UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

DAVID A. JOFFE, **Plaintiff,** **v.** **KING & SPALDING LLP**, **Defendant.**	**Case No. 17-cv-3392 (VEC) (SDA)**

PLAINTIFF'S MOTION FOR RECONSIDERATION OF THE COURT'S JUNE 4, 2020 ORDER QUASHING SUBPOENAS AND FOR A HEARING PURSUANT TO FRE 201(e)

David A. Joffe, Esq. (pro se)
155 Christopher Columbus Drive
Jersey City, NJ 07302
516-695-7086
davidajoffe@gmail.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Executive Orders

Rules

Treatises

Other Authorities

PRELIMINARY STATEMENT

The Court's June 4, 2020 Memo Endorsed Order sua sponte quashes the third-party subpoenas served on Meredith Moss and David M. Fine, two young ex-K&S partners living on opposite sides of this country. In granting full relief before they even had to formally request it, the Memo Endorsed Order finds that COVID-19 automatically creates an undue burden to Ms. Moss's and Mr. Fine's health from in-person testimony, wherever taken, that "needs no further elaboration." The undersigned respectfully moves for reconsideration, on the following grounds:

First, the Memo Endorsed Order must be reconsidered because this Court ***does not have subject-matter jurisdiction*** to quash or modify Ms. Moss's and Mr. Fine's subpoenas. Rather, jurisdiction is vested exclusively in "the court for the district where compliance is required" in the first instance, subject to "transfer [by] motion … to the issuing court."

Second, the Memo Endorsed Order should be reconsidered because, even in the new normal, the rules require Ms. Moss and Mr. Fine to elaborate. And, the undersigned respectfully submits, elaboration is amply called-for here: **(i)** One day before the Memo Endorsed Order quashing the ex-K&S partners' subpoenas, current K&S partner (and former Deputy Attorney General) Rod J. Rosenstein appeared—in-person—to give hours of testimony before the Senate Judiciary Committee, while **(ii)** less than three weeks from now Chief District Judge Colleen McMahon will preside over a two-week bench trial—in-courtroom, in Lower Manhattan—where she is "convinced that it can be done safely." If these distinguished individuals can see fit to show up, ought not Ms. Moss and Mr. Fine at least explain why they deserve special treatment?

Third, the Memo Endorsed Order should be reconsidered also because it incorrectly presumes the absence of precautions that can and will be taken. The undersigned emphatically does not object to the participants wearing masks.

Finally, pursuant to Federal Rule of Evidence 201(e), the undersigned respectfully requests "to be heard on the propriety of taking judicial notice" sua sponte of the conclusions in the article in Science relied upon in the Memo Endorsed Order.

BACKGROUND

I. Third-Party Witnesses Meredith Moss and David M. Fine

Meredith Moss and David M. Fine are civil litigators and former K&S partners with whom the undersigned worked on auditor-defense matters—including, ironically enough, a third-party subpoena dispute before this very Court.[1]

Ms. Moss was a partner in the Firm's Washington, D.C. office, and was one of five members of the Firm-wide Business Litigation Associates Committee chaired by K&S partner David Tetrick. See Def.'s Summ. J. Mot. (Doc. No. 49) at 7. As this Court previously found, Ms. Moss "acknowledged that her experience working with Joffe was limited." See Summ. J. Op. (Doc. No. 74) at 10. This experience consisted of the PwC engagement described supra, see n.1, as well as work on a weekly "Auditor Liability Bulletin" on which the undersigned was part of a large "rotating team of attorneys." K&S 56.1 Reply (Doc. No. 64) ¶ 133. The undersigned and Ms. Moss have never met in-person. See May 7, 2020 Tr. (Doc. No. 236) at 7:14-19. This Court also previously found that Ms. Moss did not play a primary role in any adverse actions concerning the undersigned. See Summ. J. Op. at 10 ("Tetrick primarily cited administrative shortcomings."). Ms. Moss currently resides in the State of Utah.

[1] See Patel v. L-3 Comms. Holdings, Inc., No. 14-cv-6038-VEC (S.D.N.Y.) (Doc. No. 18) (discovery order) (explaining, in recitals, that "on June 28, 2016, the parties and third parties Alix Partners and [K&S client] PricewaterhouseCoopers ('PwC') participated in a telephone conference with the Court regarding a discovery dispute with respect to Plaintiffs' subpoenas served on these third parties," and excluding from production in Patel "[certain] discovery previously produced by PwC to the SEC"). At the June 28, 2016 teleconference PwC was represented by the senior attorney on the engagement, (current) K&S partner James P. Cusick, with the undersigned also in attendance; Ms. Moss had previously worked with the undersigned on this matter as well. The undersigned continued to work on this matter through the end of his tenure at K&S—with the undersigned's zero-notice termination apparently delayed for more than three months (until December 7, 2016) because he was deemed "essential" to defending a deposition scheduled pursuant to above-referenced discovery order issued by this Court.

Mr. Fine was a partner in K&S's New York office and currently resides in New York City. The Firm's records show that Mr. Fine and the undersigned had "moderate" work contract in 2013 and "limited" work contact in 2015, see Exs. P-17 & J-7;[2] in both years, Mr. Fine rated the undersigned's work as "above expectations." In Fall 2016, after the decision to terminate the undersigned had already been made, Mr. Fine sent an email to Mr. Tetrick stating that the undersigned seemed "withdrawn and even hostile,'" Ex. D-72, and, three weeks later, sent another email stating that the undersigned "seemed like his old self," Ex. P-160. This Court has specifically noted the "limited relevance" of Mr. Fine's emails. See Summ. J. Op. at 12 n.8.

II. K&S's Eleventh-Hour Designations of Ms. Moss and Mr. Fine

When the parties exchanged their initial disclosures in Summer 2017, K&S did not identify Ms. Moss or Mr. Fine as potential trial witnesses, and, consequently, neither of these individuals had been deposed when fact discovery concluded later that year. K&S also did not update its disclosures to include Ms. Moss or Mr. Fine for more than two years thereafter, despite being aware of the undersigned's reliance on its decision to not designate them as trial witnesses. (See Doc. No. 226 at 3.). On November 18, 2019, this Court set trial for April 20, 2020. (See Doc. No. 190). Three months later (and close to three years after the parties' initial disclosures), K&S designated Ms. Moss and Mr. Fine as potential trial witnesses for the first time, with the former added one day before the amended joint pre-trial order deadline, which had been extended at K&S's request. (See Doc. No. 222 at 2.)

One day after K&S's surprise designations, on March 4, 2020, the undersigned requested leave to move in limine to exclude Ms. Moss's and Mr. Fine's testimony. (See Doc. No. 222 at 1). The Court denied the undersigned's request, stating that the undersigned "ha[d] not

[2] All "Exhibit" references herein are to the exhibits set forth in the parties' Proposed Joint Pretrial Order filed on March 6, 2020 (Doc. No. 224).

demonstrated" why an in limine motion "would be productive." (See id.) On March 9, 2020, the undersigned filed a renewed letter-request elaborating on his basis for requesting leave to file an in limine merits brief to exclude Ms. Moss's and Mr. Fine's testimony at trial. (See Doc. No. 226.)

III. Adjournment Due to COVID and Out-of-Time Deposition Period

On March 13, 2020, while the undersigned's renewed letter-request was sub judice,[3] Chief District Judge Colleen McMahon issued Standing Order M10-468, which continued all jury trials in this District (including this one) scheduled to begin before April 27, 2020. See In re COVID-19, No. 20-mc-154-CM (Doc. No. 1). On April 20, 2020, Standing Order M10-468 was extended indefinitely. See In re COVID-19, No. 20-mc-164-CM (Doc. No. 1 at 2).

A. March 17, 2020 Conference and Initial Deposition Deadline

At a conference with the parties on March 17, 2020, this Court adjourned trial for three months, until July 20, 2020, and, in light of this adjournment, granted the undersigned leave to depose Ms. Moss and Mr. Fine by no later than May 15, 2020. See Scheduling Order, Mar. 17, 2020 (Doc. No. 232) at 1.

At some point, Ms. Moss and Mr. Fine, as third-party witnesses, both independently engaged K&S's defense counsel to represent them for purposes of their depositions. (See Doc. No. 235 at 1.)

---

[3] The undersigned understands his March 9, 2020 renewed letter-request to have been rendered moot in light of the adjournment of trial and the out-of-time deposition period subsequently set by this Court. Subject to Ms. Moss's and Mr. Fine's deposition testimony, however, the undersigned would again seek to preclude these witnesses from testifying at trial. To the extent the ex-K&S partners' testimony is admitted at trial, however, and here too subject to their deposition testimony, the undersigned would also again seek to designate as his own trial witnesses (and/or, as time permits, to depose) the additional individuals set forth in the undersigned's March 9, 2020 renewed letter-request. (See Doc. No. 226 at 5.) At the March 17, 2020 conference, the undersigned specifically requested to depose K&S partner Mr. Cusick—whose testimony is relevant with respect to both Ms. Moss, see supra n.1, and Mr. Fine as well, see Mar. 17, 2020 Tr. (Doc. No. 231) at 7:8-8:14—and the Court deferred decision on this request, see id. at 9:8-9, a ("[A]fter you depose Fine and Moss … [m]y inclination is to say we can have the conversation at that point.").

B. First Adjournment of Deposition Deadline

On April 16, 2020, New York Governor Andrew Cuomo extended the State's then-in-force ban on "all non-essential gatherings of individuals of any size for any reason" through May 15, 2020. See Office of N.Y. Gov., Exec. Order No. 202.18 (Apr. 16, 2020) (available at https://www.governor.ny.gov/news/no-20218-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency). The following day, on April 17, 2020, the undersigned wrote to this Court requesting a two-week extension of the deposition deadline, through May 29, 2020, which request this Court granted. See Order, Apr. 17, 2020 (Doc. No. 234).

C. May 17, 2020 Conference and Second Adjournment of Deposition Deadline

As it happened, on May 22, 2020, the state ban on gatherings of any size that prompted the undersigned's request for a two-week extension was repealed, one week in advance of the May 29, 2020 deadline.[4] Ms. Moss and Mr. Fine did not wait to find that out, however, but, instead, on May 6, 2020 "requested an informal conference with the Court by letter-motion for a pre-motion discovery conference" pursuant to Local Civil Rule 37.2. (See Doc. No. 235.)[5] The ex-K&S partners' letter stated that both witnesses were unwilling to be deposed in-person under any circumstances and that their depositions should be conducted remotely. See id. at 1. In addition, Ms. Moss and Mr. Fine asked the Court to permit alternative service of subpoenas via

---

[4] See N.Y. State Governor's Executive Order No. 202.33 (May 22, 2020) (available at https://www.governor.ny.gov/news/no-20233-continuing-temporary-suspension-and-modification-laws-relating-disaster-emergency) (permitting "any non-essential gathering of ten or fewer individuals").

[5] This Court's Individual Rule 3.B directs parties to follow Local Rule 37.2 subject to the modification that "the parties must jointly call Chambers" rather than submit a letter-motion. As the ex-K&S partners' letter noted, however, counsel "attempted to jointly call Chambers … but reached a voicemail." Thus, Ms. Moss's and Mr. Fine's May 6, 2020 letter-request for a conference—as well as their June 3, 2020 letter-request for a conference on the basis of which this Court entered the June 4, 2020 Memo Endorsed Order that is the subject of the instant motion (see Doc. No. 239 at 1-6)—were effectively submitted pursuant to Local Rule 37.2.

email to their (shared-with-K&S) counsel. See id. The undersigned noted in the same letter that he had scheduled both witnesses' depositions to take place "in extra-large conference rooms within suburban, social-distancing-conducive facilities." The following day, on May 7, 2020, this Court granted Ms. Moss's and Mr. Fine's request for alternative service and scheduled a teleconference for that afternoon. See Order (Doc. No. 235).

At the May 7, 2020 teleconference (see Doc. No. 236 ("May 7, 2020 Tr.")) with this Court, attended by the undersigned, pro se, as well as by the third-party witnesses' and K&S's joint counsel Mr. Baumgarten and Mr. Goldberg, the Court addressed **(i)** the undersigned's reasons for seeking in-person testimony; **(ii)** the COVID-related precautions that would be taken; **(iii)** the deposition deadline; and **(iv)** the trial date.

First, the undersigned explained at the conference that in-person depositions are needed because both ex-K&S partners' testimony "will heavily depend on their credibility," making it necessary to "observe the witnesses' manner and demeanor and all the things that determine credibility ***in the same way that the jury would at trial***[6]." May 7, 2020 Tr. at 3:14. When the Court noted that a remote deposition would permit seeing the witnesses even more closely, id. at 7:4-5, the undersigned emphasized that, when it comes to taking the measure of Ms. Moss and Mr. Fine, even a robust video connection is not the same thing. See id. at 7:7-13 ("having observed people on video and then observed them sort of personally in real life … it's still a

[6] If K&S requests that Ms. Moss's and/or Mr. Fine's testimony before the jury at trial be given remotely (and this Court approves), then the undersigned represents that he would in turn happily agree to have their deposition testimony taken remotely as well. But the undersigned isn't holding his breath, since Mr. Baumgarten "prefer[s] in-person" testimony too. See May 7, 2020 Tr. at 10:9-10.

distant second best").[7] The Court concluded that, on this question, "I think we all agree that in-person depositions are better." Id. at 10:16-19.

Second, with respect to health precautions, the undersigned explained that he had reserved twelve-person conference tables in large facilities with extensive safety measures in place. See May 7, 2020 Tr. at 4:20-5:6. When Mr. Goldberg noted—for the first time before the Court—that such a room may still be too small because both ex-K&S partners plan be accompanied by several other lawyers, id. at 5:23-6:4, the undersigned suggested that, "if we coordinate constructively …we will be able to find [a suitable] arrangement … [for] everyone to be optimally socially distant," adding: "If it truly isn't feasible, if it turns out that the available spaces don't make that work, then absolutely we will have to do it remotely," id. at 6:16-25.

In turn, Mr. Goldberg suggested that there is categorically "no way" the parties could find a suitable arrangement. The ex-K&S partners' counsel explained that, while there are "even more strict guidelines for people who are at risk or over 65"—the undersigned believes that Ms. Moss and Mr. Fine must both be considerably younger than 65—deposing even young and healthy individuals in-person, no matter what precautions are taken, is "simply inconsistent" with recommendations that "everyone should try to work remotely." May 7, 2020 Tr. at 8:3-24. This argument, however, was immediately rendered moot: just after Mr. Goldberg explained his view that in-person depositions are per se infeasible and "urge[d] your Honor to reject [the

[7] The third-party witnesses' counsel Mr. Goldberg also questioned the premise that in-person depositions would adequately permit the undersigned (i.e., his opposing counsel) to assess credibility by noting that Ms. Moss and Mr. Fine "are going to need to wear masks, so you won't even be able to see each other speaking." May 7, 2020 Tr. at 9:1-3. The June 4, 2020 Memo Endorsed Order quashing the Ms. Moss's and Mr. Fine's subpoenas, however, appears to misattribute Mr. Goldberg's view to the undersigned, and from this to presume that the undersigned objects to masks. (See Doc. No. 239 at 5 ("because Plaintiff is insisting that he needs to observe the witnesses' demeanor, face masks would presumably not be used.")). This presumption is incorrect: as set forth infra, the undersigned has no objection to the use of masks, both as a health-and-safety matter, and because the undersigned believes these witnesses' demeanor and credibility can be more than adequately assessed in-person even with masks, yet cannot be adequately assessed online even without masks.

undersigned's] argument" to the contrary, id. at 9:4-6, this Court suggested, instead, to again adjourn the deposition deadline, an idea with which defense counsel Mr. Baumgarten immediately agreed, see id. at 10:8-19.[8] Thus, Mr. Goldberg's categorical argument was never addressed by both sides.

Third, with respect to scheduling, this Court adjourned the deposition deadline a second time, to July 15, 2020, and noted: "Let's see if things ease up [before then]. If they don't, [Mr. Joffe] has agreed that he will take up without complaining via video conferences." May 7, 2020 Tr. at 10:1-3. In setting this deadline, this Court appeared to accept the undersigned's suggestion that a sufficiently large space with a robust COVID-related safety protocol would be acceptable, assuming that general prohibitions on gatherings were lifted.[9]

Finally, this Court adjourned the trial date sine die. See May 7, 2020 Tr. at 10:20-21. On May 20, 2020, the Court directed the parties to propose, by August 7, 2020, possible trial dates for the fall. See Scheduling Order (May 20, 2020) (Doc. No. 236).

D. The ex-K&S Partners' Renewed Request for Informal Conference

On May 15, 2020, in accordance with this Court's May 7, 2020 Order authorizing alternative service via email to counsel, the undersigned duly served Ms. Moss and Mr. Fine with subpoenas for depositions to take place the second week of July 2020 in Lehi, Utah and

[8] Mr. Goldberg appears to have dropped off the call during this exchange, see May 7, 2020 Tr. at 9:12-13 ("THE COURT: How about Mr. Goldberg? That's who I lost.")—thus illustrating, the undersigned can't help but note, one of the reasons why testimony via remote connection is a poor fit when it comes to assessing credibility and demeanor.

[9] As set forth supra, (i) at the time of the May 7, 2020 conference, New York State—where Mr. Fine's deposition was then-expected to take place—had prohibited gatherings of any size for any purpose, which is the reason the undersigned had initially requested a two-week extension from May 15, 2020 to May 29, 2020; and (ii) the undersigned had represented that he would "absolutely" agree to a remote deposition "if it turns out that the available spaces don't … work." Thus, the undersigned (i) understood this Court's statement "Let's see if things ease up" as referring to the lifting of the legal prohibitions on gatherings then in place, and (ii) understood this Court's statement about the undersigned's agreement to take remote testimony "without complaining" as referring to the eventuality in which a sufficiently large conference space is unavailable. As it happened: (i) the general prohibitions on gatherings were lifted, including in New York, see supra, n.4; while (ii) the undersigned did find available spaces that complied with the safety parameters discussed at the May 7, 2020 conference.

Bethlehem, Pennsylvania, respectively. These locations, which are within the 100-mile radius provided-for in Federal Rule of Civil Procedure ("FRCP") 45(c)(1)(A), were chosen because they met the size requirements discussed at the May 7, 2020 conference, as well as the undersigned's budget. (See Doc. No. 239 at 4.)

On June 3, 2020, Ms. Moss and Mr. Fine submitted a renewed letter-request for an informal conference pursuant to Local Rule 37.2, at which they stated they intend to "ask the Court to order that the depositions be conducted remotely." (See Doc. No. 239 at 2.) As the undersigned noted, however, because at that point Ms. Moss and Mr. Fine had been duly served with testimonial subpoenas, their request amounted to a sub rosa motion to quash duly-issued subpoenas.[10] Ms. Moss's and Mr. Fine's renewed request again represented that both witnesses remain categorically unwilling to appear in-person, anywhere, for a deposition that was then six weeks away.[11] In the same letter, the undersigned, briefly setting forth his position with respect to the requested informal conference, noted that, as contemplated at the May 7, 2020 hearing for in-person depositions to go ahead, public-health rules at the locations reflected in Ms. Moss's and Mr. Fine's subpoenas expressly permit and contemplate in-person gatherings, while the banquet-sized facilities that the undersigned reserved fully address all of the specific health-and-

[10] The ex-K&S partners' letter-request stated that they were willing to submit a "formal motion," (see Doc. No. 239 at 2 n.2), but did not specify what the "formal" basis for this motion would be. Because the undersigned is "not seeking party discovery, but third-party discovery pursuant to subpoena … the source of the authority for these discovery requests is Rule 45." In re Publication Paper Antitrust Litig., No. 3:04 MD 1631 (SRU), 2005 U.S. Dist. LEXIS 13681, at *5 (S.D.N.Y. July 5, 2005); see also Stanziale v. Pepper Hamilton LLP, No. M8-85 (Part I) (CSH), 2007 U.S. Dist. LEXIS 11320, at *7 (S.D.N.Y. Feb. 8, 2007) ("Fed. R. Civ. P. 45 governs the issuance, service, and enforcement of subpoenas and the procedures for objecting to them.") (emphasis added). By contrast, Defendant K&S "lacks standing to [itself] challenge subpoenas issued to non-parties [i.e., Ms. Moss and Mr. Fine] on the grounds of … undue burden," Universitas Educ. LLC v. Nova Grp., Inc., No. 11 Civ. 1590, 2013 U.S. Dist. LEXIS 1720, at *16 (S.D.N.Y. Jan. 4, 2013); see also In re Rapid-Am. Corp., No. 13-10687 (SMB), 2018 Bankr. LEXIS 378, at *7 (Bankr. S.D.N.Y. Feb. 12, 2018) (a party "cannot circumvent the limitation on [its] standing by moving for a protective order under Rule 26").

[11] Mr. Fine's position was that he was separately and additionally unwilling to appear in-person in Bethlehem, PA, due to the "additional burden" of traveling to the Lehigh Valley from his residence in New York City. (See Doc. No. 239 at 2.). The undersigned represented that he proposed holding the deposition at a conference facility closer to Mr. Fine's residence, if Mr. Fine and/or defense counsel agreed to bear the (much-more-expensive) rental fees, but that this proposal was not accepted. Id. at 3.

safety concerns previously raised. See id. at 3-4. Finally, the undersigned stated that counsel's failure to provide any competent evidence such as sworn statements, and the third-party witnesses' identical, generalized concerns ("due to the pandemic"), cannot meet their burden of proof on the issue of whether the subpoenas subject them to an undue burden under FRCP 45(c)(3)(a)(iv). See id. at 5.

IV. Memo Endorsed Order *Sua Sponte* Quashing Third-Party Subpoenas

The June 4, 2020 Memo Endorsed Order denied the ex-K&S partners' request for a pre-motion conference, and, instead, granted relief on a proposed request that the third-party witnesses had not in fact formally made by sua sponte quashing Ms. Moss's and Mr. Fine's subpoenas. (See Doc. No. 239 at 6 ("Memo Endorsed Order").)[12]

The Memo Endorsed Order stated that the ex-K&S partners' renewed request for a pre-motion conference was denied because the Court had "already held a teleconference on this exact issue," but, with respect to the resolution of this issue, the Memo Endorsed Order substantially reversed course and quashed both witnesses' subpoenas sua sponte on the basis of evidence that had "continue[d] to accumulate" after the prior month's teleconference. Specifically, the Memo Endorsed Order cited three factors that, it concluded, made in-person depositions "undoubtedly a bad mix": **(i)** the assumption that "face masks would presumably not be used" at the undersigned's insistence; **(ii)** the proposition—for which the Court took judicial notice, on its own motion, of the conclusions in a May 27, 2020 "Perspectives" article in Science

[12] The Memo Endorsed Order (emphasis added) states: "***The parties*** are directed to proceed by remote deposition." However, it is undisputed that Ms. Moss and Mr. Fine are third-party witnesses who were served with subpoenas, and, accordingly, the relief issued in the Memo Endorsed Order must be a quashing or modification of non-party subpoenas under FRCP 45(d)(3) rather than a protective order under FRCP 26(c). While "a motion to quash or modify a discovery subpoena is similar to a motion for a protective order … and is therefore judged under similar standards," 9 James Wm. Moore et al., Moore's Federal Practice—Civil § 45.50 (3d ed. 2020), as further set forth infra, they are subject to different procedural requirements. In both cases, however, the movant seeking to quash or modify a subpoena (or seeking a protective order) "bears the burden to obtain the desired remedy." See id.

Magazine—that six feet of social distance "is likely insufficient to prevent transmission" indoors; and **(iii)** the assumption that the depositions "require[] counsel or witnesses to travel across state lines." See id. On the basis of these factors, the Memo Endorsed Order found that the burden on both ex-K&S partners "needs no further elaboration." Id.

STANDARD

Motions for reconsideration are governed by Local Civil Rule 6.3. "A motion for reconsideration is appropriate where the moving party can point to controlling decisions or data that the court overlooked—matters, in other words, that might reasonably be expected to alter the conclusion reached by the court." Medisim Ltd. v. BestMed LLC, No. 10 Civ. 2463 (SAS), 2012 U.S. Dist. LEXIS 56800, at *2 (S.D.N.Y. Apr, 23, 2012) (quotation omitted). "[R]econsideration may also be granted to correct a clear error[.]" See id. (quotation omitted). The party seeking reconsideration may not raise arguments that it "chose not to raise … at an earlier stage in the litigation," Analytical Surveys, Inc. v. Tonga Partners., L.P., 06 Civ. 2692 (KMW)(RLE), 2009 U.S. Dist. LEXIS 45402, at *9 (S.D.N.Y. May 29, 2009), or that "could have been raised in the opposition to [a prior] motion," Williams v. Romarm, S.A., 751 F. App'x 20, 24 (2d Cir. 2018) (unpublished opinion). "[B]ecause a challenge to the existence or absence of subject-matter jurisdiction is never waived," however, such challenges may be brought in a motion for reconsideration in all instances. See, e.g., Domnister v. Exclusive Ambulette, Inc., No. 03-CV-1666 (NGG) (RLM), 2008 U.S. Dist. LEXIS 40860, at *5 (E.D.N.Y. May 25, 2008) (citing Louisville & Nashville R.R. Co. v. Mottley, 211 U.S. 149, 29 (1908)).

Under this standard, the arguments below are properly raised. In addition to the non-waivable jurisdictional argument, the merits arguments below have not been waived because this Court denied the ex-K&S partners' request for an informal pre-motion conference at which to

address these issues and, in quashing their subpoenas sua sponte, precluded the opportunity for briefing or oral argument in which these issues would also have been addressed Moreover, because, by its own terms, the Memo Endorsed Order is based on evidence that had "accumulate[d]" in the month after the Court held a teleconference to consider Ms. Moss's and Mr. Fine's depositions, the undersigned's arguments addressing this evidence could not have been raised at any stage in the proceedings prior to the instant motion.

ARGUMENT

I. The Memo Endorsed Order Must be Reconsidered Because it Exceeds This Court's Subject-Matter Jurisdiction

Under the plain terms of FRCP 45, this Court currently lacks subject-matter jurisdiction to quash or modify the ex-K&S partners' third-party subpoenas. Rather, the District of Utah (for Ms. Moss) and the Eastern District of Pennsylvania (for Mr. Fine) must hear these issue in the first instance, at which time these courts may elect to either decide these issues or to transfer them to this Court. Accordingly, the Memo Endorsed Order must be reconsidered so that Ms. Moss and Mr. Fine can proceed before the proper tribunals.

FRCP 45(d)(3) provides that motions to quash or modify are to be brought before "the court for the district where compliance is required." In turn, pursuant to FRCP 45(f), if, as is the case here, "the court where compliance is required did not issue the subpoena, it may transfer a motion under this rule to the issuing court." But where the issuing court receives a request to quash or modify a subpoena for out-of-district discovery in the first instance, rather than as a transferee, that issuing court lacks jurisdiction to enter the requested relief. Thus, for example, in Wartluft v. Protect the Hersheys' Children, Inc., No. 17-mc-235 (RJS), 2017 U.S. Dist. LEXIS 108128, at *2-3 (S.D.N.Y. July 11, 2017), the movant brought a challenge, in this District, to a subpoena that "provide[d] for a deposition … within the Eastern District of Pennsylvania." The

court found that it "***lacks jurisdiction*** to adjudicate such a motion," and that the movant must seek initial relief in "the district where compliance is required." Id. Similarly, in KGK Jewelry LLC v. ESDNetwork, No. 11 Civ. 9236 (LTS) (RLE), 2014 U.S. Dist. LEXIS 38630, at *8 (S.D.N.Y. Mar. 21, 2014), the court held that, because "[n]o order to transfer a motion to quash to this Court has been entered by either the District Court of New Hampshire or the District Court of Rhode Island [i.e., the courts for the districts where compliance was required]," "the ***lack of jurisdiction in this Court requires that [the] motion to quash the … subpoenas be denied***."

Indeed, interpretive authority under FRCP 45 is clear that a federal court's power to hear a challenge to a subpoena in the first instance is a threshold issue of subject-matter jurisdiction. In In re Digital Equipment Corp., 949 F.2d 228, 231 (8th Cir. 1991), the Eighth Circuit issued a writ of mandamus ordering the District Court to vacate its ruling on subpoena objections, since a different "district court initially ha[d] exclusive jurisdiction to rule on the objections … and [a]bsent [a] transfer … the District Court [appealed from] ***lack[ed] jurisdiction to rule***" on the subpoenaed parties' objections. Because, like in In re Digital, the Memo Endorsed Order quashes deposition subpoenas over which a different court has exclusive jurisdiction in the first instance, the Memo Endorsed Order should be reconsidered and vacated so that the matter can be initially brought in the correct federal district.

Particularly with respect to Ms. Moss, the undersigned respectfully submits that

proceeding first in the District of Utah is no mere formality.[13] Because Ms. Moss would appear even for a remote deposition from her home in Utah where she might be self-isolating,[14] the power to enforce compliance with the subpoena, whether for in-person or remote testimony, would again initially rest only with the "court for the district where compliance is required—and also, ***after a motion is transferred***, the issuing court." Fed. R. Civ. P. 45(g) (emphasis added); see also Gucci Am. v. Bank of China, 768 F.3d 122, 141 (2d Cir. 2014) ("A district court … must have personal jurisdiction over a nonparty in order to compel it to comply … under [Rule] 45.").[15] Moreover, because Ms. Moss's objections do not relate in any way to the substance of

[13] With respect to Mr. Fine, a New York City resident, the undersigned respectfully submits that the entire issue of jurisdiction in the Eastern District of Pennsylvania could easily be resolved with even minimal cooperation between the parties. When Mr. Fine's deposition was scheduled for May, the undersigned had reserved a conference space in Westchester County, within this District; however, when seeking (now-super-)extra-large conference spaces for July dates (in light of the May 7 conference with this Court), the undersigned found the available Westchester County options to be outside his budget. (See Doc. No. 239 at 4-5.) The undersigned is willing to book a venue in Westchester (and thus fall within this Court's jurisdiction in the first instance) if Mr. Fine and/or his legal team agree to bear the rental fees, but they have not so agreed. (See id. at 4.) The undersigned would also be willing to book an extra-large venue that is both within this District and is within the undersigned's budget—for example, in Sullivan County—but fears that would not work either, since Mr. Fine takes the position that Bethlehem, PA (which is closer to him than Sullivan County) is separately unduly burdensome because it is too far, despite being within the 100-mile Rule 45 limit. (See id. at 4-5.) In short, Mr. Fine's place-of-compliance outside this District is the result only of what the Memo Endorsed Order states was the undersigned's "extraordinary" diligence in addressing the witness's health concerns, not the result of jurisdictional gamesmanship.

[14] When read as carefully as they were doubtlessly written, counsel's unsworn representations about Ms. Moss's and Mr. Fine's level of interaction with society appear to be subtly evolving, On May 7, 2020, the witnesses were both "***unwilling to spend time*** in an enclosed space with non-family members"—full stop—either at that time or later that month. (See Doc. No. 235.) By June 3, 2020, however—when the subject at hand was a deposition in mid-July—the ex-K&S partners were "***unwilling to spend up to seven hours testifying*** in an enclosed indoor space with non-family members." (See Doc. No. 239 at 1.) The more narrowly-cabined second representation suggests that both these witnesses are more willing—though the reader gets no hint how much more willing—to be with non-family members than they were one month prior; and, in turn, that Ms. Moss's personal circumstances in Utah and Mr. Fine's in New York are not necessarily (in fact very likely are not) exactly the same.

[15] The undersigned does not suggest that Ms. Moss will fail to show up for in-person testimony or log in to a remote deposition as directed. But, especially with respect to a remote deposition, given the novelty of the format and the fact that the testimony will be suffused with confidential information subject to this Court's protective order, one can easily imagine the sort of scenarios—e.g., someone frequently getting "accidentally" disconnected or going on mute at seemingly opportune moments; a witness's pattern of opening the wrong sealed envelope and getting a peek at the lawyer's forthcoming topics of inquiry; the frequent need to change the subject of questioning because a family member who hasn't signed the protective order happens to keeping coming within earshot—which would compel the lawyer to call (or, at least, compel him to tell the witness and her counsel that he is prepared to call) Chambers. See State Farm Mut. Auto. Ins. Co. v. Cordua, No. 07-518, 2010 U.S. Dist. LEXIS 161435, *2 (E.D. Pa. Sept. 16, 2010) ("when a party attends a deposition and answers questions in an uncooperative and evasive manner, it is tantamount to failing to appear").

underlying action but rather concern, as this Court noted, health-and-safety guidelines in place in Utah and that State's public policy choices on the matter, see Memo Endorsed Order, the District of Utah, in light of its closer experience on the ground in that State, would be well-placed in the first instance to evaluate the concerns of its fellow Utahan.

II. The Memo Endorsed Order Should Be Reconsidered In Light of Controlling Legal Principles as Well as Ongoing Practice in This District and Elsewhere

Even assuming this Court had (or, upon transfer, obtains) jurisdiction over Ms. Moss's and Mr. Fine's subpoenas, the Memo Endorsed Order should nevertheless be reconsidered. This Memo Endorsed Order held, sua sponte, that COVID-19 means the undue burden for two lawyers on opposite sides of the country whose health, risk factors, and family situation[16] are all unknown "needs no further elaboration." But FRCP 45 requires, and ongoing judiciary operations (including in this District) confirm, that the extent of each witness's burden—and the appropriate form of relief—should be established using objective and particularized evidence rather than general preconceived notions.

A. FRCP 45 Requires an Individualized Showing, Even in the Age of COVID

As the ex-K&S partners' counsel concedes, public-health guidelines—in every state—are not one-size-fits-all but rather are "more strict [] for ***people who are at risk or over 65***." May 7, 2020 Tr. at 8:3-6 (emphasis added). To establish that their subpoenas impose an undue burden—even, current practice confirms, post-COVID—Ms. Moss and Mr. Fine must provide a concrete, individualized explanation why they are at risk from an in-person appearance no matter what precautions are taken. They have not made—and their posture thus far in this dispute calls into question whether they credibly can make—such a showing.

[16] The Memo Endorsed Order refers to undue burden from "potential exposure … [for] their [i.e., Ms. Moss's and/or Mr. Fine's] families." But counsel has represented nothing about whether Ms. Moss and/or Mr. Fine—who, one easily forgets, are different people—even live with family members in the first place (rather than, like millions of Americans, by themselves), making such second-order risk hypothetical.

"The burden of persuasion in a motion to quash a subpoena issued in the course of civil litigation is borne by the movant." Dukes v. NYCERS, 331 F.R.D. 464 (S.D.N.Y. 2019). To make this showing, a subpoenaed witness "cannot merely assert that compliance with the subpoena would be burdensome without setting forth the manner and extent of the burden." Kirschner v. Klemons, No. 99 Civ. 4828 (RCC), 2005 U.S. Dist. LEXIS 9803, at *6 (S.D.N.Y. May 19, 2005). Nor can a witness rely on preconceptions. Thus, in Kirschner, counsel asserted that the non-party witness "is 88 years old and requires assistance walking such that it would be an undue burden for him to testify at trial," but "provide[d] no affidavit or specific information regarding the manner and extent of the burden and the injurious consequences of insisting upon compliance." Id. at *8. The court, accordingly, held that such "limited information" is insufficient for the mobility-limited senior citizen's deposition subpoena to be quashed. Similarly, in Ashkenazi v. Lincoln National Life Insurance Co., No. 08 CV 3235 (ENV), 2010 U.S. Dist. LEXIS 161249, 2010 U.S. Dist. LEXIS 161249, at *7 (E.D.N.Y. Aug. 27, 2010), where counsel averred that the subpoenaed witness "is 87 years old and is suffering from a variety of illnesses … [and] is unable to withstand a deposition," the court declined to credit this conclusion "absent a definitive ***statement from her doctors*** that [the witness's] health would be jeopardized."

Recent practice in this District confirms that COVID-19 does not relieve the necessity of determining "the manner and extent of the burden" with reference to specific, individualized risk factors. For example, in Ferring Pharmaceuticals Inc. v. Serenity Pharmaceuticals, LLC, No. 17-cv-9922-CM-SDA (S.D.N.Y.)—which is scheduled for bench trial a few weeks from now, on July 6, 2020, with Chief Judge McMahon presiding ***in-courtroom***—one of the parties sought to preclude its witnesses from having to fly from Europe, noting that "three of [the witnesses] are

over sixty years old and one of [them] is seventy-five years old." Id. (Doc. No. 686 at 2.) At a teleconference on the issue on May 20, 2020, Chief Judge McMahon noted that, while she is "far less skittish than people who are ***a whole lot younger and a whole lot healthier …***', noting that she is 68," she "doubted whether having [these] witnesses travel internationally would be wise." Dorothy Atkins, NY Judge Won't Require In-Person Testimony In IP Bench Trial, Law360 (May 20, 2020).[17] By contrast, while the ex-K&S partners' counsel aver "that courts in this District now routinely require depositions to be conducted remotely," they fail to identify ***a single instance*** (whether COVID-related or otherwise) where a court in this District or elsewhere categorically precluded an in-person deposition against the deposing lawyer's objections.[18]

Accordingly, Ms. Moss and Mr. Fine should be required to discharge their burden of proof and persuasion by setting forth, with specifics and under oath, the manner and extent of their burdens. Yet, at this point, beyond the fact that they are lawyers living on opposite sides of the country—and that, the undersigned represents, they are well-younger than 65—this Court lacks any relevant information about either third-party witness. Indeed, neither Ms. Moss nor Mr. Fine has provided a single specific fact about the "extent of the [witness's] burden," such as their general health profile, immunological circumstances, or any other facts from which a physician could conclude—much less a note from an actual medical professional which does conclude, as the court required in, e.g., Ashkenazi—that either Ms. Moss's or Mr. Fine's health

[17] The undersigned cites Law360 for Chief Judge McMahon's statement because the May 20, 2020 teleconference in Ferring Pharmaceuticals was held without a court reporter present and, accordingly, no transcript could be obtained.

[18] Ms. Moss's and Mr. Fine's June 3, 2020 letter cites to individual practices providing that "depositions ***may*** be taken … [by] remote means." (Doc. No. 239 at 1 n.1 (emphasis added)) And the sole ruling the ex-K&S partners cite where the Court granted a motion to compel remote depositions—Magistrate Judge Aaron's May 21, 2020 order in Mogollan v. La Abundancia Bakery & Restaurant Inc., No. 18-cv-3202 (GBD)(SDA) (S.D.N.Y.) (Doc. No. 190)—in fact cuts the other way. In that case, "in-person depositions were scheduled"—in this District, during the COVID outbreak—at the witnesses' counsel's request, but, "***[u]pon arrival to the first [in-person] deposition***, [the witnesses' counsel] objected to the size of the conference room and refused to go forward with the four scheduled depositions." And on this basis ***deposing*** counsel (and not, like here, the witnesses) successfully petitioned Magistrate Judge Aaron to compel depositions to take place remotely instead. See id. (Doc. No. 189 at 1-2).

would be unduly threatened by an in-person deposition in a room of any size no matter what precautions are taken. In the absence of any objective evidence concerning the specific witnesses in question, there cannot be a finding of undue burden within the meaning of FRCP 45.

Nor does this Court know how much Ms. Moss and/or Mr. Fine are actually self-isolating. Rather, their counsel represents only that both witnesses' self-imposed limitations on social contact now include, conveniently, not being willing to "spend up to seven hours testifying [indoors]." (See Doc. No. 239 at 1.) But that tells the reader nothing about what either witness *is* willing to do outside the home—e.g., Does Mr. Fine occasionally go into the office? Has Ms. Moss gone for a haircut? Have either or both traveled to a second home in the mountains?—and, accordingly, makes it impossible to infer that sitting for testimony in a giant banquet room with extensive precautions would uniquely put either ex-K&S partner's health in jeopardy.

Finally, K&S's counsel's scant (unsworn) representations thus far strongly suggest that, as a matter of believability, Ms. Moss and Mr. Fine seek to avoid social contact more in word than in deed. Most glaringly, defense counsel represented to this Court that, if an in-person deposition ends up taking place both witnesses intend to be accompanied by a team of (at least) two attorneys coming from New York and one flying in from Atlanta. If Ms. Moss and Mr. Fine truly are trying to minimize personal interaction with non-family members, then surely they would not make the perfect the enemy of the good. That is, if required to show up in-person, they would show up alone (or, at most, with one attorney), and arrange for their lawyers to appear by tele- or videoconference. But the ex-K&S partners' insistence on either having zero social contact with counsel whatsoever, or extensive contact if zero is not an option, suggests that their concerns are rooted in litigation posture rather than genuine worry about health. And specifically with respect to Mr. Fine, this inference is further magnified by the fact that, if he is

required to testify in-person, Mr. Fine claims to be separately unduly burdened by an hourlong drive to the less-densely-populated Lehigh Valley and would instead prefer to be joined by a squad of lawyers in a conference room closer to New York City.

Even during COVID, the scant information Ms. Moss and Mr. Fine provide through their counsel does require elaboration in order to meet their burden under FRCP 45. This Court's conclusion to the contrary, the undersigned respectfully submits, should be reconsidered.

B. If Chief Judge McMahon and Rod Rosenstein Can Do It, Why Can't Ms. Moss and Mr. Fine?

The special solicitude given by the Court in finding that two young ex-K&S partners face a per se undue burden by testifying in-person is inconsistent with similar proceedings taking place in this District and elsewhere.

Thus, in Ferring Pharmaceuticals, see supra, Chief Judge McMahon currently plans to do exactly what Ms. Moss's and Mr. Fine's said they cannot—i.e., "spend time in an enclosed space with non-family members." In a May 27, 2020 written order setting forth procedures for the July 6, 2020 bench trial, Chief Judge McMahon explained: "Whether counsel would prefer to cross examine … from the courtroom is up to you. … ***I am convinced that it can be done safely from the courtroom, and there are certainly good reasons to want you in the courtroom with me (it is a huge courtroom, you know how easy it will be to keep socially distanced)***," Ferring Pharmaceuticals, 1:17-cv-09922-CM-SDA (Doc. No. 690) at 2 (emphasis added). That is, Chief Judge McMahon expressed a willingness to interact in-person, and to cause other individuals who would be present in the courtroom to interact in-person, with the full range of those who might be present at a bench trial, from local staff providing the "[old] normal model of in court tech support" up to and including "counsel [flying in] from Texas." See id. It ought to be no less safe for Ms. Moss and Mr. Fine to appear for a day with a handful of other persons, at

proceedings held within reasonable driving distance of their homes at huge banquet rooms in Lehi, UT, and Bethlehem, PA, than it will be for Chief Judge McMahon to preside over a two-week bench trial from a courtroom in Lower Manhattan.

And current experience, even before midsummer, further compels against Ms. Moss and Mr. Fine getting special treatment. Indeed, on June 3, 2020, one day prior to this Court's Memo Endorsed Order quashing subpoenas served on two ex-K&S partners, *current* K&S partner and former Deputy Attorney General Rod J. Rosenstein appeared before the members of the Senate Judiciary Committee as part of oversight hearings on the FBI's Crossfire Hurricane investigation to do what, by Ms. Moss's and Mr. Fine's standards, would seemingly be daredevilry—namely, Mr. Rosenstein testified, for hours, in an "enclosed indoor space" (here, the Dirksen Senate Office Building) that, by all appearances, held dozens of other people in it some but not all of whom wore masks (Mr. Rosenstein, while he was testifying, was unmasked).[19]

In short, abounding day-to-day evidence shows that health risks from appearing in-person are not insurmountable but can be mitigated, particularly for young, healthy lawyers who have the means and willingness to take commonsense precautions.

III. The Memo Endorsed Order Misassumes the Facts at Hand and Relies on Other Facts Not Properly Subject to Judicial Notice

As set forth supra, the Memo Endorsed Order bases its sua sponte relief on three factors that, as found therein, collectively create a "bad mix during a pandemic." The undersigned respectfully submits that the predicate assumptions for each of these factors should be reconsidered.

A. Masks *Will* Be Worn If the Witnesses So Prefer

This Memo Endorsed Order finds, as one factor creating a "bad mix" for disease spread,

[19] See Videotape: Oversight of the Crossfire Hurricane Investigation: Day 1 (Senate Committee on the Judiciary, June 3, 2020), available at https://www.judiciary.senate.gov/meetings/oversight-of-the-crossfire-hurricane-investigation-day-1.

that **(i)** "face masks would presumably not be used." See Memo Endorsed Order. This presumption is incorrect: face masks would be used.

The Court's inaccurate presumption that the undersigned objects to face masks appears to misattribute to the undersigned the position of ***K&S's witnesses' counsel*** Mr. Goldberg at May 7, 2020 conference, where Mr. Goldberg questioned whether his masked clients' demeanor can be assessed in-person when "you won't even be able to see each other speaking." See May 7, 2020 Tr. at 9:1-3.[20] But the undersigned—the attorney actually taking the testimony of these witnesses—does not share his colleague Mr. Goldberg's view. For his own part, the undersigned's respectfully submits that face masks at an in-person deposition would be a far lesser impediment to his ability to assess Ms. Moss's and Mr. Fine's demeanor and credibility, as compared to a remote deposition where their maskless faces are beamed through a camera to the undersigned's computer screen.[21] In any case, undersigned respectfully asks this Court to credit his representation that, again, he does not object to face masks, and, accordingly, to reconsider its Memo Endorsed Order under the opposite presumption—that masks will be used.

B. The "Perspectives" Article Should Not Be Judicially Noticed; but, Even So, Since Masks Will Be Worn, it Cuts the Other Way

Applying the reversed presumption of factor **(i)**—i.e., that masks will be worn—appears to also confute a second factor on which this Memo Endorsed Order relied: namely, **(ii)** the May 27, 2020 "Perspectives" article in Science Magazine commenting on the aerosol spread of the

[20] To the extent the Court credited (rather than misattributed to the undersigned) Mr. Goldberg's position about the usefulness of real-life observation of a witness-wearing-a-mask, the undersigned respectfully submits that, because Mr. Goldberg is not taking testimony but rather is an advocate for Ms. Moss and Mr. Fine, his views on what would be helpful for the undersigned when assessing Mr. Goldberg's clients' demeanor should not be afforded weight.

[21] In asking the Court to credit his sincerely held view on this, the undersigned does not purport to be Clarence Darrow. Rather, both from his legal experience and even more from common everyday experience, the undersigned believes that whether someone is telling the truth cannot be assessed remotely in the same way that it can in real life (which is how Ms. Moss and Mr. Fine would presumably be assessed by the jury when trial is held in this case), and for reasons—e.g., excessively averting (or, on the other hand, excessively making) eye contact—that have little to do with the whether "you're able to see each other['s] [lips] speaking." See May 7, 2020 Tr. at 9:1-3.

COVID virus. See Kimberly A. Prather et al., Perspectives: Reducing transmission of SARS-CoV-2, Science (May 27, 2020) ("Perspectives Article"). As set forth in the Memo Endorsed Order, the central takeaway of the Perspectives Article is that "[i]ncreasing evidence … suggests the 6 ft CDC [social-distancing] recommendation" "is likely insufficient to prevent transmission." See id.

As a threshold matter, the undersigned respectfully submits that, while judicial notice of certain adjudicative facts may be taken on the Court's own motion, see Fed. R. Evid. ("FRE") 201(c)(1), the taking of judicial notice of the Perspectives Article's conclusions is improper here; accordingly, the undersigned respectfully requests a judicial-notice hearing pursuant to FRE 201(e) so that his objections on this matter may be heard. As such hearing, the undersigned would further set forth the grounds for his objection, which revolve around the contention that the conclusions in a commentary article in Science Magazine are not facts that "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned," as required by FRE 201(b)(2). The undersigned would further set forth at an FRE 201(e) judicial-notice hearing that, inter alia, the Perspectives Article's "suggest[ion]" about the "likely insufficien[cy]" of guidance issued by the CDC—a gold-standard government agency generally regarded as so reliable that its publications are commonly judicially noticed[22]—cannot itself be the proper object of judicial notice under FRE 201(b)(2). Thus, the undersigned respectfully requests an opportunity "to be heard on the propriety of taking judicial notice" of the Perspectives Article's conclusions so that these points may be properly elaborated upon and

[22] See, e.g., Basank v. Decker, No. 20 Civ. 2518 (AT), 2020 U.S. Dist. LEXIS 53191, at *9 (S.D.N.Y. Mar. 26, 2020) (citing to CDC guidance to "take[] judicial notice that, for people of advanced age, with underlying health problems, or both, COVID-19 causes severe medical conditions and has increased lethality"); Crosby v. Petermann, No. 18-cv-9470 (JGK), 2020 U.S. Dist. LEXIS 50796, at *18 n.4 (S.D.N.Y. Mar. 4, 2020) (taking "judicial notice of … background information on hepatitis … from the CDC website."); McDonnell v. First Unum Life Ins. Co., No. 10-CV-8140, 2013 U.S. Dist. LEXIS 110361, at *52 n.33 (S.D.N.Y. Aug. 5, 2013) ("the Court takes judicial notice of [] background information on Lyme Disease … from the official CDC website").

considered. See FRE 201(e) ("If the court takes judicial notice before notifying a party"—as was done here—"the party, on request, is still entitled to be heard.")

Even if this Court concludes after a hearing that the Perspectives Article's conclusions are a proper object of judicial notice, however, once the fact that masks will be worn, see supra, is accounted-for, the Perspectives Article in fact appears to support the undersigned's position. The article states that, because "it is difficult to define a safe distance for social distancing … it is important to wear properly fitted masks indoors," since "[m]asks provide a critical barrier, reducing the number of infectious viruses in exhaled breath," "reduce the likelihood and severity of COVID-19 by substantially reducing airborne viral concentrations," and "protect uninfected individuals from SARS-CoV-2 aerosols and droplets." See Perspectives Article. These conclusions—which, the undersigned would argue at a FRE 201(e) hearing, should not be judicially noticed—in any case all strongly suggest that Ms. Moss's and Mr. Fine's depositions can safely be taken in-person, if reasonable precautions, such as facemasks (to which the undersigned, again, has no objection), are used.

More fundamentally, the undersigned respectfully submits that the discrete issue of mask-wearing should never have come before this Court in the first place, much less have served as a basis for the heavy artillery of sua sponte quashing. Had there been even minimal cooperation via the meet-and-confer process, defense counsel and the undersigned could have developed (and still can develop) an appropriate protocol that takes into account masks, room size, and any other health-and-safety aspects needed to make Ms. Moss and Mr. Fine feel reasonably comfortable showing up. Such a protocol could use, e.g., Chief Judge McMahon's procedures for next month's bench trial, as a template. But, as the undersigned previously represented, Mr. Baumgarten and Mr. Goldberg have rejected all attempts by the undersigned to discuss the

subject of a safety protocol, and instead have communicated their clients' specific concerns in the first instance (and only) to this Court. The sua sponte relief issued in the Memo Endorsed Order can only disincentivize defense counsel from engaging in constructive dialogue with the undersigned in the future too. Why bother, one would think, if going straight to the Court gets you all the relief you want without even having to formally ask for it.

C. Counsel's Burden Is Voluntary and May Not Be Imputed to the Witnesses

The remaining factor in the "bad mix" on which the Memo Endorsed Order is based is that the subpoenas quashed sua sponte therein **(iii)** "require[] counsel or witnesses to travel across state lines." (See Doc. No. 239 at 6.) This premise is factually inaccurate, and, with respect to counsel, is in any case not relevant to the undue-burden calculus.

First, the witnesses are not required to cross state lines: Ms. Moss will stay in Utah, while, as set forth supra, see n.13, Mr. Fine's place-of-compliance across the New York border was chosen only to accommodate Mr. Fine's own preferences. And their lawyers, like K&S's in-house lawyer(s) who will be listening in, are also emphatically not required to travel anywhere. As the undersigned represented: "if defense counsel, for example, would prefer to participate remotely, I'll, of course, make that available and easy to access." See May 7, 2020 Tr. at 3:19-21. Thus, any burden on Mr. Baumgarten, Mr. Goldberg, and/or the K&S representative(s) flying in from Atlanta would be borne entirely voluntarily.

Second, even if K&S's in-house counsel and/or the witnesses' counsel were required to travel (which they are not), their interests are not relevant to the decision whether to quash Ms. Moss's and Mr. Fine's subpoenas; rather, only the undue burden on the witness is cognizable. With respect to Defendant's in-house lawyers, as set forth supra, see n.10, K&S "lacks standing to challenge subpoenas issued to non-parties on the grounds of … undue burden." See

Universitas, 2013 U.S. Dist. LEXIS 1720, at *16. And, similarly with respect to the ex-K&S partners' attorneys, courts have "consistently rejected" the notion that someone who "is not the recipient of a subpoena can nonetheless challenge that subpoena because it creates an undue burden." See Malibu Media, LLC v. Doe, No. 15-cv-3147 (AJN), 2016 U.S. Dist. LEXIS 134478, at *7 (S.D.N.Y. Sept. 29, 2006). Here, "[b]ecause the subpoena[s] do[] not obligate [counsel] to do or produce anything, [they] cannot be unduly burdened." See id.[23]

Finally, to the extent factor **(iii)** contemplates that travel across state lines by counsel is a burden on Ms. Moss or Mr. Fine directly, such inference would be misplaced. The ex-K&S partners' attorneys and Defendant's in-house counsel, again, are not required to travel to an in-person deposition, while the undersigned's own travel to a large banquet room will not create an undue burden for anyone, as evidenced by, e.g., Chief Judge McMahon's willingness, set forth supra, to be in the same room on July 6, 2020 with an attorney flying in from Texas.

Because factor **(iii)** does not support a finding of undue burden on the witnesses, this factor too should be reconsidered.

CONCLUSION

For the reasons set forth herein, the Memo Endorsed Order sua sponte quashing third-party subpoenas should be reconsidered and the undersigned's request for a judicial-notice hearing pursuant to FRE 201(e) should be granted.

Dated: June 18, 2020

By: */s/ David A. Joffe*

David A. Joffe, Esq. (pro se)
155 Christopher Columbus Drive
Jersey City, NJ 07302
516-695-7086
davidajoffe@gmail.com

[23] Indeed, crediting a third-party subpoena recipient's lawyer's purported burden would create a distinct incentive for third-party subpoena recipients to strategically choose counsel for the purpose of avoiding compliance. Here, e.g., it would give Ms. Moss the incentive to hire Proskauer Rose in New York rather than Utah counsel for whom crossing state lines would not be a factor.