

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

In the Matter of)	
)	
Evanston Northwestern Healthcare Corporation,)	Docket No. 9315
a corporation, and)	
)	Public Filing
ENH Medical Group, Inc.,)	
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*³

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

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
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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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