NO.

IN THE
SUPREME COURT OF THE UNITED STATES

NEW PRODUCTS CORPORATION and MARK S. DEMOREST,
Petitioners,
v.
DICKINSON WRIGHT, PLLC, BANK OF AMERICA, N.A., EVERGREEN DEVELOPMENT, LLC, and 3 OCIR 337, LLC,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

If a subpoena recipient objects to a subpoena under Rule 45(d)(2)(B), its duty to respond to the subpoena **ceases** until a court enters an order compelling compliance, and determining who shall pay the costs of compliance. The questions presented in this appeal concern a situation in which non-party subpoena recipients objected to subpoenas, but nevertheless proceeded to incur significant expenses in responding to the subpoena without seeking any judicial relief or waiting for a court order compelling compliance. The recipients—having objected to the subpoenas—had no legal obligation to comply with the subpoena, and had no legitimate expectation that they would be reimbursed for costs incurred **before** a court order. By putting the cart before the horse, the subpoena recipients deprived the court of the opportunity to "protect them" from the costs of compliance through, for example, limiting the scope of production. Therefore, the subpoena recipients waived the right to request reimbursement.

Based on a gross misreading of the Federal Rules of Civil Procedure, the Sixth Circuit held that a non-party subpoena recipient is automatically entitled to recover "significant expenses" it incurs in responding to a subpoena **before** any involvement by the court. This decision resulted in improperly shifting $166,187.50 in attorney fees and costs for subpoena compliance from large corporations, including Bank of America and the Dickinson Wright law firm, onto a small Michigan corporation and its attorney. Virtually all of the fees awarded to Bank of America and the other corporations were incurred **before** any court involvement, and **before** any invoice or estimate of the cost of subpoena compliance was

provided to the Petitioners or the Court.[1] Respondents purposely did not communicate with Petitioners about the subpoenas while Respondents were incurring costs. Respondents improperly presented Petitioners and the bankruptcy court with a *fait accompli*, and the lower courts erred by endorsing Respondents' conduct, which was contrary to the Federal Rules of Civil Procedure.

The questions presented here are:

(1) Whether, as the Sixth Circuit held, Rule 45(d)(2)(B)(ii) entitles a non-party to recover all "significant fees" it incurs (including attorney fees) for responding to a subpoena where the fees were incurred by the non-party **before** a court order compelling compliance with the subpoena or whether, as the Fourth Circuit and district courts in the Third, Fourth, Ninth, and DC Circuits have correctly held, a non-party may only recover reasonable costs that were incurred **after** the non-party is compelled to respond to a subpoena by court order.

(2) Whether Rule 45(d)(1) allows sanctions to be imposed against an attorney issuing a subpoena in the absence of a finding of bad faith by the attorney and where the court enters an order for full compliance with the subpoena over the

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[1] Even worse in this case, Petitioners paid the full amount of $166,187.50, but Respondent Bank of America did not produce all of the documents that it was ordered to produce. Bank of America's failure to produce all documents prejudiced New Products in its prosecution of its adversary proceeding against the Bankruptcy Trustee.

recipient's objections. Petitioners are unaware of any other court in this country awarding any Rule 45(d)(1) sanctions in the absence of bad faith or an order quashing or limiting the subpoena, let alone sanctions in the amount of $166,187.50—the most severe sanctions in the history of Rule 45(d)(1).

LIST OF PARTIES

Petitioner New Products Corporation was Plaintiff in the bankruptcy court adversary proceeding against the bankruptcy trustee, and an Appellant in the district court and the Sixth Circuit. Petitioner Mark Demorest was the attorney for New Products Corporation in the adversary proceeding, and an Appellant in the district court and the Sixth Circuit. Respondents Dickinson Wright, PLLC, Bank of America, N.A., Evergreen Development, LLC, and 3 OCIR 337, LLC were non-party subpoena recipients in the bankruptcy court adversary proceeding against the bankruptcy trustee, and Appellees in the district court and the Sixth Circuit. Dickinson Wright, PLLC also represented all of the other subpoena recipients.

CORPORATE DISCLOSURE STATEMENT

New Products Corporation is a Michigan corporation. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

APPENDIX

TABLE OF CITED AUTHORITIES

Cases

Federal Rules of Civil Procedure

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit is reported at *New Prods. Corp. v. Dickinson Wright PLLC (In re Modern Plastics Corp.),* 2018 U.S. App. LEXIS 10542 (6th Cir., Apr. 26, 2018). The Sixth Circuit affirmed the September 22, 2017 decision of the United States District Court for the Western District of Michigan, reported at 577 B.R. 690 (W.D. Mich. 2017), which affirmed the July 23, 2015, August 26, 2015, and November 2, 2015 decisions of the United States Bankruptcy Court for the Western District of Michigan recorded at 2015 Bankr. LEXIS 2525, 536 B.R. 783, and 2015 Bankr. LEXIS 3861, respectively. *See* Appendices 1a—116a. Neither the district court nor the Sixth Circuit held oral argument before issuing their decisions, despite Appellants' requests for oral argument in each court.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

The Sixth Circuit's opinion was rendered on April 26, 2018. The Petition for Panel Rehearing was denied on May 17, 2018.

PROVISIONS INVOLVED

Federal Rule Civil Procedure 45(d)(2)(B) (emphasis added):

> (B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises – or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. **If an objection is made, the following rules apply**:
>
> (i) At any time, on notice to the commanded person, **the serving party may move the court** for the district where compliance is required **for an order compelling production** or inspection.
>
> (ii) **These acts may be required only as directed in the order**, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

Federal Rule Civil Procedure 45(d)(1) (emphasis added):

> (1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney 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. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction – which may include lost earnings and reasonable attorney's fees – on a party or attorney who fails to comply.

(i) **These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.**

Federal Rule Civil Procedure 45(d)(3) (emphasis added):

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* **On timely motion**, the court for the district where compliance is required must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) *When Permitted.* **To protect a person subject to or affected by a subpoena**, the court for the district where compliance is

required may, **on motion**, quash or modify the subpoena if it requires:

> (i) disclosing a trade secret or other confidential research, development, or commercial information; or
>
> (ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

> (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
>
> (ii) ensures that the subpoenaed person will be reasonably compensated.

STATEMENT OF THE CASE

A.Statutory Framework

The Federal Rules of Civil Procedure provide two ways for a subpoena recipient to respond to a subpoena that the recipient believes will impose an **undue** burden or expense:

(1) serving objections to the subpoena under Fed. R. Civ. P. 45(d)(2)(B); or

(2) filing a motion to quash or modify the subpoena under Fed. R. Civ. P. 45(d)(3).

Upon serving timely objections to a subpoena under Fed. R. Civ. P. 45(d)(2)(B), **a subpoena recipient's duty to respond to the subpoena ceases until compliance is ordered by the court**. *See* Fed. R. Civ. P. 45(d)(2)(B)(ii). And if the court orders a non-party to comply with a subpoena over its objection, the court's order must **protect** the non-party from "significant expense resulting from compliance." *Id.* Significantly, the Federal Rules do **not** allow the third procedure that Respondents followed in this case: object to subpoenas, but then incur costs to comply and ask the court to reimburse them for costs that they have already incurred. Rule 45 repeatedly uses the word "protect," which is based on the court becoming involved **before** costs are incurred to comply with the subpoena. By allowing recovery of costs incurred **before** a court order, Petitioners and the lower courts subverted the purpose and intent of Rule 45.

It is widely accepted—with the notable exception of the Sixth Circuit—that Rule 45(d)(2)(B)(ii) protects a non-party from subpoena compliance fees that will be incurred **after** the court's order compelling

compliance is entered, but not costs incurred **before** there was any legal obligation to comply.

The Sixth Circuit is the only circuit that has ever held that Rule 45(d)(2)(B)(ii) imposes mandatory cost-shifting for "significant expense" incurred by a non-party **before** a court order or any judicial involvement. In addition to being an outlier among all of the circuits, the Sixth Circuit's decision is expressly contrary to the well-reasoned holdings of the Fourth Circuit, as well as district court decisions in the Third, Fourth, Ninth, and DC Circuits.

B. Background And Proceedings Below

1. Subpoenas to Non-Parties and Bankruptcy Court Sanctions Under Fed. R. Civ. P. 45

Petitioner New Products Corporation served Respondents with subpoenas for the production of documents relevant to its claims in an underlying adversary proceeding. The Respondents all served boilerplate objections to the subpoenas, but nonetheless incurred costs to compile requested documents. The Respondents did not seek judicial relief or wait for an order compelling compliance with the subpoenas before allegedly incurring significant fees in compiling documents responsive to the subpoenas. Nor did the Respondents send Petitioners or the bankruptcy court any estimates, bills, or invoices prior to incurring over $150,000 in alleged fees. In fact, neither Respondents nor their attorney made a single phone call to Petitioner or its attorney before incurring over $150,000 in alleged subpoena compliance fees. Respondents admitted to the Sixth

Circuit that they purposely did not respond to phone calls from Petitioner's attorney.

Several months after the original deadline and extensions granted to Respondents for responding to the subpoenas had passed, the Respondents demanded for the first time that Petitioners pay them over $150,000 before they would produce **any** of the responsive documents. Petitioners refused to pay the Respondents the demanded amount, and requested documentation to support the costs that had allegedly already been incurred. Respondents then filed a motion for protective order in the bankruptcy court. In turn, Petitioners filed a motion to compel the Respondents to turn over the responsive documents.

Respondents sought to quash or limit the subpoenas, even though the parties to the case did not object to the subpoenas. The bankruptcy court enforced the subpoenas as written, which contradicts any argument that Petitioners acted in bad faith in issuing the subpoenas.

As part of their motion, the Respondents requested that the bankruptcy court shift fees that they had **already** incurred, and the requested total had ballooned to $180,000. In response, the bankruptcy court initially properly commented that it did not see how it could shift the costs to Petitioners, because Respondents had objected to the subpoenas. The Court stated:

> [I]t's hard for me to see why the fee shifting should come into play after you have relieved yourself of the burden of responding by objecting, and not having been hit with a motion to compel.

The bankruptcy court inexplicably later reversed itself, ruling that it would shift the "lion's share" of the Respondents' fees onto Petitioners under Fed. R. Civ. P. 45(d)(2)(B) and 45(d)(1), even though (1) the bankruptcy court never decided what "undue" burden was imposed by the subpoenas, (2) the bankruptcy court never found that the Petitioner's attorney issued the subpoenas in bad faith, (3) Petitioner's attorney agreed to reduce the scope of the subpoenas by limiting the search terms and number of persons for e-discovery, and (4) Respondents intentionally refused to take phone calls from Petitioner's attorney about the subpoenas. The bankruptcy court required Petitioners to pay Respondents' the astronomical amount of $166,187.50, comprising primarily consultant's fees and attorney's fees. Virtually all of the fees shifted were incurred by the Respondents *before* the bankruptcy court entered an order requiring compliance with the subpoena.

Significantly, despite Respondents' efforts to quash or limit the scope of the subpoenas, the bankruptcy court ordered the Respondents to produce all of the responsive documents and did not narrow the subpoena or otherwise find that any of the document requests made by Petitioners were improper or overly broad. The bankruptcy court agreed that the subpoenas were proper discovery.

Despite the court's Order that all the subpoenaed documents be produced to Petitioners, and despite receiving full payment, the Respondents still have not produced all of the documents, years after they were ordered to do so. For example, Bank of America has failed and refused to produce loan statements and records of payments made on the loan it sold to Petitioner New Products. Bank of America's failure

to produce basic banking records prejudiced New Products in its adversary proceeding against the Bankruptcy Trustee, which is the subject of a separate petition to this Court (Docket No. 18-135).

2. Decision of the District Court

Without oral argument, the district court affirmed the bankruptcy court's award of fees incurred by Respondents, including fees incurred *prior* to the order compelling compliance. In doing so, the district court relied heavily on its erroneous interpretation of Rule 45(d)(2)(B)(ii), which requires the court ordering compliance with the subpoena to protect a non-party subpoena recipient from "significant expense resulting from compliance." Specifically, the district court erroneously held that the term "compliance" under Rule 45(d)(2)(B)(ii) refers to "compliance *with a subpoena,"* not "compliance *with a court order."* This ruling ignored the express language of Rule 45.

The district court held that Rule 45(d)(2)(B)(ii) requires a court to award all significant expenses resulting from compliance **with a subpoena**, regardless of the fact that expenses were incurred prior to a **court order** and regardless of whether the significant expenses were disclosed to the Petitioners or the court before the expenses were incurred. This ruling also ignored the express language of Rule 45.

3. Decision of the Sixth Circuit

The Sixth Circuit affirmed the decision of the bankruptcy court and the district court in a published opinion. The Court of Appeals did not grant New Products oral argument.

The Sixth Circuit further held that whether a non-party subpoena recipient is entitled to recover

significant fees incurred prior to a court order depends on when the documents are actually produced, not whether they were incurred before a court order. The rule established by the Sixth Circuit is that a non-party subpoena recipient is entitled to recover its significant expenses incurred *prior* to a court order only if it withholds the production of responsive documents until the court enters its order. Because the non-party subpoena recipients had not turned over responsive documents prior to the court's order, the Sixth Circuit concluded that the Respondents had "technically" complied with the Rule 45(d)(2)(B)(ii).

REASONS FOR ALLOWANCE OF THE WRIT

A. The Sixth Circuit's Decision Openly Conflicts with a Decision of the Fourth Circuit, as well as District Court Opinions Within Several Other Circuits

The Sixth Circuit is the only circuit to hold that a non-party subpoena recipient is entitled to recover "significant expense" incurred **before a** court order under Rule 45(d)(2)(B)(ii). Indeed, its ruling is expressly contrary to a recent ruling from the Fourth Circuit and decisions from district courts within the Third, Fourth, Ninth, and District of Columbia Circuits.

Unlike the Sixth Circuit, the Fourth Circuit held that Rule 45(d)(2)(B)(ii) only allows the shifting of fees "actually necessary to a non-party complying with a discovery order." *Hinterberger v. Am. Nurses Assn. (In re Am. Nurses Assn.),* 643 Fed. Appx. 310, 314 (2016); *See also Clingman v. Hanger Mgmt. Assocs., LLC v. Knobel (In re Regent Educ., Inc.),* Civil Action No. ELH-17-3541, 2017 U.S. Dist. LEXIS 204704, at *8 (D. Md. Dec. 13, 2017) (holding that a nonparty subpoena recipient "is not entitled to reimbursement for expenses it already incurred prior to requesting judicial relief of being ordered to comply" with a subpoena).

In *Hinterberger,* plaintiffs subpoenaed the American Nurses Association ("ANA"), a non-party, for documents related to its case. ANA was compelled by the trial court to comply with the subpoena after ANA filed a motion to quash. Thereafter, the district court awarded ANA approximately $50,000 of the

$75,000 that ANA sought for fees under Fed. R. Civ. P. 45(d)(2)(B)(ii).

On appeal, the Fourth Circuit reversed the trial court's award of fees in part because the district court had included fees in its award that were not "necessary to a non-party complying with a discovery order." *Id.* at 314. Although the district court properly excluded fees "incurred before the order for e-discovery,"[1] it improperly awarded other fees (such as fees incurred for drafting a motion for attorney fees) that were "plainly not necessary to ANA's compliance with the discovery order". *Id.* at 314. The same thing occurred in this case.

The Fourth Circuit's holding that Rule 45(d)(2)(B)(ii) only allows for the recovery of fees **necessary** to a non-party's compliance with a discovery order is squarely at odds with the Sixth Circuit's holding that a non-party is entitled to recover "significant expenses" incurred prior to any judicial involvement. But the Fourth Circuit's decision is the norm in the district courts for other circuits as well. *See G&E Real Estate, Inc. v. Avison Young-Wa., D.C., LLC,* 317 F.R.D. 313, (D.D.C. 2016) (holding that "it is critical" under Fed. R. Civ. P. 45(d)(2)(B)(ii) "that only expenses that result from, and therefore, are caused by, the order of compliance are potentially compensable"); *See also Stewart Health Care Sys. LLC v. Blue Cross & Blue Shield of R.I.,* No. 15-272, 2016 U.S. Dist. LEXIS 154313, at *9 (E.D. Pa. Nov. 4, 2016); *Stormans Inc. v. Selecky,* No. C07-5374 RBL, 2015 U.S. Dist. LEXIS 5141, at *12

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[1]*Hinterberger v. Catholic Health Sys. (In re Am. Nurses Ass'n),* 2015 U.S. Dist. LEXIS 41231 (March 31, 2015).

(W.D. Wash. Jan 15, 2015) and *Cornell v. Columbus McKinnon Corp.,* 2014 U.S. Dist. LEXIS 158607, at *5 -6 (N.D. Cal. Nov. 10, 2014) (holding that Rule 45(d)(2)(B)(ii) "require[s] that a party only be entitled to expenses 'resulting from compliance' with a court order compelling discovery.").

The Third, Fourth, Ninth, Tenth, and DC Circuits have also issued rulings regarding Rule 45(d)(2)(B)(ii), and its predecessor Rule 45(c)(2)(B)(ii), but none of those circuits have ever held that a non-party subpoena recipient could recover significant fees incurred prior to a court order, as the Sixth Circuit has held. *See Michael Wilson & Partners, Ltd. v. Sokol Holdings, Inc. (In re Michael Wilson & Partners, Ltd.),* 520 Fed. Appx. 736 (10th Cir. 2013); *In re Fannie Mae Secs. Litig.,* 552 F.3d 814 (D.C. Cir. 2009); *EEOC v. Kronos Inc.,* 694 F.3d 351 (3rd Cir. 2012); *Legal Voice v. Stormans Inc.,* 738 F.3d 1178 (9th Cir. 2013).

B. The Sixth Circuit Badly Misconstrues Fed. R. Civ. P. 45(d)(2)(B)(ii)

Rule 45(d)(2)(B)(ii) is a specific form of relief intended to **protect** non-party subpoena recipients from incurring "significant expense" if ordered to comply with a subpoena over their objection. Importantly, when a court orders a non-party to comply with a subpoena over its objection, the court may take a broad range of action to protect the non-party subpoena recipient, such as reducing the scope of the subpoena, modifying the form of production, etc. In other words, the court is not limited to simply shifting "significant expenses" from a non-party onto the party requesting documents or information relevant to their case.

By incurring costs without seeking protection from the court, Respondents deprived the court of the opportunity to protect them from costs, and deprived the party issuing the subpoena of the opportunity to limit or even withdraw the subpoena. Therefore, by incurring costs without seeking protection from the court, Respondents waived the right to seek reimbursement.

The Sixth Circuit's decision significantly undermines the purpose of the Rule and the court's ability to use a range of tools to protect non-parties from significant expense, but which do not necessarily involve fee shifting. The Sixth Circuit essentially held that Rule 45(d)(2)(B)(ii) issues a blank check to non-parties to recover "significant expenses" every time they serve objections to a subpoena even generic, boilerplate objections. All a non-party needs to do to cash in is to serve objections and then proceed to comply with the subpoena it complains of, until the expenses have already been incurred and are unavoidable. This tactic sidesteps the requirement that the costs be reasonable.

Contrary to the Sixth Circuit's decision, Rule 45(d)(2)(B)(ii) is not intended to write a blank check to non-parties for subpoena compliance every time they serve objections to a subpoena. The subpoena recipients must first be ordered by the court to comply with the subpoena, thereby triggering the court's duty to protect them with the variety of tools (not just reimbursement of costs) that the court has available. It is during the court's involvement that the subpoenaing party and the court would be informed of the *estimated* costs of compliance (information which it is likely not privy to as an outsider) and can make a determination as to how much it is willing to pay for

the production of the documents or information, or whether it wants to forego receiving the documents or further limit the subpoena.

The Sixth Circuit's ruling also negates other discovery rules, such as Rule 45(d)(3)(A), regarding motions to quash. If a nonparty subpoena recipient chooses to file a motion to quash under Rule 45(d)(3)(A), the motion *must be timely*. The Sixth Circuit's ruling creates a judicially-crafted exception to Rule 45(d)(3)(A) that allows nonparties to file what is essentially an *untimely* motion to quash. In this case, the Respondents did not file any motion regarding the subpoenas until long after the original deadline and extensions for producing documents had passed and over $150,000 had allegedly been incurred. While the Respondents' motion complaining of the subpoenas was clearly untimely under Rule 45(d)(3)(A), the Sixth Circuit permitted it under an erroneous reading of Rule 45(d)(2)(B).

In addition to negating the rule that motions to quash be timely, the Sixth Circuit has also expanded the relief available to a non-party that files an untimely motion. Whereas a motion to quash could result in either an order compelling compliance or an order quashing the subpoena, non-parties filing untimely motions in the Sixth Circuit are now automatically entitled to recover "significant expenses" incurred prior to filing their untimely motion (provided – as the Sixth Circuit has unbelievably held – that the non-party withhold the responsive documents from the subpoenaing party until a court order has been entered).

The dire consequences of the Sixth Circuit's ruling are further highlighted by the fact that there is

nothing limiting the recoverable costs under Rule 45(d)(2)(B)(ii) to only those that are **reasonable**, because all that the rule requires is that the fees be "**significant**." The Sixth Circuit's ruling – which is no doubt being celebrated by big banks, other large corporations, and large law firms like Respondent Dickinson Wright – will have a chilling effect on smaller corporations and individuals seeking to exercise their basic rights to issue subpoenas to larger corporations and wealthier individuals. By proceeding with incurring huge costs without a motion or a court order, the Respondents created a *fait accompli*.

C. The Sixth Circuit's Ruling Improperly Expands Available Sanctions Under Rule 45(d)(1)

The Sixth Circuit's ruling regarding Fed. R. Civ. P. 45(d)(1) is erroneous for similar reasons. By proceeding to incur costs without seeking judicial relief of a court order, the Respondents prevented the Petitioners and the Court from learning of the costs that would be incurred in subpoena compliance until it was too late in the process for any of the fees to be avoided. It also gives large corporations an unfair advantage over smaller companies and individuals. However, in the Sixth Circuit's unprecedented decision, it merely used Rule 45(d)(1) as a way to shift "significant expenses" incurred by the subpoena recipients prior to any court involvement onto the attorney issuing the subpoena. There was never any finding by the Sixth Circuit that Petitioners misused the subpoena (i.e. that they acted in bad faith or that the subpoenas should have been quashed or limited). To the contrary, the bankruptcy court ordered the subpoena recipients to comply with the subpoenas

without limiting the subpoenas in any way – a ruling that is contrary to a finding of bad faith by Petitioners.

The Sixth Circuit's ruling presents a clear departure from the application of Rule 45(d)(1). The sanctions in this case represent the most severe sanctions in the history of Rule 45(d)(1). Typically, when Rule 45(d)(1) sanctions are imposed, they are limited to reimbursing a subpoena recipient for attorney fees and costs incurred in filing a motion to quash. These sanctions typically range from a few hundred dollars up to a few thousand dollars. *See Liberty Mut. Ins. Co. v. Diamante,* 194 F.R.D. 20, 23 (D. Mass. 2000)(awarding $3,240.00 as a sanction under Rule 45(c)(1)); *Schweickert v. HuntsPoint Ventures, Inc.,* No. 13-cv-675RSM, 2014 U.S. Dist. LEXIS 168299, at *36 (W.D. Wash. Dec. 3, 2014) (awarding sanction of $1,200 under Rule 45(d)(1)). Cases involving sanctions under Rule 45(d)(1) of more than a few thousand dollars are difficult to find, but the ones that can be located involve the most egregious acts and a court order quashing the subpoena. *See ABC, Inc. v. Aereo, Inc.,* No. 13-MC-0059, 2013 U.S. Dist. LEXIS 165145, at *22 (N.D. Iowa Nov. 19, 2013)(awarding sanction of about $30,000 under Rule 45(d)(1)); *In re Morreale Hotels, LLC,* 517 B.R. 184 (2014)(imposing $25,000 sanction under Rule 45(d)(1) after motion to quash granted in total). Petitioners were unable to locate any cases that involved sanctions under Rule 45(d)(1) of more than $30,000, let alone anything remotely close to the sanctions of $166,187.50 issued in this case.

According to the 1991 Advisory Committee Notes, Rule 45's sanctions provision was intended to protect "a non-party witness as a result of a *misuse* of the

subpoena." (emphasis added). But by ruling that a subpoena recipient may incur significant costs before seeking judicial relief or waiting for a court order, the Sixth Circuit essentially gives subpoena recipients a blank check for subpoena compliance, without requiring any disclosure of expected costs in advance. The Sixth Circuit's ruling allows a subpoena recipient to turn the rule on its head and *misuse* an objection to a subpoena.

The sanctions in this case were issued based on the Sixth Circuit's erroneous interpretation of Rule 45(d)(2)(B). The Sixth Circuit's ruling that sanctions were proper under Rule 45(d)(1) was based on an erroneous assumption that the subpoena recipients acted properly where they incurred "significant expense" in responding to a subpoena prior to any court involvement. In doing so, however, the subpoena recipients left the petitioners without any ability to learn of the exorbitant fees that the subpoena recipients were allegedly incurring and allowing the court to resolve the discovery dispute before it became unmanageable.

D. The Sixth Circuit's Erroneous Decision will have Far-Reaching Consequences for Parties and Their Attorneys who need to Subpoena Documents from Large Corporations and will Inject Uncertainty into a Previously Settled Area of the Law.

The circumstances under which a party issuing a subpoena or its attorney may be liable for a subpoena recipient's expenses has tremendous practical significance to the discovery process everywhere. The Federal Rules of Civil Procedure ensure transparency and control over the process of cost-shifting for

subpoena compliance by requiring that a court order be entered before a non-party subpoena recipient is entitled to recover "significant expense" incurred in compliance. Yet the Sixth Circuit destroys this transparency and control by ruling that a non-party is entitled to recover "significant expense" incurred prior to any court involvement. This technique, which has been termed "sandbagging" by at least one district court[2], is not permitted in any other Circuit and is expressly rejected by the Fourth Circuit.

The expenses sought to be shifted in these discovery disputes with non-party subpoena recipients can be staggering. For example, the fees sought or estimated for subpoena compliance in the cases before the federal Courts of Appeals involving Rule 45(d)(2)(B)(ii), or the Rule's predecessor, ranged from $20,000 to $6 million, with half of the cases involving expenses of over $1 million. Thus it is not difficult to imagine a situation in which these expenses would exceed the amount of the claims at issue in the underlying litigation.

Importantly, the fees in those cases were not incurred by the non-party until **after** an order of the court compelled compliance with the subpoenas. This is a vital distinction with the Sixth Circuit case, where the significant expenses were incurred *prior* to a court order. By requiring a court order before shifting costs, the court and the party requesting documents have an opportunity to learn of the estimated costs of compliance and are given an opportunity to avoid significant expenses prior to their incurrence.

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[2]*Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.,* 2016 U.S. Dist. LEXIS 58208 (SD Fla. 2016).

The importance of this rule is magnified in cases like the one before the Sixth Circuit, where estimates of the expenses were not provided in advance, nor were invoices of the fees being incurred provided, until the fees had accumulated to over $150,000. In fact, not a single phone call was made by the Respondents' or their attorneys before the significant fees were incurred. In fact, Respondents admitted to the Sixth Circuit that they were purposely refusing to communicate with Petitioner's attorneys about the subpoenas. This utter lack of transparency is exactly what the Federal Rules of Civil Procedure guard against.

If not reversed, the Sixth Circuit's published opinion will serve as a green light for large companies and corporations to "sandbag" smaller companies and individuals exercising their basic rights to obtain documents and information necessary to represent themselves. Furthermore, the Sixth Circuit's opinion will serve to undermine the transparency and control over the discovery process that are supposed to be ensured by the Federal Rules of Civil Procedure.

CONCLUSION

For all the foregoing reasons, Petitioners respectfully request that the Supreme Court grant review of this matter.

Respectfully submitted,

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Dated: August 15, 2018

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

TABLE OF CONTENTS