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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH

FEDERAL TRADE COMMISSION and UTAH DIVISION OF CONSUMER PROTECTION, Plaintiffs, v. ZURIXX, LLC, *et al.*, Defendants.	Case No. 2:19-cv-00713-DAK-DAO District Judge Dale A. Kimball Magistrate Judge Daphne A. Oberg

PLAINTIFFS' SUPPLEMENTAL BRIEF ON MOTION TO COMPEL NON-PARTY MATT DAVIS TO COMPLY WITH RULE 45 SUBPOENA

Plaintiffs write to address the two issues raised by the Court.

I. The Amount of Costs and Davis' Ability to Pay

Mr. Davis ("Davis") has "the burden of establishing 'the existence and reasonableness of the costs or fees incurred.'" *Lambland, Inc. v. Heartland Biogas, LLC*, 2019 WL 6052414, at *3 (D. Colo. Nov. 15, 2019) (quoting *In re Application of Michael Wilson & Partners, Ltd.*, 2012 WL 1901217, at *4 (D. Colo. May 24, 2012), *aff'd*, 520 F. App'x 736, 740 (10th Cir. 2013) (agreeing appellants "failed" to demonstrate fees and costs were reasonable)). Davis has not met this burden. Rather, Davis provided only a bare estimate: "Costs to comply will be approximately $11,000 ($5,500—fees; $5,500—ESI costs)." Davis Opp'n, ECF 223, at 2. The unsupported estimate lacks any factual basis about collection, review, or production costs. It is also outdated because Plaintiffs agreed at the hearing to further limit Request No. 2.[1]

Davis also submitted no evidence of his inability to pay. It is uncontested that Davis received more than <u>$3 million</u> as a speaker at Zurixx sales events.[2] The unsupported $11,000 estimate is approximately one-third of one percent of what he received. *See* The Sedona Conference, *Commentary on Rule 45 Subpoenas to Non-Parties,* 22 Sedona Conf. J. 1, 65-66 & n.121 (2d ed., forthcoming 2021) [hereinafter Sedona Conf.] (compare "cost of compliance as a percentage of the total that a party has contributed to the non-party in a business relationship").[3]

Further, counsel's statement at the hearing that Davis had only $2,500 in income in the past 14 months is at odds with statements Davis made as a Zurixx speaker about his real estate and financial success. For instance, Davis boasted that his real estate profits fueled his "five

[1] *See W. Convenience Stores v. Suncor Energy (U.S.A.), Inc.*, 2014 WL 1257762, at *24 (D. Colo. Mar. 27, 2014) (estimate should change with narrowing of subpoena).
[2] The Receiver's accountant submitted 73 pages documenting hundreds of payments to Davis received between 2016-2019. *Broadbent v. Davis*, No. 2:20-cv-545-DAK-DAO, ECF 11-4.
[3] Available for download at https://thesedonaconference.org/download-publication?fid=5606.

businesses. All right? Real estate is my biggest and my base. . . I use the real estate as my base, as the fuel to begin to fund other things that I do." ECF 12-7 (transcript of Zurixx workshop) at 71:21—72:1. And he bragged about his substantial assets: "I have real estate all over the country." *Id.* at 37:8-9. If Davis' income has fallen, he has made no showing as to why his substantial assets all over the country do not render the $11,000 insignificant and thus weigh against shifting costs to the FTC.

II. Tenth Circuit Law Regarding Significant Expense

Counsel has not located a Tenth Circuit case that clearly addresses the multiple factors district courts in this circuit must consider in evaluating significant expense and cost shifting under Rule 45. However, the three factors district courts in this circuit (and elsewhere) routinely apply are whether: (1) the non-party has an interest in the outcome of the underlying litigation, (2) the non-party can more readily bear the costs than the requesting party, and (3) the litigation is of public interest. *See Mylan Inc. v. Analysis Grp., Inc.*, 2019 WL 424187, at *1 (D. Kan. Feb. 4, 2019) ("the widely-applied standard"); *W. Convenience Stores*, 2014 WL 1257762, at *23 (citing *In re Application of Michael Wilson & Partners, Ltd*, 2012 WL 1901218, at *5 (D.Colo. Mar. 19, 2012)); *Crandall v. City & Cty. of Denver*, 2007 WL 162743, at *1 (D. Colo. Jan. 17, 2007); *accord* Sedona Conf., at 62-63 ("the main factors").[4]

In *In re Application of Michael Wilson & Partners*, the Tenth Circuit affirmed the district court's finding that the non-party appellants had "failed" to demonstrate that certain disallowed

[4] District courts in this circuit also sometimes consider: "(4) the scope of discovery and the extent to which the non-party was required to separate responsive information from privileged or irrelevant material; and (5) the reasonableness of attorney's fees and costs of production incurred." *Lambland*, 2019 WL 6052414, at *3 (citing *In re Application of Michael Wilson & Partners*, 2012 WL 1901217, at *4). Davis has not provided sufficient information to enable evaluation of these two factors.

costs and fees were "reasonable." 520 F. App'x at 740. The appellants also contested the district court's findings that they (1) "had the ability to control the cost of the document review," and (2) "had an interest in the foreign litigations for which the subpoenas were issued." *Id.* at 741. The Tenth Circuit did "not consider these arguments because, as stated, the district court moved beyond the threshold question whether to award attorney's fees and determined that appellants failed to show which of their claimed fees (and 'costs' of the manual review) were reasonable." *Id.* This decision suggests that the consideration of the factors to determine whether there is significant expense that would even trigger cost shifting (the "threshold question") precedes consideration of the reasonableness of the expenses, which goes to the amount ultimately shifted. But the decision does not provide guidance on whether district courts should or should not use the widely applied factors.[5] District courts in this circuit and elsewhere have applied these factors and Plaintiffs submit that this Court should as well. These factors weigh against shifting costs to the FTC in this case.

A. Davis' interest in the litigation should preclude cost shifting.

Courts in this circuit "have held that an award of costs or fees for document review is inappropriate where the subpoenaed nonparty is interested in the case." *Lambland*, 2019 WL 6052414, at *6 (citing *In re Michael Wilson & Partners*, 2012 WL 1901217, at *4, where "the underlying litigation related 'directly to [the non-parties'] projects and dealings with parties on both sides of the underlying dispute'" and non-parties "were involved in related overseas litigation"); *Mylan*, 2019 WL 424187, at *2 ("When a party from whom documents are sought is not a 'classic disinterested non-party,' . . . the court can order that the non-party produce the

[5] Nor does the recent *Rhea v. Apache Corp.* decision provide guidance because there the district court failed to make a finding regarding, or even address, significant expense. 833 Fed. App'x 186, 189, 191 (10th Cir. 2020).

documents at its own expense." (citation omitted)). More concretely, "[c]ourts have held that expenses should not be shifted" where, as here, "the non-party was 'substantially involved in the underlying transaction and could have anticipated that [the transaction would] reasonably spawn some litigation.'" *W. Convenience Stores*, 2014 WL 1257762, at *23 (citation omitted); *Heartland Surgical Specialty Hosp., LLC v. Midwest Div., Inc.*, 2007 WL 2122437, at *4, 11 (D. Kan. July 20, 2007) (no shifting where non-party was involved in underlying acts); *accord Valcor Eng'g Corp. v. Parker Hannifin Corp.*, 2018 WL 3956732, at *4-6 (C.D. Cal. July 12, 2018) (same, citing cases). "Additionally, cost-shifting is not appropriate where a non-party . . . is intimately involved with or has already financially benefited from a party." Sedona Conf., at 63-64 & n. 117 (citing cases); *United States v. Cardinal Growth, L.P.*, 2015 WL 850230, at *3 (N.D. Ill. Feb. 23, 2015) (non-party had "derived substantial income" from party).

This factor weighs strongly against Davis and should preclude shifting costs because he directly participated in the underlying conduct as a speaker at the Defendants' sales events and received $3 million dollars. Moreover, Davis is a party to related Receiver litigation, and an adverse result to Plaintiffs in this litigation would likely assist him in defending that case.

B. Davis can pay costs that are a fraction of what Defendants paid him.

The second factor considers the "non-party's financial ability to bear the expenses in determining whether the expenses [are] 'significant.'" *Valcor*, 2018 WL 3956732, at *2; Sedona Conf. at 65. The estimated $11,000 costs are not significant because they are about one third of one percent of the $3 million Davis received for his participation in the underlying conduct.[6] *See*

[6] This context distinguishes this case from the dicta in footnote 2 of the Tenth Circuit's *Rhea* decision, which makes passing reference to cases where expenses of $9,000 (for two individuals) and $20,000 (for a non-profit) were found to be significant. *See United States v. McGraw-Hill Companies, Inc.*, 302 F.R.D. 532, 536 (C.D. Cal. 2014) (explaining an expense might be

Sedona Conf., at 65-66 & n.121 (the court may consider the "cost of compliance as a percentage of the total that a party has contributed to the non-party in a business relationship"); *see also Mgmt. Comp. Grp. Lee, Inc. v. Oklahoma State Univ.*, 2011 WL 5326262, at *4 (W.D. Okla. Nov. 3, 2011) (expenses of $1,761 and "approximately 55 hours of work for in-house counsel" were not significant from perspective of non-party).

Courts often consider whether the requestor or subpoenaed non-party can better bear the costs. That makes sense in typical litigation between private parties. An important and distinguishing consideration here is that although Plaintiffs are government entities with seemingly large budgets, we are stewards of limited taxpayer resources. *See Cardinal Growth, L.P.*, 2015 WL 850230, at *3 ("If the Court were to award costs to [non-party], the federal government (and ultimately the taxpayers) would be forced to foot the bill.").

C. This litigation is of public importance.

This case brought by two government entities alleging that Defendants operated a large and sophisticated fraud that caused $500 million in unredressed consumer injury and seeking injunctive relief is plainly of public importance. It is irrelevant that this factor favors non-parties in typical, "purely private business" disputes that are "not of public importance." *See Lambland*, 2019 WL 6052414, at *7.

CONCLUSION

For the foregoing reasons, Plaintiffs submit that the Court should deny cost shifting.

March 1, 2021

Respectfully submitted,

/s/ Thomas Harris
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significant for "a small family-run business, while being 'insignificant' to a global financial institution" and discussing the *Rhea* footnote cases).

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Certificate of Service

I HEREBY CERTIFY that on March 1, 2021, a true and correct copy of the foregoing, Plaintiffs' Supplemental Brief on Motion to Compel Production by Matt Davis was served electronically by the Court's ECF System upon:

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