Cost-Shifting and Document Subpoena Compliance Under the Federal Rules of Civil Procedure and the Rules of the Supreme Court of Virginia

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Clients know that litigation—although sometimes unavoidable—is never pleasant. It is time-consuming, stressful, and expensive. Worse still, it can be an enormous inconvenience for clients dragged into cases when they are not parties to the litigation. This occurs when a subpoena is served on a nonparty. Subpoenas take various forms. They may require a client to testify at a hearing, deposition, or trial, to produce documents at a specified time and place, or both. Document subpoenas, in particular, can be burdensome and expensive especially if handled incorrectly. The good news is that, generally speaking, the Federal Rules of Civil Procedure and the Rules of the Supreme Court of Virginia understand these burdens and give some relief to nonparties facing them. In certain circumstances, the Rules even allow courts to shift the costs for complying with a subpoena to the issuing party.

Document subpoenas are at best an annoyance. For whatever reason, Party A in Case X believes that your client has information that may be helpful to Party A's claims or defenses. Your client may know nothing or next to nothing about Case X. By the time the client has been served with the subpoena and has hired you to help, the subpoena's arbitrary deadline for producing documents is imminent. And, as often as not, document requests in subpoenas resemble a round of "Go Fish": "Gimme every document relating to any communication you may have had with Party B." In short, document subpoenas often require responding persons or entities to produce multiple categories of documents, including emails and other electronically stored information, covering a vast period of time. Searching for documents responsive to the subpoena will require the nonparty to collect and search hard drives, explore back-up tapes, review communications, search other records, and devote countless other resources resulting in an unexpected interruption of its business. Faced with these difficulties, some clients may want to ignore the subpoena altogether. But that is not an option; it will put the client in contempt of court.[1]

What to do? There are protective steps available: you, the nonparty's attorney, served a timely written objection on Party A.[2] You followed that objection with multiple meet-and-confer phone calls and e-mails to Party A's lawyer, explaining in concrete detail the burdens and expense that complying with the subpoena will impose on the client and its business. But Party A's lawyer is adamant. She insists Party A needs the subpoenaed information and files a motion asking the court to compel your client to produce every possible document requested in the subpoena. You, in turn, reiterate your objections in

opposing the motion to compel, and perhaps setting up these arguments in your own motion to quash the subpoena. At a hearing, the judge grants Party A's motion (and denies your motion to quash), noting that the subpoenaed information is relevant to Party A's claims in Case X and that the information cannot be obtained from any other source. The court orders your client to produce responsive documents. Will your client now be required to spend tens of thousands of dollars and untold hours collecting, reviewing, and producing the subpoenaed documents?

The bad news is yes, the client will have to undertake the effort and expense to comply with the subpoena. The good news is that the client may be able to recoup most of its money if the expenses incurred are "significant" under the Federal Rules, or if the costs are "reasonable" under Virginia law. Federal Rule of Civil Procedure 45 requires parties and their lawyers issuing subpoenas to "take reasonable steps to avoid imposing undue burden or expense on" nonparties.[3] Similarly, a Virginia court may limit the extent of a subpoena duces tecum if it determines, among other things, that the subpoena seeks unreasonably cumulative or duplicative information or is unduly burdensome or expensive.[4] The Rules recognize that a nonparty involuntarily embroiled in civil litigation, who is powerless to control the scope of discovery, should not be subjected to undue burden or significant expense because of a subpoena.

Here is the way to go about getting your client's money back. First, the Federal Rules.

I. COST-SHIFTING UNDER FEDERAL RULE 45

A. COST-SHIFTING IS MANDATORY WHERE THE EXPENSE RESULTING FROM COMPLIANCE IS SIGNIFICANT

Even if a court overrules a nonparty's objection to a subpoena and orders compliance, the Federal Rules instruct the court to "protect" the nonparty "from *significant* expense resulting from compliance."[5] Stated differently, Rule 45 *requires* a court to shift a nonparty's costs of compliance with a subpoena if those expenses are "significant."[6]

Although cost-shifting is mandatory, district courts retain considerable discretion in fashioning an award to a nonparty under Rule 45(d). For example, a nonparty's ability to bear some of the costs may affect whether expenses are deemed significant.[7] Similarly, if a nonparty refuses to work with opposing counsel or acts unreasonably in responding to the subpoena, a court may conclude that a majority of the nonparty's expenses, although technically significant, should not be shifted to the issuing party.[8] Simply put, what constitutes a significant expense is a relative, not absolute, inquiry and is largely left to the discretion of the court.

But even to open the door to possible cost-shifting, an attorney must (1) show that complying with the subpoena imposes expenses on his client and (2) prove that the client's expenses are significant. If these two requirements are met, the court is required to shift the costs of compliance to the party seeking the discovery.

B. THE EXPENSE MUST "RESULT FROM COMPLIANCE"

The court will first determine what counts as an expense. Under Rule 45(d)(2)(B)(ii), the standard is whether the expense "result[s] from compliance" with the court's order compelling production. The Rule does not explicitly define that phrase. Recently, the U.S. Court of Appeals for the Fourth Circuit held that "attorney's fees incurred by the non-party that are necessary to a discovery proceeding under Rule 45" are the kind of "expense[s] resulting from compliance" that may be shifted to the requesting party.[9] The court emphasized that shifting attorneys' fees is appropriate only where they "are actually necessary to a non-party complying with a discovery order."[10] So, for example, attorneys' fees "stemming from the preparation of discovery status reports, attendance at discovery hearings, privilege

review of discovery materials," the creation of privilege logs, and drafting a Rule 26(c) protective order are appropriately included as expenses in the cost-shifting analysis.[11] So, too, are reasonable e-discovery services, which are often expensive.[12] A nonparty's expenses incurred determining and providing a list of class members to a subpoenaing party may also be recoverable.[13]

On the other hand, attorneys' fees for work even one step removed from compliance with the subpoena are not considered Rule 45 expenses. For example, attorneys' fees incurred "for time spent 'outlining and drafting the motion for attorney fees'" cannot be shifted because they are not expenses incurred "in an effort to produce discoverable material."[14] Put differently, a nonparty's attorneys' fees and expenses stemming from the nonparty's efforts to shift expenses to the subpoenaing party are not recoverable under Rule 45. Nor can "services provided by an attorney to a non-party for the non-party's sole benefit and peace of mind" be counted as expenses in the cost-shifting analysis.[15]

In a recent case, a district court awarded a nonparty's law firm only $1100 of the more than $145,000 in attorneys' fees requested.[16] Among other things, the law firm sought reimbursement for fees spent remedying its deficient privilege log, undertaking a laborious document review, and vigorously contesting the subpoena before meaningfully conferring with the requesting party.[17] The law firm's choice "to litigate fiercely and to expend significant resources on the document review effort"—with no eye toward minimizing its expenses or toward working cooperatively with opposing counsel to resolve the disputed issues— were not 'significant expenses resulting from compliance."[18]

The Western District of Virginia applied similar reasoning where a nonparty "took on the costs of individual responsiveness and privilege review despite perfectly reasonable alternatives."[19] There, the nonparty

undertook relevance and privilege review on its own, taking on costs despite GE and Bell's alternate plan to have outside counsel conduct all of this work separately, with a provision for [the nonparty] to object to production of any privileged or protected documents that were ultimately part of the responsive group.[20]

Primarily for this reason, the court shifted only one-third of the nonparty's expenses to the subpoenaing party.[21] Of course, a nonparty has the right to fiercely litigate and refuse cost-saving alternatives "if it believes that doing so serves its own interests, but it may not then charge Plaintiff with the costs of this effort."[22]

It is impossible to catalogue every type of expense that may or may not be recoverable under Rule 45. Courts carefully scrutinize cost-shifting requests, so third parties receiving a subpoena must make sure that its expenses truly result from compliance with the court's order. Simply because a nonparty undertakes certain tasks and incurs associated expenses in the aftermath of an order compelling compliance with a subpoena does not mean that those costs "result[ed] from" compliance with that order. "Only reasonable expenses are compensable" under Rule 45; unnecessary or unduly expensive services are not.[23]

C. THE EXPENSE MUST BE SIGNIFICANT

Next, the court must decide whether your client's expenses are significant.[24] What makes a nonparty's expenses significant will, of course, vary from person to person (or entity to entity). Significant expenses for a mom-and-pop shop may be insignificant for a Fortune 500 company. The analysis must be applied on a case-by-case basis, with attention focused on the financial ability of the producing nonparty to bear the costs of production.[25]

Moreover, cost-shifting, although mandatory under the Rules, does not mean wholesale reimbursement for every penny a nonparty expended complying with a subpoena. Rather, the court must order the

party seeking discovery "to bear at least enough of the cost of compliance to render the remainder 'non-significant.'"[26] This is consistent with many courts' pronouncements that "even a nonparty is normally expected to bear some . . . of the costs of discovery."[27] Again, what takes expenses from significant to nonsignificant will depend on the characteristics of the third party complying with the subpoena.

D. COST-SHIFTING MAY REQUIRE A COURT ORDER

There is one final hurdle to cost-shifting that nonparties will want to keep in mind. Some courts, like the Fourth Circuit, imply that cost-shifting is permissible only where a court has ordered the nonparty to produce documents following the grant of a motion to compel or the denial of a motion to quash.[28] Other courts are even more direct.[29] So, if you choose to voluntarily produce documents without waiting for a court to order compliance, you may be waiving any right to seek reimbursement.[30]

Other courts take the position that a court order is *not* necessary to trigger cost-shifting to the requesting party.[31] This makes good practical sense, particularly in light of the Federal Rules' command that they be used to secure the "*inexpensive* determination of every action and proceeding."[32] Requiring litigation of discovery disputes conflicts with the purpose of Rule 45, which is to "avoid imposing undue burden or expense on a person subject to the subpoena."[33] The better policy is to encourage parties to meet and confer and come to an agreed resolution of discovery disputes before involving the court.

One solution is to condition the responding party's voluntary compliance on the requesting party's agreement to reimburse expenses or to reserve the responding party's right to seek reimbursement later.[34] The Eastern District of Virginia has left this avenue open to nonparties seeking to invoke Rule 45's cost-shifting provisions.[35] Either way, the requesting party *must* be put on notice of your intent to seek reimbursement of expenses before you begin production.[36] Requesting expenses for the first time after making a voluntary production significantly decreases your chances of recovering your money. It is "akin to sandbagging" the requesting party.[37]

II. COST-SHIFTING UNDER VIRGINIA LAW

Now, the Virginia Rules. Do similar cost-shifting provisions exist in Virginia? The short answer is yes, but with notable differences. Rule 4:9A(c)(3)—the nonparty subpoena and production Rule that was spun off of Rule 4:9 in recent years—permits courts to shift to the subpoenaing party "some or all of the reasonable cost of" production as a condition to the court's denial of a motion to quash or modify a nonparty subpoena.[38] There is scant case law interpreting Rule 4:9A, but the Rule's language is clearly different from the language of Federal Rule 45: Virginia's cost-shifting rule is discretionary, not mandatory; and a Virginia court may shift only "the reasonable cost of producing the documents" to the party issuing the subpoena, not the "significant expense resulting from compliance" under Federal Rule 45.[39]

An unresolved issue is whether reasonable costs include attorneys' fees incurred in connection with the nonparty's document production. Unlike the Federal Rule, attorneys' fees are probably not recoverable under the Virginia Rule.[40] Rule 4:9A does not expressly mention fees, only the *cost of producing* the documents, so it is at least arguable that fees cannot be shifted to the subpoenaing party.

The Virginia Code, the Rules, and case law buttress this conclusion. In other cost-shifting contexts, the General Assembly has indicated that costs and attorneys' fees are not one and the same. For example, if a public body wrongly denies a FOIA request and the petitioner substantially prevails on the merits of the case, the petitioner is generally entitled to an award of "reasonable costs . . . and attorneys' fees from the public body."[41] Virginia's business conspiracy statute likewise entitles a prevailing plaintiff to "the costs of suit, including a reasonable fee."[42] If the phrase *attorneys' fees* was synonymous with *costs*, the inclusion of both terms in these statute's cost-shifting provisions would be unnecessary. Words in a statute, after all, should be interpreted to avoid rendering words superfluous.[43] The Code

suggests that *attorneys' fees* and *costs* are intended to have different meanings.

The Virginia Rules are no different. Certain cost-shifting provisions in the Virginia Rules expressly allow for attorneys' fees. For instance, Rule 4:12(a)(4) requires the court to award the prevailing party on a motion to compel "the reasonable expenses incurred in obtaining the order, *including attorney's fees* . . . ."[44] And a court may condition relief from default on a defendant "reimbursing any extra costs and fees, including attorney's fees, incurred by the plaintiff solely as a result of the delay in the filing of a responsive pleading by the defendant."[45] The Supreme Court of Virginia chooses the language of the Rules with care, and when it intends for attorneys' fees to be recoverable, it knows how to say so.

Finally, the Supreme Court of Virginia has concluded that the right to recover costs generally does not include attorneys' fees. In *Chacey v. Garvey*, the Chaceys' agent trespassed on Garvey's property and removed timber without Garvey's permission.[46] In timber theft cases, the Virginia Code states that the timber thief must pay, among other damages, "*any directly associated legal costs* incurred by the owner of the timber as a result of the trespass."[47] In *Chacey* the Supreme Court held that "directly associated legal costs incurred" did *not* include attorneys' fees.[48] The Court stated:

The Code of Virginia contains more than 200 instances where the General Assembly has determined a successful litigant is entitled to "attorney's fees and costs" or "costs and attorney's fees." *The General Assembly clearly views costs associated with litigation as a category of recoverable expenses separate and distinct from attorney's fees.*[49]

Because the General Assembly did not include the right to recover attorneys' fees in the statute, Garvey was entitled to recover any "directly associated legal costs" that she incurred as a result of the trespass, but not her attorneys' fees.[50] *Chacey* provides guidance into whether attorneys' fees may be included in the "reasonable cost of producing the documents" that may be shifted to the issuing party under Rule 4:9A.

A rule or statute that awards costs and attorneys' fees is in derogation of common law, and therefore subject to strict interpretation.[51] The petitioner in *Chacey* failed to recover her attorneys' fees because the statute in that case provided no express right of recovery. Taking a cue from *Chacey*, the absence of the phrase *attorneys' fees* from the cost-shifting provision of Rule 4:9A(c)(3) almost surely indicates Virginia's preference that fees associated with producing documents in response to a nonparty subpoena cannot be shifted to the subpoenaing party under Virginia law.

III. CONCLUSION

A nonparty should not be expected to bear as great an expense as a party when complying with a subpoena, a principle that finds support in the Federal Rules and Virginia Rules.

In federal courts, "when discovery is ordered against a non-party, the only question before the court in considering whether to shift costs is whether the subpoena imposes significant expense on the non-party."[52] If it does, the court will require the party seeking discovery to bear at least enough of the cost of compliance to make the cost nonsignificant.[53] The shifting is mandatory, but the analysis is flexible.

In Virginia state courts, cost-shifting is permitted but not required. The costs to be shifted may include "some or all of the reasonable cost of producing the documents."[54] But, unlike case law interpreting the Federal Rule, a nonparty's reasonable costs likely exclude attorneys' fees.

At the end of the day, the facts and circumstances of each case will guide the court's interpretation of what is a "significant expense resulting from compliance" (in federal court), or the "reasonable cost of producing the documents" (in a Virginia court). However, to take full advantage of possible cost-shifting opportunities, (1) communicate early and often with opposing counsel, (2) make clear from the outset

that your client intends to recover all costs incurred in complying with the subpoena, (3) document the reasonableness and significance of those expenses, and (4) at all times, keep the court informed of your client's intention to recover those costs.

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[1] *See* FED. R. CIV. P. 45(g); *see also* VA. SUP. CT. R. 4:10(g).

[2] *See* FED. R. CIV. P. 45(d)(2)(B); *see also* VA. SUP. CT. R. 4:9A(a)(2), (c).

[3] FED. R. CIV. P. 45(d)(1); *see also*, *e.g.*, In re Subpoena for Documents Issued to ThompsonMcMullan, P.C., 2016 WL 1071016, at *8 (E.D. Va. Mar. 17, 2016) ("There is no reason to burden a third party with discovery when the opposing party has all of the information requested.").

[4] VA. SUP. CT. R. 4:9A(a), (b) and 4:1(b)(1).

[5] FED. R. CIV. P. 45(d)(2)(B)(ii) (emphasis added).

[6] Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1184 (9th Cir. 2013); *see also* Linder v. Calero–Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001) (Rule 45 "ma[kes] cost shifting mandatory in all instances in which a nonparty incurs significant expense from compliance with a subpoena."); Monitronics Int'l, Inc. v. Hall, Booth, Smith, P.C., 2016 WL 7030324, at *13 (N.D. Ga. Dec. 2, 2016) (same); G&E Real Estate, Inc. v. Avison Young–Washington, D.C., LLC, 317 F.R.D. 313, 315 (D.D.C. Mar. 30, 2016) ("if expenses are significant, the district court *must* shift the expenses above the level of 'significance' to the party serving the subpoena.").

[7] Bell, Inc. v. GE Lighting, LLC, 2014 WL 1630754, at *14 (W.D. Va. Apr. 23, 2014) (nonparty's "fairly poor financial condition" weighed in favor of shifting some of the costs of production to the subpoenaing

party).

[8] *See id.* at *13-15 (refusing to shift all of nonparty's expenses to the subpoenaing party because nonparty refused to use cost-saving measures for its document review and was otherwise "dilatory in corresponding with" the requesting parties).

[9] In re Subpoena of Am. Nurses Ass'n, 643 F. App'x 310, 314 (4th Cir. April 7, 2016) (unpublished); *id.* (court may appropriately shift attorney's fees "necessary to the production of discovery materials").

[10] *Id.*

[11] *Id.*; *see also* Stormans Inc. v. Selecky, 2015 WL 224914, at *5 (W.D. Wash. Jan. 15, 2015) (stating expenses of document review, creating a privilege log, and drafting protective orders are recoverable whether completed by in-house counsel or outside attorneys).

[12] *In re: Subpoena of Am. Nurses Ass'n*, 643 F. App'x at 315.

[13] FED. R. CIV. P. 45, Advisory Committee Notes to the 1991 Amendment.

[14] *In re: Subpoena of Am. Nurses Ass'n*, 643 F. App'x at 314-15; *see also Storman's Inc.*, 2015 WL 224914, at *5 ("[T]his court interprets Rule 45(d)(2)(B)(ii) compliance expenses as not including attorneys' fee for litigating a subpoena.").

[15] *See* United States v. McGraw-Hill Cos., Inc., 302 F.R.D. 532, 536 (C.D. Cal. 2014).

[16] G&E Real Estate, Inc. v. Avison Young–Washington, D.C., LLC, 317 F.R.D. 313, 318-19 (D.D.C. Mar. 30, 2016). *See also Stormans, Inc*., 2015 WL 224914, at *6 (reducing a nonparty's request of more than $108,000 in expenses to less than $17,000 because the overwhelming majority of the request was for attorney time "spent on the motions to compel" and otherwise "litigating the subpoena in this

Court”).

[17] *See G&E Real Estate, Inc.*, 317 F.R.D. at 318-19. After several months passed and multiple motions were filed concerning the subpoena, the nonparty “offered to allow Plaintiff to review all of the 1,900 documents then in dispute with a clawback arrangement. Plaintiff’s counsel reviewed all of those documents in one day, determined that those documents were largely duplicative and not material and agreed to withdraw the motion to compel as to them. Several additional documents were then produced by agreement. The parties’ activities that one day resolved all of the remaining issues regarding the subpoena.” *Id.* at 318 (internal citations and quotation marks omitted).

[18] *Id.* at 318-19.

[19] Bell Inc. v. GE Lighting, LLC, 2014 WL 1630754, at *15 (W.D. Va. Apr. 23, 2014). In *Bell*, the subpoenaing party suggested that the nonparty turn over all data it had retrieved (11 GB) with a corresponding agreement and claw-back provision. The nonparty refused, opting instead to review all data on its own. *Id.* at *3.

[20] *Id.* at *14.

[21] *Id.* at *15.

[22] *G&E Real Estate, Inc.*, 317 F.R.D. at 319.

[23] *Id.* at 316.

[24] Before the 1991 Amendments to the Federal Rules—when cost-shifting was discretionary—courts relied on a multifactor test to decide whether to shift costs. These factors were “[1] whether the non-party actually has an interest in the outcome of the case, [2] whether the non-party can more readily bear its costs than the requesting party, and [3] whether the litigation is of public importance.” Linder v. Calero-Portocarrero, 251 F.3d 178, 182 (D.C. Cir. 2001). Some courts still use the test to determine whether costs are significant and thus trigger mandatory cost-shifting. *See id.*;

Jeune v. Westport Axle Corp., 2016 WL 1430065, at *2 (W.D. Va. Apr. 8, 2016). It is the author's position, however, that most of these factors are inconsistent with today's Rule 45 analysis, which asks courts to focus solely on whether costs are significant. *See McGraw-Hill*, 302 F.R.D. at 535 (noting that whether the litigation is important to the general public has little to do with whether a nonparty's expenses are significant and holding "the multi-factor analysis—which helped courts decide whether to shift costs—is now obsolete"); Cornell v. Columbus McKinnon Corp., 2015 WL 4747260, at *2-3 (N.D. Cal. Aug. 11, 2015) (finding the reasoning of *McGraw-Hill* "compelling").

[25] *See* Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1185 (9th Cir. 2013) ("we have no trouble concluding that $20,000 is 'significant'" for a nonprofit legal advocacy group); *Linder*, 251 F.3d at 179-80, 182-83 (nearly $200,000 was significant for the Defense Department, the State Department, and the CIA); *G&E Real Estate*, 317 F.R.D. at 316 ("In terms of the dollar figure of the total request¾$145,843.50 in attorney's fees and $2,010.94 in [e-discovery vendor] invoices¾there is no doubt that this amount would be significant."); Drfp, LLC v. Republica Bolivariana de Venezuela, 2016 WL 491828, at *5 (S.D. Ohio Feb. 9, 2016) (shifting $46,000 in fees and costs to the Republic of Venezuela); Cornell v. Columbus McKinnon Corp., 2015 WL 4747260, at *4 (N.D. Cal. Aug. 11, 2015) (denying motion by FedEx to shift costs of subpoena compliance of more than $225,000, given FedEx's ability to pay and own financial interest in the litigation); *Stormans, Inc.* 2015 WL 224914, at *7 (awarding nonparty, a small legal aid nonprofit entity, less than $12,000 after finding that it could shoulder $5000 as a "non-significant amount"); *Bell, Inc.*, 2014 WL 1630754, at *14 (nonparty's "fairly poor financial condition: weighed in favor of shifting some of the costs of production to the subpoenaing party); Williams v. City of Dallas, 178 F.R.D. 103, 113-14 (N.D. Tex. 1998) ($9000 might be "significant" for two attorneys).

[26] *Legal Voice*, 738 F.3d at 1184 (quoting *Linder*, 251 F.3d at 182).

[27] Bell Inc. v. GE Lighting, LLC, 2014 WL 1630754, at *11 (W.D. Va. Apr. 23, 2014).

[28] *See* In re Subpoena of Am. Nurses Ass'n, 643 F. App'x 310, 314 (4th Cir. April 7, 2016) (unpublished) ("*if a court orders production on the subpoena*, 'the order must protect a [nonparty] from significant expense resulting from compliance'") (quoting FED. R. CIV. P. 45(d)(2)(B)(ii) and emphasis added). Recall that this is an unpublished opinion and, although persuasive, is ultimately not

binding precedent.

[29] *See* Swasey v. W. Valley City, 2016 WL 6090843, at *6 (D. Utah Oct. 18, 2016) (denying request for costs because "the cost-shifting provisions of Rule 45 were not yet applicable because the court has yet to compel her production with the subpoena"); Swase v. W. Valley City, 2015 WL 7756094, at *2 (D. Utah Dec. 1, 2015) ("[T]he court has yet to rule on the motion to compel or deny the motion to quash. Thus the cost-shifting provisions of Rule 45 are not yet applicable."); Angell v. Kelly, 234 F.R.D. 135, 138 (M.D.N.C. 2006) (recognizing "the authority to [fix compensation] derive[s] from the fact that the courts entered an order requiring production pursuant to Rule 45").

[30] *See* DNT, LLC v. Sprint Spectrum, LP, 750 F. Supp. 2d 616, 626 (E.D. Va. 2010) ("[B]ecause Qualcomm did not wait for this Court . . . to order compliance, it does not have the right to seek reimbursement under Rule 45 for the costs associated with its production."); *Angell*, 234 F.R.D. at 139 ("Because the BTCM Firm did not wait for a court order, its production of the documents does not fall within Rule 45; nor, does it have a right to seek reimbursement post-production based on Rule 45.").

[31] *See* Spears v. First Am. Eappraiseit, 2014 WL 6901808, at *2 (N.D. Cal. Dec. 8, 2014) ("The court agrees … that requiring a court order to award costs creates a perverse incentive to bring all discovery disputes to the court, needlessly multiplying litigation.").

[32] FED. R. CIV. P. 1.

[33] FED. R. CIV. P. 45(d)(1).

[34] *See DNT*, 750 F. Supp. at 626 ("The Court finds that recovery through reimbursement under Rule 45 is not proper as Qualcomm voluntarily complied with the subpoena *without conditioning its compliance on reimbursement*.") (emphasis added); *Spears*, 2014 WL 6901808, at *2 (finding interests of judicial economy allow parties to "agree that the non-party reserves its right to seek reimbursement, and then proceed with discovery without requiring the intervention of the court"); *see also* Sun Capital Partners, Inc. v. Twin City Fire Ins. Co., 2016 WL 1658765, at *5 (S.D. Fla. Apr. 26, 2016) ("Non-Parties could have sought the advancement of costs as a condition for the denial of the Motion to Quash.");

[35] *DNT*, 750 F. Supp. at 626.

[36] *See* FED. R. CIV. P. 45, Advisory Committee Notes to the 1991 Amendments (court may fix costs before or after production as long as the "risk of uncertainty is fully disclosed to the discovering party."); *see also Spears*, 2014 WL 6901808, at *3; North Am. Rescue Prods., Inc. v. Bound Tree Med., LLC, 2009 WL 4110889, at *14 (S.D. Ohio Nov. 19, 2009) ("A non-party's failure to follow Rule 45, however, does not mean that reimbursement is foreclosed under all circumstances. Courts have recognized that, where a non-party voluntarily complies with a subpoena without strictly adhering to Rule 45, it is reasonable to consider whether the non-party and party have reached some voluntary agreement regarding reimbursement."); In re First Am. Corp., 184 F.R.D. 234, 239 (S.D.N.Y. 1998) (when company raised issue of cost of compliance, it was not obliged to obtain court determination of costs before complying; cost-shifting may be done after production if discovering party is made aware of claim for reimbursement).

[37] *Sun Capital Partners, Inc.*, 2016 WL 1658765, at *5. In *Sun Capital*, the court required a nonparty's compliance with a subpoena duces tecum. At the same time, the court attempted to protect the nonparty by permitting it, in advance of the document production, to advise the court if the documents were "becoming excessively burdensome and expensive to produce." *Id.* Without notice from the nonparty, the court could not "work[ ] with the parties and the Non-Parties on the front end of this discovery issue to try to minimize the costs incurred." The nonparty notified neither the court nor the requesting party of its significant expenses until it was too late. *Id.* The nonparty's

failure to notify the Court and [the requesting party] of the significant expenses the [nonparty] w[as] incurring prevented the Court from further protecting the [nonparty] from significant expense and

prevented [the requesting party] from further taking steps to try and reduce the expense. The Court will not allow the [nonparty] to sit back, fail to respond to the Court's Order, and then later assert they require reimbursement of more than $136,000 in fees and costs. This is akin to sandbagging, which the Court will not permit.

Id. The court refused to order reimbursement because the requesting party "had no way of knowing that the [nonparty's] expenses would amount to over $136,000 in attorney's fees and costs." *Id.* at *6.

[38] *See* VA. SUP. CT. R. 4:9A(c)(3) ("The court . . . may . . . condition denial of the motion to quash or modify upon the advancement by the party in whose behalf the subpoena is issued of some or all of the reasonable cost of producing the documents, electronically stored information, and tangible things so designated and described.").

[39] *Compare* VA. SUP. CT. R. 4:9A(c)(3) *with* FED. R. CIV. P. 45(d)(2)(B)(ii).

[40] In *Cerkevitch v. Cerkevitch*, No. 130223, 1994 WL 1031222, at *9 (Fairfax County June 15, 1994) (decided under former Rule 4:9(c)(2)), the respondent attempted to shift the costs of responding to a subpoena to the issuing party. Although the court recognized that it could require the issuing party to pay the reasonable cost of producing the documents, it also noted that the respondent sought "payment, not for costs, but for his time based upon" his consulting firm's hourly rate of $195 per hour. *Id.* at *9. The court denied the respondent's request. *Cerkevitch* did not involve a request for attorneys' fees, but it evidences the court's conclusion that costs under Rule 4:9A should not include every expense incurred in producing responsive documents.

[41] VA. CODE § 2.2-3713(D).

[42] VA. CODE § 18.2-500(A).

[43] The McLean Bank v. Nelson, 232 Va. 420, 427, 350 S.E. 2d 651, 656 (1986).

[44] VA. SUP. CT. R. 4:12(a)(4) (emphasis added).

[45] VA. SUP. CT. R. 3:19(b), (d)(1).

[46] 291 Va. 1, 4-5, 781 S.E. 2d 357, 358 (2015).

[47] VA. CODE § 55-332(B) (emphasis added).

[48] *Chacey*, 291 Va. at 10, 781 S.E.2d at 361.

[49] *Id.* (internal citations omitted and emphasis added).

[50] *Id.* at 11, 781 S.E.2d at 361.

[51] *Id.* at 10, 781 S.E.2d at 361 (citation omitted).

[52] Cornell v. Columbus McKinnon Corp., 2015 WL 4747260, at *2 (N.D. Cal. Aug. 11, 2015).

[53] Legal Voice v. Stormans, Inc., 738 F.3d 1178, 1184 (9th Cir. 2013).

[54] VA. SUP. CT. R. 4:9A(c)(3).

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