

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

<hr/>)	
UNITED STATES OF AMERICA, <i>et al.</i> ,)	
	Plaintiffs,)	
)	
v.)	Civil Action No. 16-1493 (ABJ)
)	
ANTHEM, INC., <i>et al.</i> ,)	
	Defendants.)	
<hr/>)	

ORDER

Plaintiffs, the United States of America and the States of California, Colorado, Connecticut, Georgia, Iowa, Maine, Maryland, New Hampshire, New York, Tennessee, the Commonwealth of Virginia, and the District of Columbia, have brought this action pursuant to the Clayton Act, 15 U.S.C. § 12, *et seq.*, to enjoin the merger of two major health care companies, Anthem, Inc., and Cigna Corp. Trial is ongoing. On December 1, 2016, non-party Thomas DeLacey moved to quash a trial subpoena that requires his appearance at trial on December 12, 2016. Mot. to Thomas DeLacey to Quash Trial Subpoena [Dkt. # 375] (“Mot.”); Mem. of P. & A. in Supp. of Mot. [Dkt. # 375] (“Mem.”). The witness, who lives and works in New Hampshire, contends that the subpoena is unlawful because it commands him to testify beyond the 100-mile geographical limit imposed by Rule 45 of the Federal Rules of Civil Procedure. The government opposes the motion. Pls.’ Resp. to Mot. [Dkt. # 381] (“Opp.”), and the witness has filed a reply. Reply of Thomas DeLacey in Supp. of Mot. [Dkt. # 383] (“Reply”). Because the government has complied with the Clayton Act, the Court will deny the motion to quash.

Federal Rule of Civil Procedure 45(c)(1) provides that:

A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

Fed. R. Civ. P. 45(c)(1). Federal Rule of Civil Procedure 45(d)(3)(A)(ii) provides that “the court for the district where compliance is required must quash or modify a subpoena that . . . requires a person to comply beyond the geographical limits specified in Rule 45(c).” Fed. R. Civ. P. 45(d)(3)(A)(ii). As the Supreme Court explained:

The century-and-a-half-old special statutory provision relating to service of subpoenas more than 100 miles from the courthouse is designed not only to protect witnesses from the harassment of long, tiresome trips but also, in line with our national policy, to minimize the costs of litigation, which policy is strongly emphasized in the Federal Rules of Civil Procedure.

Farmer v. Arabian Am. Oil Co., 379 U.S. 227, 234 (1964). The rule remains part of American jurisprudence, even another half century since the Court's decision in *Farmer*. Here, the witness resides and works in New Hampshire, which is more than 100 miles from the federal courthouse in this district, and so he is beyond Rule 45's subpoena power.

But Rule 45 is not the end of the inquiry. Under the Clayton Act,

[S]ubpoenas 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 (emphasis in original). In this case, the Court granted the parties' jointly-proposed application to provide for nationwide enforcement of trial subpoenas in its case management order:

Nationwide Service of Trial Subpoenas. To assist the Parties in planning discovery, and in view of the geographic dispersion of potential witnesses in this action outside this District, each side is permitted, as authorized by 15 U.S.C. § 23, to issue trial subpoenas anywhere in the United States, requiring witnesses to appear in this Court.

Final Case Management Order [Dkt. # 91] at 14–15; Joint Proposed Scheduling & Case Management Order [Dkt. # 61] at 31.¹

Because the government has complied with 15 U.S.C. § 23,² it is hereby

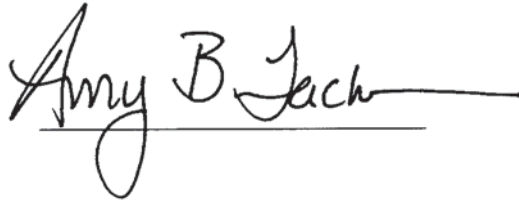
ORDERED that non-party witness Thomas DeLacey's motion to quash [Dkt. # 375] is **DENIED**. Counsel for the government shall confer with the witness as soon as practicable to arrange for his travel to the trial. It is

1 The witness argues in his reply that the Final Case Management Order provides for nationwide "service" but not nationwide "enforcement" of trial subpoenas. Reply ¶ 7. The plain language of the order, however, contemplates both that the parties may "issue" trial subpoenas nationwide, and that those subpoenas may "requir[e] witnesses to appear in this Court." Final Case Management Order at 14. The witness also argues that the government has not filed a "proper application" specific to him. Reply ¶¶ 11–12. The Court concludes that the parties' jointly proposed case management order served as a "proper application" under 15 U.S.C. § 23 for any witnesses who are beyond the Court's subpoena power.

2 The Court is mindful of Mr. DeLacey's argument that his appearance at trial will create an "undue burden" for him and his employer. Mem. at 3; Reply ¶ 16. While the Court recognizes that the required travel will be inconvenient and unwelcome, it does not find travel along the east coast for the limited period involved to be an "undue" burden. And while the Court recognizes that Mr. DeLacey was recently deposed in this matter, Reply ¶ 16, there is no requirement in the law that the party seeking nationwide enforcement of a subpoena must also demonstrate that it lacks alternatives. In any event, while the Court will enforce the subpoena, it encourages the government to review Mr. DeLacey's deposition to ensure that his live testimony is needed, and that his deposition would not suffice.

FURTHER ORDERED that, in light of the government's response to Mr. DeLacey's motion, his consent motion to require the government to respond to his motion to quash by December 8, 2016 [Dkt. # 376] is **DENIED AS MOOT**.

SO ORDERED.

A handwritten signature in cursive script that reads "Amy B. Jackson". The signature is written in black ink and is positioned above a horizontal line.

AMY BERMAN JACKSON
United States District Judge

DATE: December 7, 2016