IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

IN RE ORTHO EVRA PRODUCTS
LIABILITY LITIGATION

N.D. Ohio Case No. 1:06-40000
Judge David A. Katz

O R D E R

This matter is before the Court on Alliance Healthcare Information, Inc.'s motion for reimbursement of costs and fees pursuant to Fed. R. Civ. P. 45(c)(2)(B). Also before the Court is Plaintiff's response and Alliance's reply thereto. This Court has jurisdiction pursuant to 28 U.S.C. § 1407.

BRIEF BACKGROUND

This is a products liability multi-district litigation case involving the Ortho Evra birth control patch. In the fall of 2006, the Plaintiffs' Steering Committee ("PSC") issued multiple nonparty subpoenas. Alliance Healthcare, Inc. ("Alliance") was served with a seven page subpoena for production of documents by the PSC in November 2006.

Alliance provided call center services, specifically fielding calls from Ortho Evra users on various aspects of the product. Alliance indicates its call center offered these services to Ortho Evra consumers since 2001.

According to Alliance the subpoena:

> included production of all documents and data bases exchanged between Alliance and Defendants [Johnson & Johnson and Ortho McNeil Pharmaceuticals, Inc.] concerning the product, including daily communications and emails, all internal Alliance documents related to the Ortho Evra product, including daily reports generated by call center activities, and all other documents in Alliance's possession related to daily product reports, regardless of to whom the communications were sent or received.

Alliance Mem. At p. 2. Stated differently, the subpoena sought fourteen categories of documents for the time period of 1991 through 2006. Alliance objected to the subpoena as overbroad and cited potential violations of HIPPA[1] privacy rules.

Discussions between counsel for Alliance and the PSC are reflected in correspondence attached to the movant's motion. In a letter dated November 17, 2006, counsel for Alliance noted:

> You [the PSC] confirmed that the subpoena should not be interpreted as requesting or requiring the production of any information that would be protected by HIPPA or any similar statute. We will carefully review the potentially responsive materials and redact any patient health information or otherwise protected materials.

Subsequent correspondence does not address reimbursement for review of those materials thereby setting the stage for the present dispute.

MOTION FOR REIMBURSEMENT

Under Fed. R. Civ. P. 45(c)(1), a party "responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena." Where an objection is lodged, the court is required to protect a nonparty "from significant expense resulting from compliance." Fed. R. Civ. P., 45(c)(2)(B)(ii).

The considerations in determining whether a nonparty should bar all or some of the expenses associated with compliance include: " (1) whether the nonparty has an actual interest in the outcome of the case; (2) whether the nonparty can more readily bear the costs than can the requesting party; and (3) whether the litigation is of public importance." 9 MOORE'S FEDERAL

[1] Health Insurance Portability and Accountability Act of 1996.

PRACTICE § 45.41[3] (3d ed. 2007), *citing In re Honeywell Intern. Inc. Securities Litig.*, 230 F.R.D. 293, 303 (S.D.N.Y. 2003).

In this instance, Plaintiffs dispute that Alliance has properly invoked its right to reimbursement based upon the movant's failure to move to quash the subpoena. This Court disagrees and finds the approach taken by the district court in *First American Corp. v. Price Waterhouse LLP* 184 F.R.D. 234, 239 (S.D.N.Y. 1998) to be instructive:

> Under Rule 45, a nonparty is not rigidly required to seek reimbursement for costs of compliance prior to responding to a subpoena. Indeed the Advisory Committee's note to the 1991 amendment of Rule 45 explains that:
>
> The court is not required to fix the costs in advance of production, although this will often be the most satisfactory accommodation to protect the party seeking discovery from excessive costs. In some instances, it may be preferable to leave uncertain costs to be determined after the materials have been produced, provided that the risk of uncertainty is fully disclosed to the discovering party. Fed.R.Civ.P. 45(c)(2)(B) advisory committee's note; see *United States v. Columbia Broadcasting Sys*., 666 F.2d 364, 368 (9th Cir.1982) (recognizing that Rule 45 "has been used creatively to require interim reimbursement [as well as] reimbursement of costs at the conclusion of discovery"); *see generally* David. D. Siegel, Practice Commentaries, C45-21, 28 U.S.C.A. Rule 45, at 389 (1992) (explaining that post-compliance applications for costs are appropriate).

Here, Alliance initially objected to the broad scope of the subpoena and advised the PSC that a close review of these documents was necessitated due to HIPPA implications. Certainly the PSC understood the type of review necessary in order to comply with such a comprehensive production.

As for the relevant factors, Alliance merely provided a service to the Defendants for which it was paid but without more there is no basis to find it has an interest in the outcome of this litigation. As noted in the memoranda, Alliance is a small company which secured counsel to

respond to the subpoena as it did not employ in-house counsel and this factor weighs in favor of Alliance. The third factor, that of public importance, has been reiterated by Plaintiffs during every step of this litigation. However, the Court is reluctant to shift all costs to a nonparty simply on the basis of this factor.

From the memoranda submitted by the parties, it is clear that something more than mere production was required by Alliance. However, the Court finds the amount of time spent in terms of hours and legal fees is disproportionate to the amount being sought by Alliance. In an attempt to be fair to both sides, the Court finds an award of $24,365.32 to be appropriate amount in this dispute.

CONCLUSION

Accordingly, Alliance's motion for reimbursement of costs and fees (Doc. No. 187) is granted in part and denied in part. The PSC is ordered to pay Alliance $24,365.32. Alliance's request for an award of fees in conjunction with the present motion is denied.

IT IS SO ORDERED.

S/ *David A. Katz*
DAVID A. KATZ
U. S. DISTRICT JUDGE