would be open to subpoena requiring that they testify about their work.

Finally, the Court should consider the resulting burdens that the Subpoena would impose on Dr. Hei should his testimony be compelled. Given the complexity of the scientific issues and the need for accuracy, the time it would take Dr. Hei to prepare to give testimony in this case would be significant. If compelled to testify, Dr. Hei would need to put aside his on-going research and significant administrative responsibilities and review the methods and procedures used for his 2005 study. As Dr. Hei has attested, that preparation time alone would cause a significant disruption in his work, both as a

research scientist and an administrator. *See* Hei Decl. ¶10. Given the utter lack of relevance of Dr. Hei's testimony to the facts at issue in this lawsuit, he should not be compelled to put these significant responsibilities aside to testify as an expert, a role he has always eschewed

CONCLUSION

For these reasons, the Court should quash the subpoena served on Dr. Hei.

Dated: Newark, New Jersey
July 25, 2008

Respectfully submitted,

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TO:

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PLEASE TAKE NOTICE that, upon the accompanying declaration of Tom K. Hei, dated July 11, 2008, the exhibits thereto, the accompanying memorandum of law, and all prior proceedings held herein, non-party Tom K. Hei will move this Court, on August 18, 2008, or as soon thereafter as counsel may be heard, for an order pursuant to Rule 45(c) of the Federal Rules of Civil Procedure quashing the deposition subpoena served by plaintiff upon Tom K. Hei on June 18, 2008.

PLEASE TAKE FURTHER NOTICE that answering papers, if any, must be served on undersigned counsel by August 4, 2008, fourteen days prior to the motion day.

WHEREFORE, Tom K. Hei respectfully requests that the Court enter the attached order granting this motion and quashing the June 18, 2008 deposition subpoena, and for such other and further relief as this Court deems just and proper.

Dated: Newark, New Jersey
July 25, 2008

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s/ Paul J. Fishman

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