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FEDERAL E-DISCOVERY

# Court Quashes Non-Party Subpoena as Unduly Burdensome


By **Christopher Boehning** And **Daniel J. Toal**

Under Rule 45 of the Federal Rules of Civil Procedure, a person or company with no direct involvement or financial stake in a litigation can suddenly become entrenched in management of discovery obligations. Compliance with Rule 45 subpoenas can subject non-parties to significant burden and expense, especially when—as is often the case—materials requested include electronically stored information. Limited case law and secondary sources on this topic leave non-parties with little guidance on the best way to mount effective challenges to non-party subpoenas, such as moving to quash due to undue burden or to shift costs onto the requesting party. But a recent decision from the Northern District of California and new commentary from The Sedona Conference may help change that.

CHRISTOPHER BOEHNING *and* DANIEL J. TOAL *are litigation partners at Paul, Weiss, Rifkind, Wharton & Garrison.* ROSS M. GOTLER, *e-discovery counsel, and* LIDIA M. KEKIS, *e-discovery attorney, assisted in the preparation of this article.*

### 'Genus Lifesciences'

In *Genus Lifesciences v. Lannett Co.*, 2019 WL 7313047 (N.D. Cal. Dec. 30, 2019), the district court judge quashed a non-party subpoena as unduly burdensome where the plaintiff had not first requested the materials from the defendant. In this matter, Genus Lifesciences sued its competitor, Lannett Company, alleging, inter alia, false advertising and unfair competition in the cocaine hydrochloride nasal spray market.

> 'Genus' and The Sedona Conference's Rule 45 Commentary serve to further promote and refine the discussion around non-party discovery.

During discovery, Genus served a subpoena on non-party Michael Singer, a former salesperson for Lannett, requesting Singer's agreements with Lannett, promotional and training materials on cocaine hydrochloride, and relevant communications. Singer was willing to comply, but pressed Genus to agree to reimburse him


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for his time and costs relating to responding to the subpoena. Over the course of several weeks, the parties and Singer engaged in multiple rounds of discussions on how Singer should produce the subpoenaed documents and how Genus would reimburse him. As they debated whether Singer should first produce a list of responsive documents for review, Lannett objected that "'the list may itself' disclose privileged or highly confidential information." Id. at *2.

At an impasse, Singer moved to quash the subpoena in its entirety or, if denied, for costs covering his time, copying expenses, and the expenses of researching and litigating the

issue. Singer argued that the document request "would result in a significant expense, could subject him to sanctions from Lannett for producing privileged or confidential information, and is unduly burdensome because the requested documents are also in Lannett's possession." Id. at *1. Singer described himself as being in "a 'catch-22 situation' because Genus may seek sanction for non-compliance with the subpoena but Lannett might sue him for releasing protected company material." Id. at *4. Moreover, Singer's affidavit stated "that he has no documents that are not already in the custody or control of Lannett because he provided all that he has to Lannett before he left his employment." Id.

Genus had not yet requested the documents from Lannett, but attempted to justify non-party discovery as recourse for Lannett's alleged production deficiencies. Genus argued that "Lannett has previously failed to produce documents that Genus has independently discovered during its investigation" and that Singer's production of a list of responsive documents would "help it determine what documents it can then obtain from Lannett." Id.

### Undue Burden

In its analysis, the court highlighted that the scope of non-party discovery through Rule 45 subpoenas is coextensive with that Rule 26 permits of parties—relevant, non-privileged matters that are proportional to the needs of the case. Among the limitations on scope is the requirement of Rule 26(b)(2)(C)(i) that a court must "limit discovery if it determines that 'the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive.'" Id. at *3. And under Rule 45(d)(3)(A)(iv), a court must quash or modify a non-party subpoena if it "subjects a person to undue burden." Id.

Analyzing these requirements, the court turned to precedent and found that, "[i]n general, there is a preference for parties to obtain discovery from one another before burdening non-parties with discovery requests … . When the requesting party has 'not shown [that it] attempted to obtain documents from the [opposing party] in an action prior to seeking the documents from a non-party, a subpoena duces tecum places an undue burden on a non-party.' … Further, 'when an opposing party and a non-party both possess documents, the documents should be sought from the party to the case.'" Id. at *4 (citations omitted).

> The Commentary provides updated guidance on a number of topics impacting non-party discovery, including the relationship between possession, custody, and control and Rule 45 obligations, preservation requirements for non-parties, and Rule 45(d) costs, sanctions, and motion practice.

Based on this, the court granted Singer's motion to quash the non-party subpoena in its entirety, determining that "[b]ecause of Genus's failure to attempt to obtain the requested documents from Lannett prior to3 seeking them from Singer, its subpoena is an undue burden on Singer." Id. Echoing Rule 26(b)(2)(C)(i), the court added that it was granting the motion to quash "because the documents requested in Genus's subpoena can be obtained from the opposing party Lannett in a way that would be more convenient and less burdensome." Id. at *5. As such, the court indicated that it did not find it necessary to address Singer's privilege concerns or whether the document request imposed a significant expense.

### The Sedona Conference Rule 45 Commentary

Just a week after the *Genus* decision, The Sedona Conference, a leading think tank on issues that impact discovery practice, released the public comment version of its "Commentary on Rule 45 Subpoenas to Non-Parties, Second Edition." The Commentary provides updated guidance on a number of topics impacting non-party discovery, including the relationship between possession, custody, and control and Rule 45 obligations, preservation requirements for non-parties, and Rule 45(d) costs, sanctions, and motion practice.

On the topic of undue burden, the Commentary concedes that assessing undue burden is not easy, noting that Rule 45(d)(3)(A)(iv)'s undue burden limitation "has created the greatest source of conflict with other parts of Rule 45[.]" Id. at 37. To that end, "courts have attempted to build a framework to guide litigants in their analysis of whether

information requested by a Rule 45 subpoena constitutes an undue burden for the non-party." Id. In the past decade, "courts have continued to refine the contours of what imposes an undue burden on a responding non-party." Id.

*Genus* provides an example of this effort, tying together the limits on discovery required under Rule 26 and the undue burden limitation under Rule 45. The Commentary and the *Genus* decision, although each developed independently of the other, are remarkably aligned in setting forth additional contours to guide future undue burden analyses.

The Commentary offers a set of "Practice Pointers" with direct guidance on this topic, including:

- Prior to issuing a subpoena to a non-party, it may be beneficial for a party to confirm that the information cannot be obtained through discovery from a party. The party issuing a subpoena generally should avoid seeking information from a non-party that likely is duplicative of information in a party's possession, custody, or control.
- The party issuing a subpoena should be mindful of its obligations under Rule 45 to avoid imposing undue burden and expense on a non-party recipient.
- It may be beneficial for the party issuing a subpoena and the non-party recipient to confer in an effort to resolve any disputes regarding the scope of discovery or the scope of the subpoena before seeking to quash or enforce a subpoena. If appropriate, other parties should be given the opportunity to participate in such discussions.

Id. at 42-43.

### Cost Shifting

In *Genus,* Singer, proceeding pro se, advocated for himself as a non-party in a way that can be instructive to others facing Rule 45 subpoenas. Until Lannett raised the issues relating to privilege and confidentiality, Singer was willing to comply with the non-party subpoena as long as he was reimbursed for his time and expenses. Non-parties should, as matter of course, demand such reimbursement, including attorney fees, from requesting parties prior to complying with a Rule 45 subpoena. Such a demand is supported by Rule 45, which requires mandatory cost shifting by a court when it orders a non-party, over its objection, to produce documents at significant expense.

The Sedona Commentary spends much of its space covering this topic, writing that "[u]nder Rule 45(d)(2)(B)(ii), when a court orders compliance with a subpoena over a non-party's objection, the court must first protect the non-party from significant expense resulting from compliance. If the non-party would be subjected to significant expense, this protection shifts as much of the compliance expense as necessary to the requestor to render the remaining expenses non-significant." Id. at 22. After describing the detailed steps and requirements—including costly motion practice—before a court can make a final determination regarding the cost shifting appropriate for a matter, the Commentary provides a practical suggestion: "If the non-party has served objections, the requesting party could consider offering to pay most or all of the non-party's compliance costs up front to expedite production and avoid motion practice. This approach limits the ability of the non-party to argue 'significant expense' and delay compliance." Id. at 36.

### Conclusion

*Genus* and The Sedona Conference's Rule 45 Commentary serve to further promote and refine the discussion around non-party discovery. Both reinforce the notion that courts and parties should be mindful of the limitations on otherwise broad discovery allowable by the Federal Rules of Civil Procedure, especially with respect to non-parties. And both support the concept that, as a best practice, a party should not pursue discovery from non-parties until and unless such discovery has first been sought from the parties to the litigation, better equipping non-party subpoena recipients to present justifiable arguments that compliance would impose an undue burden. And, importantly, both remind parties and non-parties alike of the ability of non-parties to demand cost shifting to alleviate potentially significant discovery expenses.