UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF LOUISIANA

	:	**MDL NO. 1355**
IN RE: PROPULSID	:	
PRODUCTS LIABILITY LITIGATION	:	**SECTION "L"**
	:	
	:	**JUDGE FALLON**
.. ..	:	

THIS DOCUMENT RELATES TO ALL CASES

ORDER & REASONS

Before the Court is the Motion of the Degge Group for Reimbursement Under Federal Rule of Civil Procedure 45. For the following reasons, the Degge Group's motion is GRANTED IN PART AND DENIED IN PART.

I. FACTS

On February 11, 2003, the Plaintiffs' Steering Committee ("PSC") served a subpoena duces tecum on the Degge Group, a non-party in this case, seeking production of documents associated with the Degge Group's dealings with defendants Johnson & Johnson and Janssen Pharmaceutica surrounding the development of Propulsid. The subpoena was issued through the Court having jurisdiction over the Degge Group, the United States District Court for the Eastern District of Virginia and sought three types of documents: (1) any and all documents in Degge's possession relative to Propulsid/ Cisapride; (2) any and all documents, correspondence or communications between Degge and Johnson & Johnson relating to

Propulsid/ Cisapride; and (3) any and all documents, correspondence or communications between Degge and Janssen Pharmaceutica related to Propulsid/ Cisapride. The return date on the subpoena was February 26, 2003.

Degge, acting through its attorney, requested an extension of time to respond to the subpoena, and the PSC agreed, continuing the return date until March 12, 2003. On March 12, 2003, Degge filed its objections to the subpoena in the Eastern District of Virginia.[1] The objections indicated that Degge would comply with the subpoena only if the PSC would guarantee reimbursement for the expenses incurred in responding to the subpoena. Unable to reach an agreement, this Court ordered Degge's counsel to appear via telephone at the next monthly status conference on April 25, 2003. At that time, the Court discussed the matter with Plaintiffs' Liaison Counsel ("PLC") and counsel for Degge.

The first point of disagreement was the scope of the subpoena. Counsel for Degge requested that the subpoena be narrowed only to hard copies of documents rather than include electronic production of documents. The Court agreed with the Degge Group and ordered production only of hard documents.[2] *See* Court's Minute Entry entered April 28, 2003 [Record Doc. 1160]. The Court also addressed the issue of costs stating that the expense for copying documents should be borne by the plaintiffs. *See* Transcript of Status Conference, April 25, 2003, at 31. Finally, the Court addressed the method for

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[1]The parties dispute whether objections to the subpoena were timely. However, the Degge Group has clearly demonstrated that the objections were filed in the Eastern District of Virginia on March 12, 2003. Although the objections should have been filed in this Court, as transferee court in this MDL, the Court finds that the objections were nonetheless timely made.

[2]At the conference, the Court stated "I don't know about the electronics at this point. I suggest that what we do is to look first at the hard copies, see whether or not there is any way of resolving it only with the hard copies. If there isn't, then we regroup and see how we do with the electronic." Transcript of Status Conference, April 25, 2003, at 31-32.

production of documents stating that the Degge Group should make the copies available to members of the PSC who would travel to their offices to review the documents in a room. The PSC would identify any documents they wished to copy and would inform Degge of the desired documents. [3] At the outset it appeared to the Court that the likelihood of any of the requested documents being privileged was remote so the Court suggested that the focus of scrutiny be on the documents that the PSC singled out for copying.[4]

Pursuant to the Court's directives, counsel conferred and settled on May 22, 2003 as the date for the production of documents. At the same time, the Court was conducting its monthly status conference with the attorneys involved in the case. PLC advised the Court of certain "procedural issues" delaying the production of documents. The Court re-iterated its instructions for the production of documents to be held

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[3]The Court stated:

> So from the standpoint of the hard documents, it would be my hope that these could be put in some kind of room, on some kind of table, let the plaintiffs look through them. let them assemble them, let them do whatever they need to do with them and tell you whether or not they need them copied. If so, then it's their expense, not yours.
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> ...
>
> What we have done in the past is required the parties to have somebody from each side there, let somebody from the defendant look over it, make sure that this is being done satisfactorily, they know what they're seeing, what they haven't seen, tag the documents, don't remove anything, then you have an opportunity to look at the material that they've tagged, which at that point is considerable less number. If they look through 2,000 documents and tag five, you only need to look at the five documents to determine whether or not you're going to give them or not give them. And then if you have any problems with those five documents, tell me, I'll look at them and I'll make that cut.

Transcript of Status Conference, April 25, 2003, at 32-33.

[4]Indeed, in the end, none of the documents were designated as privileged.

at the offices of the Degge Group, with opportunity for the PSC to review the documents and tag any it wished copied. Thereafter, Degge personnel would review the tagged documents for privileged material, and all documents to be produced would be copied at the PSC's expense. *See* Transcript of May 22, 2003 Status Conference, at 6.

Rather than follow the Court's instruction, the documents were produced at the offices for Degge's counsel, after the documents had been reduced and redacted. Eventually, Degge did produce unredacted copies. After reviewing the documents, the PSC requested only 57 documents, or 761 pages.

On July 17, 2003, counsel for the Degge Group wrote the Court requesting reimbursement of fees and expenses pursuant to Federal Civil Procedure Rule 45. The letter requested recovery for $32,712.84 in legal fees and disbursements and $2,423.95, for a total claim of $35,136.79. The Court ordered that the letter be filed in the record of the case and construed as a motion for reimbursement of costs. The Court further instructed the PSC to file any opposition to the motion. The Court now addresses whether Rule 45 affords relief to the Degge Group.

II. ANALYSIS

Rule 45(c)(2)(B) provides that where a party issuing a subpoena moves to compel production of documents the Court "shall protect any person who is not a party ... from significant expense resulting from the inspection and copying commanded." FED. R. CIV. P. 45(c)(2)(B). In *Linder v. Calero-Portocarrero*, 251 F.3d 178 (D.C. Cir. 2001), the court noted that the provisions of the rule required the court to consider what expenses were significant and non-significant and require the requesting party to bear the significant costs. *Id.* at 182. Courts have also noted that this rule does not impose the entire burden on the requesting party; in fact "a non-party can be required to bear some or all of its expenses

where the equities of a particular case demand it." *In re Exxon Valdez*, 142 F.R.D. 380, 383 (D.D.C. 1992). Finally, the non-party is entitled only to reimbursement for his reasonable costs. *Broussard v. Lemons*, 186 F.R.D. 396, 398 (W.D. La. 1999).

Considering these precepts, the Court notes first that it has always stated that the PSC should bear the costs of copying of the documents produced. Accordingly, the Degge Group is entitled to recover costs for this item of expense. Second, the Court notes that some recovery is appropriate for time spent in assembling the documents and reviewing certain documents to determine whether any privilege existed.[5] However, the Court finds that the other costs sought by Degge are either non-significant or unreasonable.

First, recovery of costs for faxes sent, telephone calls, postage expenses, and the like are so clearly de minimis as to not warrant recovery under this Rule. The rule and the case law interpreting the rule speak of recovery of significant costs, not all costs incurred. Second, the Court notes that it did seek to limit the expenses incurred by Degge in responding to the subpoena. PSC attorneys were required to go to Degge's offices to review the documents. They were required to expend time and effort, as well as costs for travel and time spent reviewing documents; further, they were limited in the relief sought since the Court ruled that only hard documents would be recoverable. Considering the equities of the situation, the Court finds that shifting the entire cost on the PSC is not proper.

Turning to the reasonableness of the expenses requested, the Court finds that some of the requested fees are simply unreasonable and unrecoverable. For example, Degge seeks reimbursement for time spent

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[5]Whether the Degge Group claimed that any documents were privileged and did produce a privilege log is of no moment. They were still required to review the documents.

by three Degge employees talking to attorneys and for correspondence with attorneys. One of these employees seeks reimbursement at the rate of $400 per hour. The Court finds that to be excessive and not warranted in this case.

Having considered the detailed billing sheets provided by the Degge Group and its attorneys, the Court finds that it is proper to provide reimbursement in two areas. The first is the copying charges of $283.77, a cost this Court has consistently indicated should be borne by the PSC. Also, the Court concludes that the Degge Group is entitled to $1,000.00 for other costs in assembling the documents and reviewing them for privileged material. When added to the copying charges discussed above, the total recovery is $1,283.77.

Considering the other charges submitted by the Degge Group, the Court concludes that these are not significant, when considered in light of the Court's efforts to minimize the burden on the producing party and shift that weight to the requesting party.

III. CONCLUSION

For the foregoing reasons, IT IS ORDERED that the Degge Group's Motion for Reimbursement Pursuant to Rule 45 is GRANTED IN PART AND DENIED IN PART. The Motion is GRANTED insofar as it seeks recovery of $1,283.77 as set forth above. The Motion is DENIED as to all other relief sought. Accordingly, IT IS FURTHER ORDERED that the PSC shall pay to the Degge Group $1,283.77 for fees and expenses incurred in responding to the subpoena duces tecum.

IT IS FURTHER ORDERED that the Clerk shall serve a copy of this Order & Reasons on counsel for the Degge Group as set forth below.

New Orleans, Louisiana this 3d day of September , 2003

UNITED STATES DISTRICT JUDGE

CLERK TO SERVE:

Mr. Leon B. Taranto, Esq.
Schmeltzer, Aptaker & Shepard, P.C.
VIA FAX: 202-337-6065