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COURT OF CLAIMS  
OF OHIO

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**IN THE COURT OF CLAIMS OF OHIO**

**DAVID A. BENTKOWSKI,**

**Plaintiff,**

**v.**

**ELIZABETH POPADIUK, et al.,**

**Defendants.**

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: **Case No. 2014-00651**  
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: **Judge Patrick M. McGrath**  
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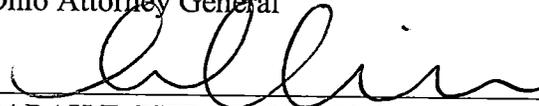
**MOTION TO QUASH OF NON-PARTY JAI CHABRIA**

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Pursuant to Civil Rule 45(C), or in the alternative pursuant to Civil Rule 26(C), non-party Jai Chabria moves to quash the subpoena seeking to compel his deposition on August 31, 2015. A memorandum in support is attached.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General



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*Counsel for Non-Party  
Jai Chabria*

## MEMORANDUM IN SUPPORT

### **I. BACKGROUND AND FACTS**

Plaintiff's August 20, 2015 subpoena seeking the deposition of non-party Jai Chabria should be quashed.

The underlying litigation arose from Plaintiff's termination from his position at the Ohio Lottery Commission. *See*, Compl. Plaintiff primarily alleges that he was wrongfully terminated in retaliation for reporting a suspected crime while he was serving as Mayor of Seven Hills, Ohio. *Id.* As an unclassified employee of the Lottery Commission prior to his termination, Plaintiff was considered an "at-will" employee.

Mr. Chabria is not a party to the litigation, has not been named in any of the allegations or pleadings, is not an employee of the Ohio Lottery Commission, and can provide no independent testimony that would be relevant or potentially relevant to the litigation. *See* Ex. 1, Chabria Aff. To the extent a justiciable issue exists in this case, the dispute is between Plaintiff and the Ohio Lottery Commission, and the issues are quite simple—whether Plaintiff was wrongfully terminated. There is no legitimate fact-finding reason for this proposed deposition and, as such, Plaintiff's attempt to haul Mr. Chabria into an unnecessary deposition after the close of discovery is improper.

On August 13, 2015, Plaintiff's counsel contacted the Governor's office, requesting Mr. Chabria's availability for deposition on August 31, 2015. Undersigned counsel returned the call to inquire as to the basis for the deposition, and advise that Mr. Chabria had no involvement in the underlying decisions leading to Plaintiff's termination. By email dated August 18, 2015, Plaintiff's counsel stated that he would re-issue a subpoena for Mr. Chabria's deposition, but

gave no specifics regarding the potential scope of the deposition. On August 19, 2015, again by email, undersigned counsel again advised that Mr. Chabria had no role in the underlying decisions leading to Plaintiff's termination, proposed a stipulation to that effect, and stated that a motion to quash the subpoena would be the next step. The subpoena was re-issued on August 20, 2015, requesting Mr. Chabria's attendance at a deposition on August 31, 2015 at 1 p.m. in Cleveland, Ohio.<sup>1</sup>

To avoid an order from this Court quashing the subpoena, Plaintiff bears the burden of establishing that Mr. Chabria's testimony is relevant to the litigation, that Plaintiff has "a substantial need" for his testimony, and that whatever Plaintiff seeks from Mr. Chabria cannot be obtained from another source. Plaintiff is unable to prove any of these requirements, or the necessity of this deposition, as it is clear that the parties named in his complaint and legally responsible for the decision to terminate his employment are already subject to discovery and scheduled to be deposed. Because there is simply no basis for Plaintiff's subpoena, it is improper to drag a senior official in the Governor's office into a case where he has nothing to add. The subpoena should be quashed.

## **II. LAW AND ARGUMENT**

Plaintiff's subpoena should be quashed for at least two reasons: (1) Mr. Chabria is not a party to the employment action and has no independent information relevant or potentially relevant to the litigation, and (2) Plaintiff has failed to tender appropriate witness fees.

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<sup>1</sup> This Court has issued an order requiring counsel to obtain the Court's leave to conduct discovery after August 28, 2015. *See* Entry, Case No. 14-00651 (filed Aug. 4, 2015). There is no entry on the docket to suggest that Plaintiff's counsel has obtained appropriate leave to conduct Mr. Chabria's deposition on August 31, 2015.

**A. Plaintiff bears the burden of proof.**

Motions to quash are governed by Rule 45(C)(3). Both the Rule and interpreting case law provide that a court “shall quash or modify a subpoena” if it “[r]equires disclosure of privileged or otherwise protected matter and no exception or waiver applies” or “[s]ubjects a person to an undue burden.” Civ.R. 45(C)(3); *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011); *see also Kaplan v. Tuennerman-Kaplan*, 2012 WL 256562, \*3 (9th Dist. Jan. 30, 2012). Rule 45(C) further provides that when a motion is made showing an undue burden, the subpoenaing party must “show[] a substantial need for the testimony or material that cannot be otherwise met without undue hardship \* \* \*.” Civ.R. 45(C)(5).

Rule 26(C) similarly allows any person from whom discovery is sought to move the Court for a protective order. Subpoenas are not only constrained by the requirements of Rule 45, but the discovery restrictions of Rule 26 also apply. *Id.* Rule 26 is “designed to prevent the abuse of discovery.” Staff Notes following Civ.R. 26 (C). It provides courts with broad authority to “issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense” during the discovery process. Civ.R. 26 (C).<sup>2</sup>

**B. Plaintiff cannot demonstrate a substantial need for irrelevant and burdensome testimony.**

Mr. Chabria has no independent information relevant or even potentially relevant to the litigation. Accordingly, Plaintiff has no substantial need for Mr. Chabria’s testimony and subjecting him to a deposition would be unduly burdensome.

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<sup>2</sup> Ohio’s Rule 26 and 45 are based on the corresponding federal rules. *See* Staff Notes following Civ.R. 26 (C) and 45.

A court “shall” quash or modify a subpoena where there is no substantial need for the discovery *or* the discovery is not relevant *or* the discovery would be unduly burdensome. *See* Civ.R. 45(C)(3); *Hendricks v. Total Quality Logistics, LLC*, 275 F.R.D. 251, 253 (S.D. Ohio 2011) (quashing subpoenas that sought irrelevant information). All of those reasons apply here. Plaintiff has the burden to prove otherwise and cannot. *See* Civ.R. 45(C). “[W]hen relevancy” of discovery “is not apparent on the face of the request, the party seeking the discovery has the burden to show the relevancy of the request.” *Transcor v. Furney Charters*, 212 F.R.D. 588, 591 (D. Kan. 2003). Subpoenas cannot be “used to conduct a mere fishing expedition for incriminating evidence.” *Martin v. The Budd Co.*, 713 N.E.2d 1128, 1131 (Ohio App. 1998). Further, Plaintiff has other means of obtaining information related to his claims without undue hardship: the already-scheduled depositions of employees of the Ohio Lottery Commission who participated in the termination decision. *See* Civ.R. 45(C)(5). Requiring Mr. Chabria, a senior government official, to be absent from his office and travel to Cleveland for a day to be deposed is unduly burdensome, particularly given the availability of testimony from those Ohio Lottery Commission employees statutorily tasked with making employment decisions for the Commission.

Additionally, Mr. Chabria has no independent knowledge or information conceivably related to any issue in the litigation that is not already known and discoverable through the named parties in this matter. While the Director of the Ohio Lottery Commission is appointed by and serves at the pleasure of Governor, Mr. Chabria holds no executive or administrative position in the Commission; he does not control its day-to-day decisions, and has no power or authority to terminate a Commission employee. By statute, this power is exclusively reserved to

the Director of the Ohio Lottery Commission. *See* Ohio Revised Code Sec. 3770.02(C); *see also* Ex. 1, Chabria Aff. at ¶ 3. More germane to this litigation, Mr. Chabria did not play a role in the underlying decisions leading to the Commission's decision to terminate Plaintiff from his position at the Ohio Lottery Commission. *See* Ex. 1, Chabria Aff. at ¶ 4. Further, Plaintiff will be deposing employees of the Ohio Lottery Commission concerning his termination; any second-hand information Mr. Chabria can provide could just as easily be obtained from other deponents.

Moreover, to the extent Plaintiff is fishing for any "political motivation" to justify his wrongful termination claim, that argument is a red herring that cannot justify a deposition of Mr. Chabria. Another court recently rejected a subpoena to discover a governor's purported "political motivations," and this court should as well. In *Babin v. Breaux*, 2012 WL 83672 (M.D. La. Jan. 11, 2012), two employees of a Louisiana state agency claim they were improperly terminated from their jobs. They sought to depose the non-party governor, claiming that even if the governor was not personally involved in the operational details of the layoffs, "he should be aware of the political motivations behind the massive layoffs of state employees." *Id.* at \*2. The court quashed the subpoena, holding that plaintiffs had produced no authority for their argument that the governor was aware of any motivations behind the layoffs "*or why such information is even marginally relevant.*" *Id.* at \*3 (emphasis added). To the extent Plaintiff is fishing for any similar arguments in this matter, Mr. Chabria's testimony is similarly irrelevant.

Here, where there is no reason for this deposition, even a "slight inconvenience" on Mr. Chabria is too much of a burden. *Serrano v. Cintas Corp.*, 699 F.3d 884, 901 (6th Cir. 2012). And, to be clear, requiring Mr. Chabria (a senior employee in the Governor's office) to travel to Cleveland to give a deposition about an independent commission's own termination decision, is

much more than a “slight” inconvenience. Plaintiff has failed to meet his burden to establish a substantial need for whatever testimony Plaintiff hopes to get in the deposition. *See Martin*, 713 N.E.2d at 1131 (subpoena to non-party should have been quashed where party failed “to demonstrate a substantial need for the requested information”). Mr. Chabria’s testimony would be irrelevant, *see Duncan v. Husted*, 2014 WL 4659863, \*5 (S.D. Ohio Mar. 20, 2014) (quashing subpoenas directed to senators because senators’ motive for legislation was irrelevant), unduly burdensome, and the subpoena should therefore be quashed.

**C. Plaintiff has not tendered appropriate witness fees and mileage.**

Each witness in a civil case is to receive a fee for attendance at a deposition and mileage for each mile necessarily traveled between their place of residence and the deposition location. *See* R.C. 2335.06(A). For a half-day’s testimony, Mr. Chabria is entitled to the statutory witness fee of \$6.00. To travel the approximately 270 miles from his residence to Cleveland and back, Mr. Chabria is entitled to mileage in the amount of \$135.00.<sup>3</sup> Assuming that the check issued to Mr. Chabria in conjunction with the earlier subpoena is intended to cover fees and mileage, at \$33.40 it is insufficient. *See* Ex. 1, Chabria Aff. at ¶¶ 5-6. For this additional reason, the subpoena requiring Mr. Chabria’s attendance at an out-of-county deposition should be quashed.

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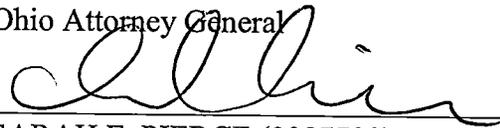
<sup>3</sup> Calculated using the lowest rate found in Franklin County, Ohio courts of record: \$0.50 per mile. *See* Cost Sheet, Franklin County Municipal Court, at <http://www.fcmcclerk.com/forms/civil/civilcost.pdf>

**III. CONCLUSION**

For all of the reasons stated herein, the subpoena should be quashed.

Respectfully submitted,

MICHAEL DEWINE  
Ohio Attorney General

A handwritten signature in black ink, appearing to read "S. Pierce", written over a horizontal line.

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*Counsel for Non-Party*  
*Jai Chabria*

**CERTIFICATE OF SERVICE**

I hereby certify that a true filed stamped copy of the foregoing *Motion to Quash of Non-Party Jai Chabria* was served by first class mail via the U.S. Postal Service and a courtesy copy by email on August 25, 2015, upon the following:

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*Counsel for the Ohio Lottery Commission*



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SARAH E. PIERCE (0087799)  
Assistant Attorney General

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In the County of Franklin  
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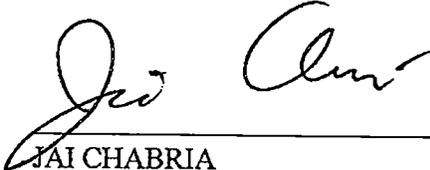
AFFIDAVIT OF JAI CHABRIA

I, Jai Chabria, being over the age of 18 and under no disability, testify from personal knowledge as follows:

1. I am employed as a Senior Advisor to the Governor of Ohio. I have worked in this position since January 10, 2011
2. My job duties as a Senior Advisor include, among other responsibilities, oversight of state-wide policy concerning human resources. Given these duties, it is not uncommon for me to become aware of some personnel decisions that a state agency, board, or commission has made.
3. While the Director of the Ohio Lottery Commission is appointed by and serves at the pleasure of the Governor, I am not an employee, executive, or administrator at the Commission. I do not supervise or manage the day-to-day operations at the Commission.
4. I did not seek or initiate the termination of David Bentkowski from the Ohio Lottery Commission. I was not engaged in any decision-making or recommendations regarding Mr. Bentkowski's termination. The Lottery Commission notified me of its intention to terminate Mr. Bentkowski. I did not encourage or discourage the action, I simply conveyed that the decision was the Lottery Commission's to make and that I trusted their judgement on this matter.
5. I received a subpoena to appear for a deposition in this case on July 28, 2015 at 2 p.m. in Cleveland, Ohio. I received a check for "witness fee" in the amount of \$33.40. I was advised by counsel that the deposition was cancelled and I did not appear.

6. On August 20, 2015, I received another subpoena to appear for a deposition in this case on August 31, 2015 at 1 p.m. in Cleveland, Ohio. I did not receive a check with this subpoena.
7. I am a resident of Delaware County, Ohio. It is approximately 135 miles from my residence to the location of the deposition.

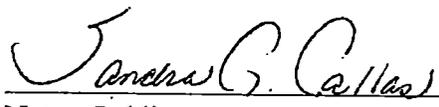
FURTHER AFFIANT SAYETH NAUGHT.

  
\_\_\_\_\_  
JAI CHABRIA

Sworn to and subscribed before me, a Notary Public, on this 24<sup>th</sup> day of August, 2015.



**Sandra G. Callas**  
Notary Public, State of Ohio  
My Commission Expires 06-06-2017

  
\_\_\_\_\_  
Notary Public