

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

In the Matter of)	
)	
Evanston Northwestern Healthcare Corporation,)	
a corporation, and)	Docket No. 9315
)	
ENH Medical Group, Inc.,)	Public Filing
a corporation.)	

REPLY IN SUPPORT OF MOTION FOR COST REIMBURSEMENT

Great-West Healthcare of Illinois, Inc. (“Great-West Healthcare”), as its reply in support of its motion for cost reimbursement with respect to locating and producing documents in compliance with the subpoena served upon it by Respondents, Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. (collectively “Respondents”), states the following:

BACKGROUND

Respondents have directed a subpoena to Great-West Health Care, requesting documents as set forth in 43 paragraphs and 26 subparagraphs (the “Subpoena”). Great-West Health Care has filed a motion for reimbursement of its personnel costs (the “Motion”), including affidavits establishing that its personnel costs in responding to the Subpoena will approach \$50,000.

Respondents have filed an Opposition (“Opposition”), contending (a) that a subpoenaed third party is entitled to no more than copying costs (which Respondents have agreed to pay); and (b) that FRCP 45 has no application to an FTC proceeding. These contentions, however, are based on authorities which are inapplicable or which preceded or failed to recognize changes in the law. Additionally, Respondents contend that granting the Motion would give Complaint

Counsel an unfair advantage, thereby denying Respondents due process. This contention, however, has no support.

ARGUMENT

Analysis Of Authorities

FRCP 45 requires a court to protect a non-party by requiring the party seeking discovery to bear enough of the expenses of complying with a subpoena so that compliance with the subpoena does not impose significant expense on the non-party. *Linder v. Calero-Portocarrero*, 251 F. 3d 178, 182 (D.C. Cir. 2001). Respondents do not contend that the personnel expenses set forth in the affidavits submitted with the Motion are insignificant. Rather, Respondents contend that the Motion “should be summarily rejected as a matter of law”.¹ The authorities cited by Respondents, however, do not compel such a result.

It should first be noted that the portion of FRCP 45 which requires a court to protect a subpoenaed third-party from incurring significant expense became effective in 1991. *Linder v. Calero-Portocarrero*, 251 F. 3d 178, 182 (D.C. Cir. 2001). The amendment represented a clear change from old Rule 45, which gave a court discretion to condition the enforcement of subpoenas on payment of the costs of production. *Id.* Cases decided before the 1991 amendments to Rule 45, therefore, are of limited use in deciding cost reimbursement issues in this case. Moreover, the authorities cited by Respondents in support of their contention that the Motion should be denied as a matter of law, do not lead to the conclusion that FRCP 45 should be ignored.

An analysis of the authorities cited by Respondents demonstrates that each one has evolved from FRPC 45 as it existed prior to 1991. The earliest case appearing in the Opposition

¹ Opposition, p. 1.

is *U.S. v. I.B.M.*, 62 F.R.D. 507 (S.D.N.Y. 1974).² In *U.S. v. I.B.M.*, the court stated that the advancement of costs in connection with a third-party subpoena is a matter of discretion, citing (at 509) *Blank v. Talley Industries, Inc.*, 54 F.R.D. 627 (S.D.N.Y. 1972). In *Blank v. Talley Industries, Inc.*, the court denied a request for costs by a subpoenaed third-party in the exercise of its discretion under FRCP 45. 54 F.R.D. 627. Since 1991, however, FRCP 45 has required protection of a subpoenaed third-party from incurring significant expense, and it is not a matter of discretion. *Linder v. Calero-Portocarrero*, 251 F.3d 182. Therefore, the holdings of *U.S. v. I.B.M.* and *Blank v. Talley Industries, Inc.* cannot be relied upon to deny the request of a subpoenaed third-party for cost reimbursement. The same is true with respect to Respondents' other cases.³

The next decided case was *In re Matter of Kaiser Aluminum & Chem. Corp.*, No. 9080, 1976 FTC LEXIS 68 (1976).⁴ In denying cost reimbursement to a subpoenaed third-party, the ALJ cited *U.S. v. I.B.M.*, thereby relying on the discretionary standard inherent at the time in FRCP 45. *Kaiser Aluminum* is therefore no longer authority for Respondents' contention that only the cost of copying need be reimbursed.

The next decided case was *FTC v. Dresser Industries, Inc.*, Misc. No. 77-44, 1977 U.S. DIST. LEXIS 16178 (D.D.C. 1977).⁵ In *Dresser*, however, there was no discussion as to whether the subpoenaed third-party should be awarded cost reimbursement, and it does not appear that the third-party requested cost reimbursement. Contrary to Respondents' assertion, therefore, *Dresser* is in no sense "controlling authority".⁶

² Opposition, p. 4.

³ Respondents' other cases will be discussed in the chronological order in which they were decided.

⁴ Opposition, p. 4.

⁵ Opposition, p. 3.

⁶ Opposition, p. 4.

The next decided case was *FTC v. Texaco, Inc.*, 555 F. 2d 862 (D.C. Cir. 1977).⁷ There was no discussion as to whether the subpoenaed party should be awarded cost reimbursement. Moreover, the subpoenaed party was not a third-party. 555 F.2d 882, n. 59 (“This is not a case in which the subpoena is directed to a third party not under investigation”). *Texaco*, therefore, has no bearing on the Motion.

The next decided case was *S.E.C. v. Arthur Young & Co.*, 584 F. 2d 1018 (D.C. Cir. 1978).⁸ The court indicated with respect to cost reimbursement that it was exercising its discretion under FRCP 45. 584 F. 2d 1033. *Arthur Young*, therefore, does not determine whether Great-West Healthcare must absorb personnel expenses in complying with the Subpoena.

The next decided case was *In re Int’l. Tel. & Tel. Corp.*, 97 F.T.C. 202, 1981 LEXIS 75 (1981).⁹ It held with respect to cost reimbursement that such a request after compliance with a subpoena is untimely. It has no bearing on the Motion.

The next decided case was *In the Matter of Flowers Indus., Inc.*, No. 9148, 1982 FTC LEXIS 96 (1982).¹⁰ The ALJ held that a subpoenaed third-party was entitled only to copying costs, citing *U.S. v. I.B.M.*, 62 F.R.D. 507. The ALJ's reasoning, however, was faulty, because *I.B.M.* does not hold that the only costs which a subpoenaed third party may recover are copying costs. Furthermore, *Flowers* is not a barrier to recovery by Great-West Healthcare of personnel costs incurred in complying with the subpoena, because it is part of the line of authority emanating from FRCP 45 as it existed prior to 1991.

⁷ Opposition, p. 2.

⁸ Opposition, p. 3.

⁹ Opposition, p. 3.

¹⁰ Opposition, p. 4.

The next decided case was *In the Matter of Rambus, Inc.*, No.9302, 2002 WL 31868184 (FTC 2000).¹¹ In this case the ALJ, in denying cost reimbursement to a subpoenaed third party, stated that, in contrast to FRPC 45, reimbursement is only appropriate where the subpoenaed party has demonstrated that the cost of compliance would be unreasonable or extraordinary, citing *In re Int'l. Tel. & Tel. Corp.*, 97 F.T.C. 202, 1981 LEXIS 75, (*supra* at note 8), and *In re R. R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268 (1991). Both cases set forth the “unreasonable or extraordinary” test, but neither case draws a distinction between that standard and the standard imposed by FRCP 45. To the contrary, *R. R. Donnelly* cites *S.E.C. v. Arthur Young & Co.*, 584 F. 2d 1018, a case based on FRCP 45 (*supra*, at note 7).¹² Further undercutting *Rambus* as precedent with respect to the Motion, is the fact that in *Rambus*, the subpoenaed third-party, apparently submitted nothing showing the costs of compliance with the subpoena. It should also be noted that Respondents do not contend that Great-West Healthcare’s personnel costs in responding to the Subpoena are either reasonable or ordinary.

The last decided case was *In re Matter of N. Tex. Specialty Physicians*, No. 9312, 2004 WL 527337 (2004), which Respondents cite for the proposition that subpoenaed parties can be required to absorb reasonable expenses of compliance.¹³ In this case, the ALJ denied costs of compliance to a subpoenaed third-party, citing *FTC v. Dresser Industries, Inc.*, 1977 U.S. DIST. LEXIS 16178 (*supra* at note 4). As in *Rambus*, the subpoenaed third-party in *N. Tex. Specialty Physicians*, apparently submitted nothing showing the costs of compliance with the subpoena. Moreover, the citation to *Dresser* suggests that there was no consideration of the effect of the 1991 amendments to FRCP 45.

¹¹ Opposition, p. 3

¹² *R.R. Donnelly* was decided June 6, 1991. It predates the 1991 amendment to FRCP 45, which became effective on December 1, 1991. 9 *Moore’s Federal Practice*, §45App.08 (Matthew Bender 3d ed.).

¹³ Opposition, p. 3.

Due Process

Respondents state, without citation of authority, that Complaint Counsel has no duty to compensate subpoenaed third-parties. They contend, therefore, that granting the Motion would give Complaint Counsel an unfair advantage, thereby denying Respondents due process.¹⁴

The FTC Operating Manual states:

This Operating Manual (OM) provides the Commission's staff with guidance in processing matters within the agency and in carrying out law enforcement assignments.

§1.1.1. It further provides that:

Third party witnesses may move for recompense to cover the cost of producing voluminous records in response to a subpoena. When appropriate the ALJs have entered such an order; in such event the proponent of the subpoena must tender payment.

§10.13.6.4.7.8. There is no suggestion in the OM that cost reimbursement is limited to copying costs or that personnel costs are not recoverable. Respondents' due process contention, therefore, cannot be sustained.

Dated: June 25, 2004

GREAT-WEST HEALTHCARE OF
ILLINOIS, INC.

By: /S/ Franklin S. Schwerin
One of its attorneys

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¹⁴ Opposition, p. 5.

CERTIFICATE OF SERVICE

I hereby certify that on June 25, 2004, a copy of the foregoing Reply In Support Of Motion For Cost Reimbursement was served by overnight courier delivery on:

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