

**UNITED STATES OF AMERICA  
BEFORE THE FEDERAL TRADE COMMISSION**

In the matter of	)	
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<b>Evanston Northwestern Healthcare Corporation,</b>	)	
a corporation, and	)	Docket No. 9315
	)	
<b>ENH Medical Group, Inc.,</b>	)	
a corporation.	)	
	)	

**RESPONDENTS’ OPPOSITION TO GREAT-WEST  
HEALTHCARE’S MOTION FOR COST REIMBURSEMENT**

Respondents Evanston Northwestern Healthcare Corporation (“ENH”) and ENH Medical Group, Inc. (collectively, “Respondents”) hereby oppose third party Great-West Healthcare of Illinois, Inc.’s (“Great-West Healthcare”) Motion for Cost Reimbursement (“Motion”).

**INTRODUCTION**

Great-West Healthcare improperly seeks reimbursement for its costs in responding to Respondents’ subpoena which it claims “could approach \$50,000,” for “salaries and wages of current employees and hourly charges for temporary employees.” Motion ¶ 2. Great-West Healthcare’s request for reimbursement should be summarily rejected as a matter of law. Its request ignores Federal Trade Commission (“FTC”) authority holding that subpoenaed third parties such as Great-West Healthcare with a potential interest in the administrative litigation are, at most, only entitled to the reimbursement of copying costs – costs Respondents’ have already agreed to pay.

## **BACKGROUND**

Great-West Healthcare, formerly known as One Health Plan (“One Health”), was subpoenaed by Complaint Counsel during the pre-complaint investigation in this matter to provide hearing testimony through one of its employees, Kevin Dorsey. To the best of Respondents’ knowledge, Complaint Counsel did not subpoena any documents from One Health or Great-West Healthcare.<sup>1</sup> After the complaint was filed, Complaint Counsel listed Mr. Dorsey on its preliminary witness list as a person who may be called to testify regarding One Health’s contract negotiations with Respondents. See Complaint Counsel’s Preliminary Witness List at 2.

Respondents served a subpoena *duces tecum* on Great-West Healthcare requesting several categories of documents on or about April 15, 2004. (Respondents have served similar subpoenas on over thirty other third parties.) Counsel for Respondents and counsel for Great-West Healthcare have had several conference calls to discuss the existence of potentially responsive documents. These discussions have been positive, and the parties are working toward narrowing the scope of the subpoena and minimizing any burden on Great-West Healthcare. In particular, as explained in Great-West Healthcare’s motion, Respondents offered to pay outside vendor costs associated with the copying of documents produced under the subpoena. See Motion ¶ 3.

## **ARGUMENT**

Respondents have already provided Great-West Healthcare with all of the cost reimbursement relief to which it is entitled. It is well settled in agency actions that “[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency’s legitimate inquiry and the public interest.” FTC v. Texaco, Inc., 555 F.2d 862, 882 (D.C. Cir.

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<sup>1</sup> As of the date of this filing, Complaint Counsel’s document productions to Respondents have not included any documents that were originally produced by Great-West Healthcare or One Health.

1977); see also S.E.C. v. Arthur Young & Co., 584 F.2d 1018, 1033 (D.C. Cir. 1978) (noting that “[t]here is a continuing general duty to respond to governmental process” and, therefore, “subpoenaed parties can legitimately be required to absorb reasonable expenses of compliance with administrative subpoenas”); In re Matter of N. Tex. Specialty Physicians, No. 9312, 2004 WL 527337, at \*3 (F.T.C. Feb. 4, 2004) (denying cost reimbursement because the subpoena, as limited by the court, did not create an “undue burden” on the third party) (Ex. 1). Reimbursement is warranted only when “the subpoenaed party has demonstrated that the cost of compliance would be ‘unreasonable’ or ‘extraordinary.’” In the Matter of Rambus Inc., No. 9302, 2002 WL 31868184, at \*4 (F.T.C. Nov. 18, 2002) (noting that the FTC standard is distinct from the standard under Fed. R. Civ. Pro. 45) (Ex. 2) (citing In re Int’l Tel. & Tel. Corp., 97 F.T.C. 202, 1981 LEXIS 75, at \*3 (Mar. 13, 1981) (Ex. 3).

In FTC v. Dresser Indus., Inc., one of thirty subpoenaed third parties refused to comply with a subpoena arguing, in part, that the costs associated with responding to the subpoena were excessive. Misc. No. 77-44, 1977 U.S. DIST. LEXIS 16178, at \*13 (D.D.C. Apr. 26, 1977) (Ex. 4). Despite the third party’s claims that its costs could reach \$400,000, the court ordered compliance and denied costs, in part, because the third party was part of the industry in question, no other party had complained about costs, and \$400,000 was not necessarily unreasonable. Id. at \*13-14. The court explained that it was “not unmindful of the tremendous impact which compliance with such subpoenas can have upon companies which appear to be innocent bystanders. *The cost of effective economic regulation, however, is one which must be shared by all industry, indeed by the entire society.*” Id. at \*16 (emphasis added).

Under this controlling authority,<sup>2</sup> Great-West Healthcare is only entitled to recover mere copying costs due to its possible interest in this litigation. See In the Matter of Flowers Indus., Inc., No. 9148, 1982 FTC LEXIS 96, at \*16-17 (F.T.C. Mar. 19, 1982) (stating “[e]ven where costs are awarded to a non-party, where the non-party is in the industry in which the alleged acts occurred [sic] and the non-party has interest in the litigation and would be affected by the judgment, *only the cost of copying, and no other costs of the search, need be reimbursed*”) (emphasis added) (Ex. 5) (citing U.S. v. IBM, 62 F.R.D. 507, 510 and 526, 529 (S.D.N.Y. 1974) (denying all costs regardless of whether the party is in the industry because the public has an interest in acquiring the relevant facts to resolve such actions); see also In re Matter of Kaiser Aluminum & Chem. Corp., No. 9080, 1976 FTC LEXIS 68, at \*19-21 (F.T.C. Nov. 12, 1976) (Ex. 6) (holding that “[w]here the public interest is involved . . . and . . . the nonparty is in the industry” and “has an interest in the litigation” then “*only the cost of copying need be reimbursed.*”) (emphasis added and citations omitted).

Complaint Counsel alleges in paragraph 43(e) of the complaint that ENH Medical Group violated Section 5 of the FTC Act when it “negotiated an increase in the price for One Health’s HMO . . . and for One Health’s PPO.” See Complaint at 9. Great-West Healthcare accordingly has a potential interest in this litigation and ignores the governing FTC authority cited above. In fact, Great-West Healthcare cites no FTC authority to support its claim for full

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<sup>2</sup> As Great-West Healthcare admits, the Federal Rules of Civil Procedure (“FRCP”) “may be consulted for guidance and interpretation of FTC rules *where no other authority exists.*” Motion ¶ 5 (emphasis added). Great-West Healthcare inexplicably relies on D.C. Circuit authority construing FRCP 45 despite the wealth of existing FTC authority on point discussed in this pleading.

reimbursement of non-copying expenses associated with its subpoena compliance. Its Motion should be denied for this reason alone.<sup>3</sup>

Finally, as a matter of public policy and due process, Respondents should not be compelled to compensate Great-West Healthcare or any other entity it has subpoenaed with similar costs while attempting to defend themselves. Complaint Counsel has no such duty to compensate third parties. Requiring Respondents to reimburse all third parties for their respective expenses in complying with subpoenas will hinder Respondents' discovery efforts, limit their ability to defend themselves, and give Complaint Counsel an unfair advantage. Such a result would clearly give rise to due process concerns. See McClelland v. Andrus, 606 F.2d 1278, 1285-86 (D.C. Cir. 1979) (stating that the FTC "is bound to ensure that its procedures meet due process requirements") (citing Withrow v. Larkin, 421 U.S. 35, 46-47 (1975) (noting that "a fair trial . . . is a basic requirement of due process" and "[t]his applies to administrative agencies which adjudicate as well as courts") (quotations and citations omitted)).

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<sup>3</sup> Even under FRCP 45 precedent, Great-West Healthcare would not be entitled to the amount of reimbursement it requests. See In re The Exxon Valdez, 142 F.R.D. 380, 383 (D.D.C. 1992) (noting that "'protection from significant expense' does not mean that the requesting party necessarily must bear the *entire* cost of compliance") (emphasis in original). See also Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001) (holding that, if a court orders reimbursement under Rule 45, it need only be "enough of the expense to render the remainder 'non-significant.'").

**CONCLUSION**

For the foregoing reasons, Respondents request that this Honorable Court deny Great-West Healthcare's Motion for Reimbursement of Costs.

June 14, 2004

Respectfully Submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 14, 2004, a copy of the foregoing Respondents' Opposition to Great-West Healthcare's Motion for Cost Reimbursement was served by email and first class mail, postage prepaid, on:

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**ORDER**

Upon consideration of Great-West Healthcare’s Motion for Cost Reimbursement and Respondents’ Opposition thereto, and the Court being fully informed, it is this \_\_\_\_\_ day of \_\_\_\_\_, 2004 hereby

ORDERED, that the Motion is DENIED.

\_\_\_\_\_  
The Honorable Stephen J. McGuire  
CHIEF ADMINISTRATIVE LAW JUDGE  
Federal Trade Commission



