



## **BACKGROUND**

Great-West Healthcare, formerly known as One Health Plan (“One Health”), was

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

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

**CONCLUSION**

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

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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:

The Honorable Stephen J. McGuire  
Chief Administrative Law Judge  
Federal Trade Commission  
600 Pennsylvania Ave. NW (H-106)  
Washington, DC 20580  
(two courtesy copies delivered by messenger only)

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