

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

U.S. SECURITIES AND EXCHANGE)
COMMISSION)
100 F Street, N.E.)
Washington, DC 20549)

Applicant,)

v.)

JOHN PAUL WAYMACK)
1615 Suters Lane, N.W.)
Washington, DC 20007)

Respondent.)

Misc. No. _____

**APPLICATION OF THE SECURITIES AND EXCHANGE COMMISSION
FOR AN ORDER TO SHOW CAUSE AND FOR AN ORDER
REQUIRING COMPLIANCE WITH AN ADMINISTRATIVE SUBPOENA**

The Securities and Exchange Commission (“Commission”) applies for an order requiring John Paul Waymack (“Waymack” or “Respondent”) to show cause why he should not be ordered to comply with a lawfully-issued Commission subpoena (“Subpoena”) to produce documents and appear for testimony in connection with an investigation by the Israel Securities Authority into possible violations of laws or rules relating to certain securities matters. The Commission further requests that, after the Respondent has had an opportunity to be heard, this Court order him to comply immediately and fully with the Subpoena and that the Court retain jurisdiction in this matter until such time as the Respondent does fully comply. In support of this Application, the Commission submits the accompanying Memorandum of Points and Authorities and the Declaration of Matthew B. Greiner (“Greiner Decl.”), with exhibits, and states as follows:

SUMMARY OF RELEVANT FACTS

1. The Commission is an agency of five commissioners appointed by the President, confirmed by the Senate, and charged with the responsibility of safeguarding the public interest

by administering and enforcing the federal securities laws. *See* Section 4(a) of the Securities Exchange Act of 1934 (the “Exchange Act”), 15 U.S.C. § 78d(a).

2. The Respondent, Dr. Waymack, is a medical doctor living in the District of Columbia and is the founder, Chairman, and Chief Medical Officer of Kitov Pharmaceuticals Holdings, Ltd (“Kitov”), a biopharmaceutical company headquartered in Israel and listed on the Tel Aviv Stock Exchange (ticker: KTOV). Greiner Decl. at ¶ 2. Kitov’s American Depository Shares (“ADSs”) are also listed on the NASDAQ Capital Market stock exchange, and Kitov is a foreign private issuer that made relevant regulatory filings, including its annual report on Form 20-F, with the Commission. *Id.*

3. The Israel Security Authority (“ISA”) is a governmental body empowered by the government of Israel to administer, investigate and enforce Israeli laws as they relate to securities matters. Consequently, the ISA is a “foreign securities authority” as defined in Section 3(a)(50) of the Exchange Act, 15 U.S.C. § 78c(a)(50).

4. In March 2017, the ISA contacted the Commission to request its assistance in an investigation of Kitov and others to determine whether any person may have violated laws or rules as to securities matters administered and enforced by the ISA. Greiner Decl. at ¶ 3 & Ex. 1.

5. The ISA informed the Commission’s staff in the Office of International Affairs (“OIA”) that it was investigating potential misstatements in Kitov’s public disclosures as to the results of a clinical drug trial for Kitov’s drug candidate, KIT-302, as well as potential insider trading on the results. *Id.* at ¶ 7. The ISA informed Commission staff that it was looking at the role of various individuals, including Kitov’s Data Monitoring Committee (“DMC”), in the reporting of the trial results and the disclosures. *Id.* The DMC was purportedly responsible for analyzing preliminary results and determining whether additional testing was needed on KIT-302, and, according to Kitov, included statistician Dr. Gloria Crispino and physician Dr. Ofer Sachs. *Id.* Kitov announced, on December 15, 2015, that the main target of the drug trial was

achieved and that there was no need for additional testing. *Id.* Kitov’s share price rose by 47% on the news. *Id.*¹

6. The ISA advised the staff that it was requesting the assistance of the Commission pursuant to the International Organization of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (“MMOU”). *Id.* at ¶ 3 & Ex. 1. The MMOU is signed by over one hundred securities authorities² and was formed in the wake of the attacks of 9/11.³ It seeks to enhance the sharing of information critical to the successful investigation of securities law violations and sets forth an intent by its signatories to consult, cooperate, and exchange information for the purpose of securing compliance with the laws and regulations of the jurisdictions of those authorities. *See supra* at n. 2 & Greiner Decl. at ¶ 4 & Ex. 1. The Commission and the ISA are signatories to the MMOU, *id.* at ¶ 4, and the ISA has previously undertaken to assist the Commission in securities matters of concern to the United States under the MMOU. *Id.* at ¶ 9. The ISA also requested the Commission’s assistance pursuant to the February 13, 1996 bilateral Memorandum of Understanding between the SEC and the Government of Israel and ISA (“bilateral MOU”). Attached as Exhibit 2 is a true and correct copy of the bilateral MOU. *Id.* at ¶ 3 & Ex. 2.

7. Section 21(a)(2) of the Exchange Act empowers the Commission, in its discretion, to provide assistance to any foreign securities authority that states that the authority is

¹ On February 7, 2017, following reports of the ISA’s investigation of Kitov, Kitov issued a press release acknowledging the investigation. *Id.* at ¶ 8 & Ex. 3. Dr. Waymack was quoted in the release stating that “Kitov stands fully behind the validity of all of its clinical trial results.” *Id.* The release asserted that “Kitov’s officers are cooperating fully” and its “management looks forward to the conclusion of this investigation in the most expeditious manner possible.” *Id.*

² IOSCO, *IOSCO MMoU Current Signatories*, <https://www.iosco.org/about/?subSection=mmou&subSection1=signatories> (last visited Sept. 5, 2018).

³ *Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information (MMoU)*, <https://www.iosco.org/about/?subsection=mmou> (last visited Sept. 5, 2018).

conducting an investigation which it deems necessary to determine whether any person has violated, is violating, or is about to violate any laws or rules relating to securities matters that it administers or enforces. “The Commission may, in its discretion, conduct such investigation as the Commission deems necessary to collect information and evidence pertinent to the request for assistance” from a foreign securities authority. 15 U.S.C. § 78u(a)(2). The statute further provides that “[s]uch assistance may be provided without regard to whether the facts stated in the request would also constitute a violation of the laws of the United States.” *Id.*

8. Exercising its discretion, its statutory authority, and its commitment to the IOSCO MMOU and to the bilateral MOU, the Commission began a non-public investigation to collect information and evidence pertinent to the ISA’s request for assistance. On June 13, 2017, pursuant to Section 21(a)(2) of the Exchange Act [15 U.S.C. § 78u(a)(2)], the Commission issued an Order Directing Private Investigation and Designating Officers to Take Testimony in an investigation captioned In the Matter of Kitov Pharmaceuticals Holdings, Ltd. (the “Formal Order”). Greiner Decl. at ¶ 10 & Ex. 4. The Formal Order directed the staff to conduct an investigation to provide the assistance requested by the ISA. *Id.* & Ex. 4. The Formal Order granted designated staff the authority to issue subpoenas for testimony and for documents in aid of the investigation. *Id.* It also observed that the ISA has undertaken to provide reciprocal assistance in securities matters and that compliance with the request for assistance by the ISA would not prejudice the public interest of the United States. *Id.* at Ex. 4; *see also id.* at ¶ 9. Commission staff thereafter, on the basis of the Formal Order, issued and served a subpoena, dated June 15, 2017, requiring Respondent to produce certain documents by June 30, 2017, and appear for testimony on September 12, 2017. *Id.* at ¶ 11 & Ex. 5. The June 15, 2017 subpoena was served on the Respondent by United Parcel Service priority overnight service (*see* 17 C.F.R. §§ 203.8, 201.150(c)-(d)), *id.*, and received by him the next day, as evidenced by his communications with the staff. *Id.* at ¶ 12 & Ex. 6.

9. The Respondent never contested the general relevance of the subject matter of the Subpoena, but he ultimately refused to comply with it. At first, he observed the volume of

potentially responsive documents and sought more time to comply with the Subpoena. Greiner Decl. Ex. 6. Then, through counsel, the Respondent informed the Commission's staff that he may assert his Fifth Amendment right against self-incrimination at testimony. *Id.* at ¶ 14. He refused the date set forth in the Subpoena for his testimony but his counsel discussed a new date for his appearance at the Commission, presumably to comply with the Subpoena but possibly to assert the Fifth Amendment during questioning by the staff. *Id.* The Respondent did not produce any documents in response to the Subpoena, on the possibility of raising his Fifth Amendment right against self-incrimination and claiming that the "act of production" doctrine under the Fifth Amendment may apply to the request. *Id.* at ¶ 14.⁴

10. After further delaying his testimony, the Respondent, through his counsel, advised the staff on January 23, 2018 that he would neither produce documents nor appear for testimony. *Id.* at ¶ 15 & Ex. 8. By telephone and in correspondence, but no longer explicitly raising possible Fifth Amendment objections, the Respondent informed the staff that he was refusing compliance with the Subpoena because he believed that the ISA had "intruded" into his emails, "confiscated" documents beyond its authority, and "accessed" his email accounts in "potential" violation of U.S. law. *Id.* In support of this assertion, the Respondent, six months later, on August 3, 2018, provided an untranslated letter dated January 2, 2018, written mostly in Hebrew, from Kitov to the Israeli Attorney General. *Id.* From portions of the letter, very little of which is written in English, Kitov appears to claim that the ISA violated U.S. laws in securing certain documents from the company. *Id.* at ¶ 19 & Ex. 10. The letter refers to a criminal search warrant ordered by an Israeli court at the request of the ISA, which the Commission has obtained from the ISA and which appears to permit the ISA to seize relevant documents, including computer records. *Id.* Kitov's letter, however, apparently contests the scope of that search warrant and/or the ISA's search or methods pursuant to the warrant. *Id.* at ¶ 19 & Ex. 10.

11. In advance of this Application, the staff delivered to Respondent's counsel on

⁴ See generally *United States v. Hubbell*, 167 F.3d 552, 56-69 (D.C. Cir. 1999), *aff'd*, 530 U.S. 27 (2000); *SEC v. Karroum*, 2015 U.S. Dist. LEXIS 164718, *10-11 (Dec. 9, 2015 U.S.D.C.).

July 23, 2018 another subpoena. *Id.* at ¶ 17 & Ex. 9. This subpoena was issued in an effort to resolve any lingering potential claims to a Fifth Amendment objection by Dr. Waymack to producing documents, and to provide him a last opportunity to comply with his obligations, including by attending testimony. *See id.* at Ex. 9. Styled as an amended subpoena, the subpoena reframed the Commission’s document request to avoid possible testimonial act of production issues; reset August 3, 2018, as a date for producing documents; and reset October 2, 2018 as a new date to begin two days of testimony. *Id.* at ¶ 17 & Ex. 9.

12. In response, Respondent’s counsel delivered a letter (but no document production) on August 3, 2018, reiterating that Dr. Waymack would neither produce any documents nor appear for testimony. *Id.* at ¶ 18 & Ex. 10. The August 3 letter, with no great detail, objected to the “ISA’s investigative misconduct” in Israel that, he said, “has raised significant legal and constitutional concerns within the United States.” *Id.* at Ex. 10. The letter also objected that the follow-on subpoena is overbroad in using certain search terms, which the Commission had included to address Waymack’s Fifth Amendment “act of production” assertions. *Id.* While Respondent did not re-raise potential reliance on the Fifth Amendment, he did attach to the August 3 letter an untranslated copy of the January 2, 2018 letter from Kitov to the Israeli Attorney General, relying on the contents of that letter for his objections. *Id.* at ¶ 19. His counsel also promised to “further detail [his] position” “in the near future.” *Id.* at Ex. 10.

13. On a September 13, 2018 call to confer over notice by the Commission that it would bring this subpoena enforcement action, Dr. Waymack’s counsel stated that Waymack would not produce documents or testify for at least these reasons: because the ISA may use adverse inferences against him should he raise his Fifth Amendment privilege; because the January 2018 Kitov letter to the Israeli Attorney General remains pending and Kitov’s complaints are unresolved; and because Israeli counsel for Kitov is petitioning the ISA to change its investigation from a criminal investigation to an administrative investigation, and that also remains unresolved. *Id.* at ¶ 22.

14. The Respondent has now repeatedly and for nearly a year refused to comply with

the Commission's June 15, 2017 Subpoena or to comply with the follow-on July 23, 2018 subpoena, both of which were lawfully issued and validly served.

JURISDICTION AND VENUE

15. Section 21(c) of the Exchange Act authorizes the Commission, in the case of any person's refusal to obey a subpoena of the Commission, to invoke the aid of any court of the United States within the jurisdiction of which the investigation or proceeding is carried on or such person resides or carries on business. 15 U.S.C. §78u(c). The Commission's investigation is being carried on in this district. Respondent resides in this district. Accordingly, the Court has subject matter jurisdiction over this Application and venue properly lies in this district.

MEET AND CONFER EFFORTS

16. Before filing this Application, and in addition to correspondence, the undersigned attorney for the Commission conferred at least three times by telephone with the Respondent's attorney in an effort to resolve the dispute over the Subpoena. Those efforts were unsuccessful, necessitating this Application pursuant to 15 U.S.C. §78u(c). The last time the parties conferred telephonically was around noontime on Thursday, September 13, 2018.

17. During this last call, Respondent's attorney, Ms. Kitt Addleman, asked the undersigned attorney to notify her in advance of any imminent action by the Commission against Respondent. The undersigned counsel agreed to this request as a professional courtesy and did in fact notify her of the imminence of this Application, sending the following email:

Donnelly, Kenneth

From: Donnelly, Kenneth
Sent: Friday, September 14, 2018 12:54 PM
To: kit.addleman@haynesboone.com
Cc: Granke, Owen; Tobias, Jasmine
Subject: RE: Call Tomorrow re Kitov

Kit,

Following our call yesterday, in which you conveyed again that Dr. Waymack refuses at this time to appear for testimony or produce documents despite the Commission's outstanding subpoenas, we've conferred again internally and will proceed with filings on Monday afternoon, or Tuesday morning at the latest, to enforce the subpoena.

I will send you the filed papers when they are filed, for your acceptance of service of them on behalf of Dr. Waymack.

Ken Donnelly

18. However, on the very day that the Commission gave this professional courtesy at the request of Respondent's counsel, Respondent's counsel notified the undersigned counsel, at 6:45 p.m., that the Respondent had preemptively filed in this court, at 4:39 p.m. (it seems, via the drop box), his own separate matter, and a motion to quash the SEC subpoena. The Respondent's counsel never informed the undersigned counsel in any meet and confer discussions (or at any other time) that her client would file such an action. The Commission is moving to dismiss that separate matter as improper and lacking an independent jurisdictional basis for proceeding.

19. The undersigned counsel is providing counsel for the Respondent a copy of this Application and accompanying papers upon the filing of this Application today.

REQUESTED RELIEF

Based on the foregoing, and the evidence and arguments that accompany this Application, the Commission respectfully requests that the Court:

(A) Enter an Order to Show Cause, in the form submitted, directing Respondent to show cause why this Court should not enter an order requiring production of all documents responsive to the Subpoena and requiring Respondent to appear for testimony;

(B) Authorize service of the Order to Show Cause on the Respondent via service through his attorney, Ms. Kit Addleman, 2323 Victory Avenue, Suite 700, Dallas, TX 75219, Kit.Addleman@haynesboone.com, by overnight delivery, e-mail, personal service by any employee of the Commission who is not counsel of record in this matter, or in any other manner authorized by Rule 5 of the Federal Rules of Civil Procedure;

(C) After the Respondent has had an opportunity to be heard, enter an Order, in the form submitted herewith, directing him to comply fully with the Subpoena, produce documents as directed, and appear for testimony at the Commission;

(D) Retain jurisdiction over this proceeding until such time as the Respondent fully complies with the terms of this Subpoena and this Court's orders; and

(E) Order such other relief as may be necessary or appropriate to achieve compliance with the Commission's Subpoena to the Respondent.

Dated: September 17, 2018

Respectfully submitted,

/s/ Kenneth W. Donnelly

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CERTIFICATE OF CONFERENCE

I certify and declare under penalty of perjury that the factual statements contained in paragraphs 16 through 19 of this Application are true and correct.

/s/ Kenneth W. Donnelly

Kenneth W. Donnelly