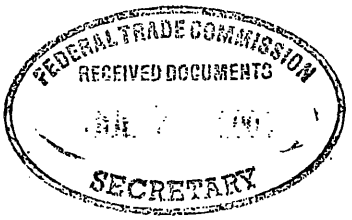
UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



In the Matter of EVANSTON NORTHWESTERN HEALTHCARE CORPORATION, and ENH MEDICAL GROUP, INC., Respondents.	Docket No. 9315

ORDER DENYING NON-PARTY GREAT-WEST HEALTHCARE'S MOTION FOR COST REIMBURSEMENT

I.

On May 21, 2004, non-party Great-West Healthcare of Illinois, Inc. ("Great-West Healthcare") filed a motion to extend the time in which to seek cost reimbursement and move to limit the subpoena *duces tecum* served on it by Evanston Northwestern Healthcare Corporation and ENH Medical Group, Inc. ("Respondents"), seeking an extension until June 4, 2004.

On June 3, 2004, Great-West Healthcare filed a Motion for Cost Reimbursement ("Motion"). On June 14, 2004, Respondents filed an opposition to the motion ("Opposition"). On June 16, 2004, Great-West Healthcare filed a motion for leave to file a reply. On June 25, Great-West Healthcare filed an amended motion for leave to file a reply and on the same date filed their reply brief ("Reply").

Great-West Healthcare's Motion to extend time in which to seek cost reimbursement and move to limit the subpoena *duces tecum* is **GRANTED**. Great-West Healthcare's Amended Motion for leave to file a Reply is **GRANTED**. For the reasons set forth below, Great-West Healthcare's Motion for Cost Reimbursement is **DENIED**.

II.

Great-West Healthcare moves for cost reimbursement with respect to personnel costs of up to $50,000 associated with locating and producing documents in compliance with the subpoena *duces tecum* served upon it by Respondents, arguing that such reimbursement is required by the 1991 amendments to Rule 45 of the Federal Rules of Civil Procedure.

Respondents assert that controlling authority holds that subpoenaed third parties, such as Great-West Healthcare, with a potential interest in the administrative litigation are, at most, entitled to reimbursement of copying costs – costs which Respondents have already agreed to pay.

III.

Pursuant to Rule 3.31(d), the "Administrative Law Judge may deny discovery or make any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense, or to prevent undue delay in the proceeding." 16 C.F.R. 3.31(d). Great-West Healthcare does not argue that the requested discovery is objectionable under Rule 3.31(d), but rather argues that the Federal Rules of Civil Procedure "requires the court to protect non-part[ies] by requiring the party seeking discovery to bear enough of the expense of complying with a subpoena so that compliance with the subpoena does not impose significant expense on the non-party." Reply at 2.

Federal Rule of Civil Procedure 45(c)(2)(B) provides that where a party issuing a subpoena moves to compel production of documents, the Court "shall protect any person who is not a party . . . from significant expense resulting from the inspection and copying commanded." Courts have noted that "this rule does not impose the entire burden on the requesting party; in fact 'a non-party can be required to bear some or all of its expenses where the equities of a particular case demand it.'" *Propulsid Products Liability Litigation*, 2003 WL 22174137, *2 (E.D. La. 2003) (quoting *In re Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992)). In addition, the non-party is entitled only to reimbursement for his reasonable costs. *Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999).

Great West Healthcare relies primarily on *Linder v. Calero-Portocarrero,* 251 F.3d 178 (D.C. Cir. 2001), which discusses amendments to Rule 45 made in 1991. The D.C. Circuit in *Linder* stated:

> There are relatively few reported cases applying the new Rule 45. *In re The Exxon Valdez,* 142 F.R.D. 380 (D.D.C.1992), described the 1991 amendment as representing "a clear change from old Rule 45(b), which gave district courts *discretion* to condition the enforcement of subpoenas on the petitioners paying for the costs of production." *Id.* at 383. The court thought "'protection from significant expense' does not mean that the requesting party necessarily must bear the *entire* cost of compliance.... There is no indication that [the amendment] intended to overrule prior Rule 45 case law, under which a non-party can be required to bear some or all of its expenses where the equities of a particular case demand it." *Id.* The district court here considered the factors mentioned in *Exxon Valdez* and in pre-1991 cases dealing with cost shifting: "whether the non-party actually has an interest in the outcome of the case, whether the non-party can more readily bear its costs than the requesting party, and whether the litigation is of public

importance." *Linder,* 180 F.R.D. at 177; *Linder,* 183 F.R.D. at 322.

Linder, 251 F.3d at 182 (emphasis in original). The D.C. Circuit thus affirmed the district court's decision which was based on the consideration of equitable factors. *Id.*

Neither the D.C. Circuit decision in *Linder*, nor the district court decisions in that case, alter the traditional factors that may be considered before costs are shifted to the party issuing the subpoena. *Linder*, 251 F.3d at 182-83; *Linder,* 180 F.R.D. at 177; *Linder,* 183 F.R.D. at 322. Specifically, whether the non-party has an interest in the outcome of the litigation and whether the litigation is of public importance are both factors to be considered. *Exxon Valdez,* 142 F.R.D. at 383.

In the instant case, the Respondents are charged in the Complaint with violating Section 5 of the FTC Act when it "negotiated an increase in the price for One Health's HMO . . . and . . . PPO" which are now known as Great-West Healthcare. Complaint, ¶ 43(e). Thus, Great-West Healthcare has an interest in the outcome. Great-West Healthcare, which is not subject to a motion to compel, has not demonstrated sufficient reason in this case to depart from the settled rule 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." *Federal Trade Commission v. Dresser Indus., Inc.*, 1977 U.S. Dist. LEXIS 16178, *13 (D.D.C. 1977); *see also In re Rambus Inc.*, 2002 WL 31868184 (2002).

IV.

For the reasons set forth above, Great-West Healthcare's Motion for Costs is **DENIED**.

ORDERED:

Stephen J. McGuire
Chief Administrative Law Judge

Date: July 7, 2004