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Fresh Takes on Seeking Costs and Fees Under Rule 45

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Recent case law reveals that courts vary widely in their approaches to shifting the costs and fees incurred in responding to a Federal Rule of Civil Procedure 45 subpoena. Some courts view shifting costs and fees as mandatory in situations where a nonparty is forced to bear "significant" costs. Others may shift costs and fees only to the extent those costs are "unreasonable," which is measured by (1) the nonparty's size and economics, despite its lack of connection to the dispute, (2) defining "reasonable costs" so narrowly that the nonparty bears substantial costs or (3) eliminating attorneys' fees from the cost-shifting

calculation. The relief a nonparty may be awarded may depend on factors that are not specifically identified in Rule 45 but that are nonetheless included in the court's concept of fairness. As the cases discussed below demonstrate, nonparties responding to Rule 45 discovery requests should consider the following best practices:

- Know and understand the applicable jurisdiction's rules pertaining to Rule 45's protections.

- Be able to demonstrate that the nonparty has attempted to respond to Rule 45 discovery in the most efficient manner available.

- If possible, demonstrate that review for compliance with regulations or attorney-client privilege is consistent with any applicable protective order or local rule and, therefore, not just for the nonparty's benefit.

- In order to increase the likelihood of recovering costs of any motion practice, attempt to cooperate with the requesting party and demonstrate a willingness to resolve or mitigate the costs and the dispute.

The cases discussed below evaluate motions for costs and fees in two broad categories: (1) those incurred when litigating the scope of the subpoena itself and (2) those incurred in compliance.

Costs and Fees Incurred Litigating the Scope of the Subpoena Itself

The district court in *In re Aggrenox Antitrust Litigation*[1] considered the motion of a nonparty, Gyma Laboratories of America, to recover $72,778.20 in costs and fees incurred in response to a Rule 45 subpoena from the direct purchaser plaintiffs. Gyma objected to the requests as overbroad and asserted that production would be unduly burdensome. At the hearing on cross-motions to compel and to shift costs and fees, the court expressed concern that Gyma had not made a record establishing the alleged difficulties in production, but directed that Gyma would be eligible for reimbursement of reasonable costs incurred.

In reviewing Gyma's subsequent motion for costs and fees, the court reasoned that Rule 45 makes cost-shifting "mandatory in all instances in which a non-party incurs significant expense from compliance with a subpoena," but that it did not require the requesting party to bear the entire cost of compliance. Further, the court held that only "reasonable"

costs are compensable under Rule 45 and that the moving party bears the burden of proof. The court found that Gyma had not established that a reasonable client would use its "expensive" New York counsel to handle the subpoena, and further that costs and fees incurred prior to the date it provided an estimate of costs to the plaintiffs and the court were not fairly chargeable.

Moreover, the court found that many of the costs and fees were incurred in connection with Gyma's efforts to resist compliance with the subpoena, which the court found was a unilateral "decision to litigate the subpoena zealously." Finding that Gyma was "notably intransigent and dilatory in its response," and considering the admonition of the U.S. Court of Appeals for the Second Circuit, that courts should "not endorse scorched earth tactics" or "hardball litigation strategy," the district court denied Gyma's motion for fees in bringing the motion, and awarded only $20,000 in reasonable costs and fees for compliance with the subpoena.

The court in *Valcor Engineering Corp. v. Parker Hannifin Corp*.[2] considered the motion of nonparty MEDAL, to shift the entire cost of production pursuant to a subpoena, $476,000, to the requesting party. The court found that the costs and fees were objectively unreasonable, and that much of the cost resulted from MEDAL's tactical decision to aggressively challenge every aspect of the subpoena, which led to two separate motions to compel. Moreover, the court found that MEDAL demonstrated little interest in minimizing expenses or preventing further motion practice. For example, after the court granted the first motion to compel, MEDAL withheld nearly 90 percent of the documents identified by search terms as nonresponsive, without providing any explanation. The court also found that MEDAL's aggressive tactics tended to demonstrate that it was not a truly disinterested nonparty, and that it had been intimately involved in the acts giving rise to the litigation. Finding that MEDAL's motion came "close to wielding the shield of Rule 45 as a sword," the court denied its motion for cost-shifting.

By contrast, the court in *Linglong Americas Inc. v. Horizon Tire Inc.*[3] granted, in full, a similar request by nonparty GCR Tire & Service for costs and fees associated with a Rule 45 subpoena served by Horizon. GCR objected to the scope of the subpoena, and its counsel spent several months negotiating with Horizon's counsel to narrow the request. GCR moved to recover its costs and fees, and Horizon objected to allocation of fees incurred in narrowing the scope of the subpoena. Reviewing Rule 45 case law, including *Aggrenox*, the court reasoned that it was required to protect the nonparty from significant, reasonable expenses incurred in compliance. The court found that narrowing

the subpoena took several months of work by GCR's attorneys and that the charges were reasonable, particularly since GCR had already paid them. The court further found that expenses incurred in litigating the fee dispute were reasonable and incurred in compliance with the subpoena. Accordingly, the court awarded the full $24,567 sought for responding to the subpoena and another $15,338 in fees for filing the fee dispute.

Costs and Fees Incurred in Collection, Processing and Review

In *Sands Harbor Marina Corp. v. Wells Fargo Insurance Services of Oregon*,[4] the plaintiffs alleged that EVMC Real Estate Consultants, Inc. and others conspiring with EVMC fraudulently induced the plaintiffs to pay advance loan commitment fees when, in fact, no financing was available. Wells Fargo, the employer of one of the defendants, served a subpoena on Dogali Law Group, a nonparty law firm that had represented EVMC in connection with the loan transactions at issue. Dogali withheld multiple documents on the basis of attorney-client privilege. Several years later, the court ruled that a defendant law firm could not withhold documents on the basis of attorney-client privilege because no surviving entity had standing to invoke the privilege on EVMC's behalf. Wells Fargo then renewed and expanded its earlier subpoena to Dogali, seeking the withheld documents. When Dogali argued that an electronic production would be time-consuming, Wells Fargo proposed to use its own vendors to reduce time and costs. After unsuccessful negotiations about the payment of costs and fees for the production, the court ordered production of the previously withheld privileged documents, as well as all documents responsive to the expanded subpoena. Dogali later filed a motion for costs and fees in the amount of $39,709.[5]

Weighing the mandate of Rule 45, the court held that Dogali was entitled to an award of fees. While the court generally agreed that the legal services rates charged were reasonable, it found that the legal time spent responding to the second subpoena and renewed subpoena included time for tasks that were unreasonable, such as time spent researching whether Dogali had standing to assert the attorney-client privilege, reviewing the documents for privilege, creating privilege logs for documents reviewed previously, and researching privilege and waiver issues. In addition, the court held that time spent communicating with former partners, preparing file memoranda, and conferring with Wells Fargo's counsel about costs and production was not reasonable.[6]

Finally, the court looked at the attorney time spent researching and preparing the motion for costs as well as the paralegal time spent reviewing documents for production. The court denied Dogali's request for the costs of drafting and reviewing the application as

unnecessary and excessive.[7] As to time billed for the paralegal and cost of production, the court noted Wells Fargo's offer to allow Dogali to utilize its vendor and determined that "rather than explore a more efficient and economical approach for the production, [Dogali] opted to have [its] paralegal print each email individually and convert it into a pdf…[Wells Fargo] should not be required to bear the cost of [Dogali's] unilateral decision to utilize a more time-consuming approach."[8] After carving out costs and fees determined to be unreasonable, the court awarded Dogali fees and costs in the amount of $10,537.33.

In *Nitsch v. Dreamworks Animation SKG Inc.*,[9] the court determined that attorneys' fees and costs associated with protecting the confidentiality of affected nonparties were reasonable and therefore compensable. Nonparty Croner Company, a consulting company that conducted annual compensation benchmarking, moved for reimbursement of costs incurred in responding to the plaintiffs' subpoena, which sought survey data that Croner obtained from companies in the animation and visual effects industry over several years. Before Croner responded to the subpoena, its counsel conferred with plaintiffs' counsel, advised that it would seek reimbursement of costs, and provided an initial estimate of those costs.

Because all surveys Croner conducted were subject to confidentiality provisions, Croner notified affected clients about the subpoena and devised a form of production to produce the information for the plaintiffs but preserve the anonymity of the survey participants. The process was more time-consuming than expected, and Croner sought costs, including outside attorneys' fees, in the amount of $67,787.55. The plaintiffs objected on the basis that the request was unreasonable, arguing that Croner had produced only 16 documents and that the requested sum was grossly overinflated and unreasonable.

Citing Rule 45(d)(2)(B)(ii)'s requirement that a court must protect a person who is neither a party nor a party's officer from "significant expense resulting from compliance," the court stated that the "shifting of significant expenses is mandatory, but the analysis is not mechanical; neither the Federal Rules nor the Ninth Circuit has defined 'significant expenses.'"[10] The court then discussed whether costs tied to Croner's confidentiality concerns were compensable, as "resulting from compliance" with a subpoena.[11]

The court noted that reimbursable fees include those incurred in connection with legal hurdles or impediments to production, such as ensuring that production does not violate federal law or foreign legal impediments, but reimbursable fees do not include fees

incurred for services for the nonparty's sole benefit and peace of mind. The plaintiffs argued that Croner's efforts to protect client confidentiality were purely business interests that inured solely to Croner's benefit and that the protective order was sufficient to address Croner's confidentiality issues. The court disagreed, finding that the efforts to address confidentiality issues were reasonable and compensable.

Significantly, the court held that Croner's efforts were consistent with the protective order entered into by the parties, stating that:

> Croner's efforts to protect client confidentiality were not made to be obstreperous, but were the result of compliance with the subpoena. Indeed, if any of the parties in this case were asked to produce a nonparty's confidential information, the stipulated protective order requires them to do what Croner did.[12]

In *Steward Health Care System LLC v. Blue Cross & Blue Shield of Rhode Island*,[13] however, the court reached the opposite conclusion when the nonparty, Nemzoff & Company LLC, requested reimbursement for costs and fees associated with complying with a subpoena from Blue Cross, which included a review for relevancy and privilege. Nemzoff initially refused to comply due to the costs involved, resulting in a court order compelling compliance and a warning that Nemzoff should minimize expense as it may bear the cost. The court explained that only "reasonable expenses" incurred — and not all expenses — may be shifted.

The court held that attorneys' fees have traditionally been awarded as sanctions in the most egregious circumstances or when the requested fees were for work that benefited only the requesting party. Since it was not presented with any argument for sanctions, the court found that Nemzoff's use of its own attorneys to review the documents for relevancy, confidentiality and privilege matters was only for Nemzoff's benefit, and conferred an unwanted benefit upon Blue Cross. Nemzoff's attorneys were protecting its own interests. As such, the court denied Nemzoff's request.

While cost-shifting remains within the discretion of the court, courts have consistently been more likely to award costs and fees when a nonparty has worked in good faith to narrow the scope of a subpoena and responded in an efficient fashion. To the contrary, when a nonparty attempts to obstruct the discovery process, courts have refused to shift costs and fees. As demonstrated by the case law, the potential for cost-shifting must necessarily turn on the particular facts and circumstances of each case.[14]

Endnotes

1 *In re Aggrenox Antitrust Litigation*, 2017 U.S. Dist. LEXIS 172231 (D.Conn. Oct. 18, 2017).

2 *Valcor Engineering Corp. v. Parker Hannifin Corp.*, No. 8:16-cv-00909 (C.D. Ca. July 12, 2018).

3 *Linglong Americas Inc. v. Horizon Tire Inc.*, No. 1:15-cv-1240 (N.D. Ohio Apr. 4, 2018).

4 *Sands Harbor Marina Corp. v. Wells Fargo Insurance Services of Oregon*, 2018 U.S. Dist. LEXIS 58729 (E.D.N.Y. Mar. 31, 2018).

5 *Id.* at *11.

6 *Id.* at *19-20.

7 *Id.* at *22.

8 *Id.* at *23.

9 *Nitsch v. Dreamworks Animation SKG Inc.*, 2017 U.S. Dist. LEXIS 34106, 2017 WL 930809 (N.D. Ca. Mar. 9, 2017).

10 *Id.* at *6-7.

11 *Id.* at *7.

12 *Id.* at *11.

13 *Steward Health Care System LLC v. Blue Cross & Blue Shield of Rhode Island*, No. 15-272 (E.D. Pa. Nov. 14, 2016).

14This article is a continuation of the authors' examination of Rule 45 subpoenas in "Does Rule 45 Protect Nonparties From Undue Burden?." published by Law360 in October 2018 and available at https://www.pepperlaw.com/publications/does-rule-45-protect-nonparties-from-undue-burden-2018-10-03/.

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