

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ALVIN EMORY, :
 :
 Plaintiff, :
 : Civil Action No. 02-1466 JJF
v. :
 :
ASTRAZENECA :
PHARMACEUTICALS, :
 :
Defendant. :
 :
 :

Barbara H. Stratton, Esquire of KNEPPER & STRATTON, Wilmington,
Delaware.
Attorney for Plaintiff

Michael P. Kelly, Esquire of McCARTER & ENGLISH, Wilmington,
Delaware.
Of Counsel: Edward S. Masurek, Esquire, and S. Elizabeth
Hamilton, Esquire, of MORGAN, LEWIS & BOCKIUS, Philadelphia,
Pennsylvania.
Attorneys for Defendant

MEMORANDUM OPINION

September 4, 2003

Wilmington, Delaware

Farnan, District Judge

Presently before the Court is Plaintiff Alvin Emory's motion to quash Defendant's subpoena pursuant to Rule 45 (D.I. 50-1) and, for a protective order pursuant to Rule 26 (D.I. 50-2). For the reasons discussed below, Plaintiff's Motion (D.I. 50) will be denied on both parts.

On January 23, 2003, the Court issued a Scheduling Order under Federal Rule of Civil Procedure 16 (Rule 16) stating that "any party desiring to depose an expert witness shall notice and complete said deposition no later than thirty(30) days from receipt of said expert's report, unless otherwise agreed in writing by the parties." Pre-discovery disclosures were to be made by February 3, 2003.

Michael Ferrari conducted a vocational-psychological evaluation of the Plaintiff on March 4, 1994. Plaintiff sent AstraZeneca a copy of this evaluation on May 13, 2003. On May 16, 2003, Ferrari was listed on Plaintiff's response to Rule 26(a) initial disclosures and was said to possess information based on a psychological evaluation of Alvin Emory. On June 25, 2003, Plaintiff wrote "to confirm" that "Michael Ferreirra" was an expert witness. AstraZeneca sought to depose Ferrari on July 8, 2003, and suggested possible dates for the deposition. The Plaintiff denied this request, prompting AstraZeneca to subpoena

Ferrari. Emory then filed the instant motion to quash the subpoena and motion for a protective order.

Emory contends that AstraZeneca's request to depose Ferrari was an untimely request to take an expert's deposition. Emory claims that Ferrari's report was received on May 13, and that under the scheduling order a request to depose Ferrari was required prior to June 12.

AstraZeneca claims that Ferrari was originally identified only as a fact witness likely to have relevant discoverable information. Defendant claims that it only discovered Ferrari was an expert witness via the aforementioned June 25th "confirmation" and made its request within 30 days of receipt of this information.

Subpoenas are controlled by Rule 45, which, in relevant part, provides, "[o]n timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it (i) fails to allow a reasonable time for compliance... or (iv) subjects a person to undue burden." Fed. R. Civ. P. 45(c)(3)(A). The Court concludes that Plaintiff has failed to meet the requirements of Rule 45, and thus, Plaintiff's motion to quash (D.I. 50-1) must be denied. Plaintiff alleges that Defendant's request was issued after the deadline for such requests had passed; however, Plaintiff has not demonstrated that he will incur any undue burden. Plaintiff argues that the time scheduled for the deposition conflicts with time set aside for his attorney

to respond to a summary judgment motion, but this is not a substantial burden since cooperative scheduling can resolve this conflict.

Protective orders are governed by Rule 26(c), which, in pertinent part, provides, “[u]pon motion by a party ... for good cause shown ... the court ... may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense.” Fed. R. Civ. P. 26(c). There are a litany of criteria which may be examined to determine good cause for a protective order. See *Glenmede Trust Company v. Thompson*, 56 F3d 476, 483 (3rd Cir. 1995). In all circumstances, good cause requires a specific showing of a disclosure that will “cause a clearly defined and serious injury.” *Id.* As stated above, Plaintiff’s only substantive objection to the subpoena and the deposition appears to be that it will conflict with time that would otherwise be spent responding to a summary judgment motion. The Court finds this contention insufficient.

Further, assuming that an untimely request for a deposition can by itself constitute the kind of burden that would support the entry of a protective order or motion to quash, in this case, it is unclear that such an untimely request has been made. Rule 26(2) governs the disclosure of expert testimony and requires the disclosure of those who will present evidence under Federal Rule of Evidence 702, 703, or 705. Additionally, when an expert is

retained or specially employed to provide testimony, a report summarizing the testimony must accompany the disclosure. These and other formalities were not complied with in the present case. Ferrari was not clearly designated an expert witness until the June 25th letter from Plaintiff, and therefore, Defendant was not put on notice that Ferrari was an expert witness until the June 25th notice.

For these reasons, the Court will deny the motions.

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O R D E R

At Wilmington, this 4th day of September 2003, for the reasons discussed in the Memorandum Opinion issued this date;

IT IS HEREBY ORDERED that:

1. Plaintiff Alvin Emory's Motion to Quash Defendant's Subpoenas Pursuant to Rule 45 (D.I. 50-1) is **DENIED**.
2. Plaintiff Alvin Emory's Motion for a Protective Order Pursuant to Rule 26 (D.I. 50-2) is **DENIED**.

JOSEPH J. FARNAN, JR.
UNITED STATES DISTRICT JUDGE