

DORIS ADAMS	*	IN THE
Plaintiff	*	CIRCUIT COURT
v.	*	FOR
NOVARTIS CONSUMER HEALTH, INC, <i>et al.</i>	*	BALTIMORE CITY
Defendants	*	Case No.: 24-C-04-007317
* * * * *		

**MEMORANDUM OF DECISION**

This matter comes before the Court on Third Party UPS Supply Chain Solutions, Inc.'s Motion for Sanctions and Supplemental Statement in Support of It's Motion for Sanctions, Certification of Counsel in Opposition to the Motion for Sanctions of UPS Supply Chain, Inc., the Supplemental affidavit of Julie C. Jared, Third Party UPS Supply Chain Solutions, Inc.'s Second Supplemental Statement in Support of It's Motion for Sanctions, and correspondence received from Mr. Haverty in response thereto.

**Background**

The underlying matter is a products liability case involving an over-the-counter weight loss drug, Acutrim, containing Phenylpropanolime (PPA). Acutrim was pulled from the market in November, 2000 at the request of the FDA after a study published in the New England Journal of Medicine found that the ingestion of PPA created a statistically significant increase in the risk of hemorrhagic stroke. The Plaintiff in the underlying action, Doris Adams, suffered a hemorrhagic stroke following the ingestion of Acutrim.

Heritage Consumer Products ("Heritage") acquired the Acutrim product line in 1997. However, it did not manufacture the drug; it was only a sales and marketing company. When it took over the product line, the former manufacturer agreed to provide a supply of Acutrim to Heritage while Heritage sought a new manufacturer. In 2000 Heritage stopped doing business and ceased to exist.

During discovery in the underlying action, Plaintiff Adams deposed several Heritage employees, none of whom were able to produce any product, packaging, labeling or warnings. They explained that Heritage relied on outside contractors for production. One of the deponents, K. Tibor Roth, identified Livingstone Health Services ("Livingstone"), UPS Supply Chain, Inc.'s ("UPS") predecessor in interest, as a company that performed order fulfillment for Heritage. Based on this information Plaintiff's counsel, Mr. Kevin Haverty, served a Subpoena Ad Testificandum and Duces Tecum (the "subpoena") upon UPS on September 30, 2004 requesting that UPS provide "all documents, papers or other materials relating to order fulfillment services, invoicing, distribution or sales of Acutrim by and through your predecessor-in-interest Livingstone Health Care Services for and on behalf of Heritage Consumer Products LLC for years 1997 – 2000 inclusive." According to Mr. Haverty he did so in the hopes "that any such documents might contain information about the packaging and labeling of Acutrim, including any warnings accompanying the product."

Mr. Haverty never enforced the subpoena because on the eve of trial he received from a source other than UPS what he sought through the subpoena. Specifically he obtained the appropriate Acutrim packaging. However, between

the time Mr. Haverty issued the subpoena and when he obtained the packaging much transpired with regards to the subpoena, the specifics of which this Court will set forth in its analysis below.

Trial of Mr. Adams' action commenced on April 4, 2005 and according to Mr. Haverty lasted five (5) weeks. On April 4, 2005 UPS filed a Motion for the Entry of a Protective Order Quashing Subpoena, or Alternatively, Limiting the Scope of the Subpoena and Protecting the Confidentiality of the Requested Documents and for Sanctions. Mr. Haverty never responded to the Motion, and accordingly this Court issued an order on May 16, 2005 quashing the subpoena and permitting additional briefing on the issue of sanctions.

UPS seeks sanctions on two (2) bases: (1) under Md. Rule 2-433(c) for \$8,051.34 in attorneys' fees and expenses in connection with preparing and filing the Motion for a Protective Order; and (2) under Md. Rule 1-201(a) and 2-510(g) for \$30,983.61 in attorneys' fees and expenses incurred from compliance with the subpoena when Mr. Haverty had the opportunity to reduce or avoid these expenses.

### **Analysis**

#### **1. UPS is Entitled to Reasonable Expenses Incurred in Filing for a Protective Order Under Md. Rule 2-403 and 2-433(c).**

Under Md. Rule 2-433(c) this Court "*shall require* the party... whose conduct necessitated the motion or the party or the attorney advising the conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining [a protective] order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." (emphasis added).

Here, the case is rather simple. This Court granted UPS' Motion for a Protective Order pursuant to Md. Rule 2-403 to which Mr. Haverty never filed an

opposition or response. Having filed no opposition or response, Mr. Haverty can hardly claim that his opposition "was substantially justified." Mr. Haverty claims that he never received the Motion for Protective Order because he was in a five (5) week trial. That is no excuse. The Certificate of Service on the Motion states that it was sent on April 4, 2005 to his office address. This address is identical to the one listed on Mr. Haverty's letterhead. According to the letterhead there appear to be other attorneys who work in that office. And, most certainly someone checked the firm's mail before this Court issued its order six (6) weeks after UPS filed its Motion and sent it to Mr. Haverty. Nor can this Court find any other circumstances making the award of damages unjust. In fact, if Mr. Haverty would have bothered to notify UPS that he no longer needed the documents requested in the subpoena on April 2, 2005 when he received the Acutrim packaging from another source, these expenses could have been avoided. Therefore, this Court awards UPS reasonable attorney fees and expenses it incurred in connection with filing the Motion for Protective Order jointly and severally against Plaintiff Doris Adams, Kevin Haverty, and Williams, Cuker & Berezofsky, Attorneys at Law, Mr. Haverty's law firm.

In accordance with the accompanying order, UPS is to submit an affidavit(s) detailing how it has calculated its reasonable attorneys fees and expenses. UPS shall also submit a memorandum explaining how the attorney fees are reasonable based on the lodestar approach and the factors to be considered when determining reasonableness. See *Fiolo v. Frankel*, M.D., 373 MD 819 (2003). This memorandum may also include a discussion of the four (4) factors discussed in *Johnson v. Baker*, 84 Md. App. 521, 541-42 (Md. App. 1990), as this is a motion for sanctions. Ms. Adams, Mr. Haverty, and Williams, Cuker & Berezofsky, Attorneys at Law may submit a response memorandum based on lodestar approach and the four (4) sanction factors.

## 2. UPS Is Also Entitled to Reasonable Compliance Expenses Because Mr. Haverty Failed to Take Reasonable Steps to Avoid Undue Burden or Expense

Under Md. Rule 510(g) "A party or an attorney responsible for the issuance and service of a subpoena *shall take reasonable steps to avoid imposing undue burden or expense* on a person subject to the subpoena." (emphasis added). Common sense would dictate that this responsibility would be heightened with regards to service of a subpoena upon a non-party. Non-parties are asked to bear some of the expense of litigation yet, at least on the surface, do not stand to gain from the litigation. Moreover, the party requesting the information stands in a better position than does the non-party to minimize the burdens and expenses of a subpoena. The issuing party understands better the information he or she seeks. Thus, it is easier for the issuing party to narrow the requests from the outset rather than placing the burden on the subpoenaed party to ascertain what information is sought or to produce all and any documents. To request more information than that which is truly sought shifts the burdens and expenses on the subpoenaed party rather than the issuing party.

Md. Rule 2-510(g) is based upon Fed. R. Civ. P. 45 which also provides that

“The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney’s fee.” Md. Rule 2-510 (g) contains no such language; however, the Md. Rules do permit this Court to impose sanctions under its inherent authority to moderate the discovery process. See *Wilson v. N.B.S., Inc.*, 130 Md. App. 430, 451 (2000). The Maryland discovery rules are to “be construed to secure ... fairness in administration, and elimination of unjustifiable expense and delay. If no consequences are prescribed, the court may ... determine the consequences of the noncompliance in light of the totality of the circumstances and the purpose of the rule.” Md. Rule 1-201(a).

The obvious purpose of Md. Rule 2-510(g) is “to avoid imposing undue burden or expense on a person subject to the subpoena.” As discussed previously this concern is heightened when the subpoena has been issued to a non-party. Thus, the question here is whether Mr. Haverty under the totality of the circumstances took reasonable steps to avoid imposing undue expense and burden upon UPS.

Here, it does not appear that Mr. Haverty made any genuine or reasonable attempts to avoid imposing unnecessary expenses upon UPS. Mr. Haverty asserts that during a deposition, K. Tibor Toth, a former employee of Heritage, identified (“Livingston”), UPS’s predecessor in interest, as a company that did order fulfillment for Heritage. Haverty Certification ¶ 6. Based upon this testimony, he subpoenaed UPS “to obtain documents from Livingston Health Care Services in the belief that any such documents might contain information about the packaging and labeling of Acutrim, including any warnings accompanying the product.” Haverty Certification ¶ 7.

However, the subpoena which Mr. Haverty served upon UPS was much broader. The subpoena requested “all documents, papers or other materials relating to order fulfillment services, invoicing, distribution or sales of Acutrim by and through [its] predecessor-in-interest Livingston Health Care Services for and on behalf of Heritage Consumer Products LLS for years 1997 – 2000 inclusive.” This request encompasses significantly more documents than the packaging, labeling and warnings Mr. Haverty claims he sought.

Mr. Haverty asserted at the hearing that he also hoped to obtain the names of the manufacturer and packagers of Acutrim via the subpoena. Again, even if this is not a post hoc rationalization for the broadness of the subpoena<sup>1</sup>, Mr. Haverty could have significantly narrowed his broad brush request. He could have requested all documents that identify the manufacturer or packager of the Acutrim product in addition to all labels, packaging and warnings.

Fortunately, on December 9, 2004 UPS counsel, Julie Jared, contacted Mr. Haverty about narrowing the scope of the subpoena before expending any

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<sup>1</sup> It appears to this Court that Mr. Haverty’s true purpose for issuing the subpoena was to obtain the packaging, warnings and labeling because after Mr. Haverty obtained the Acutrim package from a different source he no longer had a need for any documents produced in response to the subpoena.

substantial efforts to comply with the subpoena. During this conversation Mr. Haverty agreed to narrow the scope of the subpoena both temporally and substantively. He agreed to reduce the timeframe of the documents sought from four (4) years, 1997 – 2000, to three (3) years, 1997 – 1999. Substantively, he agreed to limit the documents sought to those relating to the distribution or sales of Acutrim to Big Bear in Ohio or Penn Traffic Company. However, again Mr. Haverty failed to tailor his request to obtain the information and/or documents he claims he sought via the subpoena. He failed to limit the search to labels, packaging or warnings and/or documents identifying a manufacturer and/or packagers. Mr. Haverty claims that he told Ms. Jared “what he was looking for.”<sup>2</sup> Ms. Jared, on the other hand, denies that Mr. Haverty informed her that he was seeking the labels, packaging and warnings. She appears to have been under the impression that he was seeking documents identifying the manufacturer(s) of Acutrim as evidenced by her December 9, 2005 letter to Mr. Haverty. In fact, she claims that had he so informed her, the search would have been quite brief because as a warehouse Livingston maintained no such records.

Moreover, Ms. Jared claims that during this conversation she informed Mr. Haverty that UPS would only produce the requested documents subject to a confidentiality agreement and that Mr. Haverty agreed to this condition. In her December 9, 2004 letter to Mr. Haverty confirming their conversation she stated that she would be sending him a proposed protective order as discussed. Even if Mr. Haverty had not agreed to the confidentiality agreement/protective order, as the attorney seeking the information from a non-party, Mr. Haverty should have contacted Ms. Jared if he were not going to agree to the order.

But rather, Mr. Haverty again waited for Ms. Jared to initiate contact regarding the subpoena. True to her word, on January 7, 2005 Ms. Jared forwarded Mr. Haverty a proposed confidentiality agreement promising to produce responsive documents finalizing the agreement. Importantly, this letter also stated that there were potentially other responsive documents in Delaware and California. In other words, UPS was still to incur a significant portion of the compliance expenses.

Yet again, Mr. Haverty failed to respond to Ms. Jared’s correspondence. If Mr. Haverty truly objected to a confidentiality agreement, he should have voiced his objections upon receipt of the proposal knowing that UPS was about to incur significant production costs. In fact, Mr. Haverty did not contact Ms. Jared until March 21, 2005 regarding the confidentiality agreement, two and one-half months after Ms. Jared sent it to him.

From January 7, 2005 until March, 2005 UPS searched over 200,000 documents and collected and beta-stamped over 1000 responsive documents from three different states. Not once during this time frame did Mr. Haverty initiate contact with UPS or make any attempts to reduce the expenses UPS was incurring. He either led them to believe that he agreed to enter into the confidentiality agreement or

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<sup>2</sup> Mr. Haverty never stated at the hearing exactly what he told Ms. Jared he was looking for. In other words, he never stated in court that he told her he was looking for packaging, labels and warnings.

simply ignored the matter for several months. Either way, knowing that UPS would not produce the documents without the agreement, Mr. Haverty should have contacted UPS to stop them from incurring compliance expenses under the assumption that Mr. Haverty had agreed to enter into a confidentiality agreement. It was his burden, not theirs, for it was Mr. Haverty who had the duty to minimize production costs.

Moreover, sometime in March, 2005 Mr. Haverty learned that he only needed documentation from 1998. He never informed UPS. At this point, however, UPS probably had already incurred the compliance costs.

It was not until the eve of trial, on March 21, 2005 that Mr. Haverty contacted UPS to obtain the documents. On April 2, 2005 after agreeing to the proposed confidentiality agreement, Mr. Haverty obtained a sample package from a different source, and no longer needed the packaging from UPS. Yet, again Mr. Haverty neglected to inform UPS of this important update.

The totality of Mr. Haverty's conduct is thus: (1) Mr. Haverty initially issued an overly-broad subpoena; (2) he failed to narrow his request to documents he actually sought when he had the opportunities to do so; (3) he completely failed to communicate with UPS' counsel regarding the confidentiality agreement, and (4) he failed to inform UPS that he obtained the documentation he sought from a different source. Based upon this conduct, it cannot be said that Mr. Haverty took reasonable steps to avoid imposing expenses upon UPS. Rather, it appears that Mr. Haverty initiated a fishing expedition without any care for the burden placed upon UPS. Therefore, this Court imposes sanctions upon Adams, Haverty and Williams, Cuker & Berezofsky, Attorneys At Law, jointly and severally in the amount of UPS' compliance costs reduced in recognition of UPS' obligation to perform a reasonable search.

To determine this amount, UPS is required to submit an affidavit(s) detailing the compliance expenses it has incurred. This affidavit must be specific as to dates, purpose, etc. If these compliance expenses include attorney fees, UPS must also submit a memorandum supporting the reasonableness of these fees as discussed

previously. Adams, Haverty, and Williams, Cuker & Berezofsky, Attorneys at Law, shall be afforded an opportunity to respond. The parties are entitled to address in their memoranda the estimated cost of an appropriately tailored, reasonable request by Ms. Adams.

An Order reflecting the above analysis is attached.

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Date  
Judge

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Kaye A. Allison

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* * * * *	*	* * * * *

**ORDER**

Upon Consideration of Third Party UPS Supply Chain Solutions, Inc.'s Motion for Sanctions and Supplemental Statement in Support of It's Motion for Sanctions, Certification of Counsel in Opposition to the Motion for Sanctions of UPS Supply Chain, Inc., the Supplemental affidavit of Julie C. Jared, Third Party UPS Supply Chain Solutions, Inc.'s Second Supplemental Statement in Support of It's Motion for Sanctions, and correspondence received from Mr. Haverty in response thereto, and after oral argument heard on July 7, 2005, it is this \_\_\_\_ day of December, 2005, by the Circuit Court for Baltimore City hereby

**ORDERED** that UPS Supply Chain's Motion for Sanctions is hereby **GRANTED** for the reasons set forth in the accompanying Memorandum of Decision; and it is

**FURTHER ORDERED** that UPS shall submit within thirty (30) days of the date of this Order an affidavit detailing the expenses and reasonable attorney fees it has incurred in preparing the Motion for Protective Order and for complying with the subpoena along with a memorandum explaining the reasonableness of any attorney fees in accordance with the accompanying Memorandum of Decision.

Adams, Haverty, and Williams, Cuker & Berezofsky, Attorneys At Law, shall have fifteen (15) days in which to file any response.

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Kaye A. Allison  
Judge