UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO

In Re:	)	Case No.: 01-44007
	)	
Phar-Mor, Inc.,	)	Chapter 11
	)	
Debtor.	)	Adv. Pro. No. 03-4069
	)	
Phar-Mor, Inc.,	)	Hon. Mary Ann Whipple
	)	
Plaintiff,	)	
v.	)	
	)	
McKesson Corporation,	)	
	)	
Defendant.	)	

MEMORANDUM OF DECISION AND ORDER DENYING MOTION FOR PROTECTIVE ORDER

Plaintiff Phar-Mor, Inc. ("Phar-Mor") is before the court on the Motion for Protective Order Regarding McKesson's Third Party Subpoenas that it filed in this adversary proceeding on September 1, 2005 [Doc. #88] (the "Motion for Protective Order"). Having reviewed the Motion for Protective Order, its exhibits, and Defendant McKesson Corporation's ("McKesson") opposition, the court will deny the motion for the following reasons.

The Motion for Protective Order seeks an order that McKesson not be permitted to obtain discovery of what it contends are irrelevant documents pursuant to 56 subpoenas issued to entities that are not parties to this litigation. The subpoenas were issued by district courts or bankruptcy courts in California, Connecticut, Florida, Georgia, Illinois, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, Texas, and Virginia; only one of the subpoenas was issued in the Northern District of Ohio (by the district court). Nineteen of the subpoenas were the subjects of motions to quash that Phar-Mor filed on August 5 and 9, 2005, which asserted that the documents sought by the subpoenas are irrelevant and outside the scope of permissible discovery. The court denied those motions by orders entered on August 29, 2005, because (1) they were filed in this court, rather than the courts that issued the subpoenas, (2) while a protective order may be sought in the court in which the litigation is pending, Phar-Mor did not seek a protective order or even attempt to

make a showing the grounds for a protective order, (3) the motions did not include a certificate of an attempt to resolve the discovery dispute without court action, and (4) Phar-Mor lacks standing to challenge subpoenas issued to non-party entities.

Three days after those orders were entered, Phar-Mor filed the Motion for Protective Order presently before the court, the main thrust of which is to reiterate the argument that the documents sought are irrelevant. Phar-Mor attempts to address some of the reasons those motions were denied, such as by recharacterizing the relief sought as a protective order, rather than an order quashing the subpoenas, so that the relief may be sought in this court. The Motion for Protective Order also includes a Certificate of Consultation, although it certifies that Phar-Mor attempted to resolve the dispute only with McKesson.[1] Assuming that a party has standing to seek a protective order with respect to a subpoena issued to a non-party even though the party would not have standing to seek an order quashing the subpoena,[2] the result is the same because the rule requires a showing that a protective order would be necessary "to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." When the subpoena is issued to a non-party, it is the non-party that is generally entitled to protection. As one district court explained:

> The Court finds Rule 26(c) inapplicable here. That rule allows the entry of a protective order only when necessary to protect a party or the person from whom the discovery is sought "from annoyance, embarrassment, oppression or undue burden or expense." Here, the discovery is not sought from Defendant, but rather from [a non-party]. Thus, the burden and expense of producing these documents falls only on [the non-party] and not on Defendant. Defendant simply cannot demonstrate that

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[1] The court has not identified any cases addressing the meaning of "other affected parties" in Rule 26(c)'s requirement of a "certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action." Although not necessary to a decision on the motions presently before the court, it would appear that a good faith effort to resolve the dispute without court action would include an attempt to confer with the subpoenaed entities, as well as the opposing party.

[2] Some courts so hold, since Rule 26(c) permits a "motion by a party or by the person from whom discovery is sought." *Springbrook Lenders v. Nw. Nat'l Ins. Co.*, 121 F.R.D. 679, 680 (N.D. Cal. 1988). Other courts disagree, applying the same standing rule irrespective of whether the subpoena is challenged by a motion to quash or by a motion for a protective order. *See, e.g., New Park Entertainment L.L.C. v. Elec. Factory Concerts, Inc.*, No. Civ.A. 98-775, 2000 WL 62315, at *4-*5 (E.D. Pa. Jan. 13, 2000).

> it will suffer any "annoyance, embarrassment, oppression or undue burden or expense."

Epling v. UCB Films, Inc., Nos. CIV.A. 98-4226-SAC, CIV.A. 98-4227-RDR, 2000 WL 1466216, at *2 (D. Kan. Aug. 7, 2000) (citation omitted). Phar-Mor asserts that "[t]he burden *to Phar-Mor* from McKesson's third-party discovery is substantial" [Motion for Protective Order ¶ 3 (emphasis added)], but it is the burden to the non-parties that must be shown before a protective order must be issued.

Moreover, even if the burden on Phar-Mor may be considered, its conclusory statement in that regard is insufficient to make the specific showing required for a protective order. *Washington v. Thurgood Marshall Acad.*, 230 F.R.D. 18, 21 (D.D.C. 2005). As one bankruptcy court has explained:

> Under Fed.R.Civ.P. 26(c), the burden is on the person seeking to avoid discovery to point to a specific reason for denial of discovery. In order to show cause for entry of a protective order, the moving party must provide a "particular and specific demonstration of fact, as distinguished from a stereotyped and conclusory statement." The determination of whether good cause does or does not exist must be based on appropriate testimony and other factual data, not the unsupported contentions and conclusions of counsel.

Fid. & Deposit Co. of Md. v. Mulhern (In re Mulhern), 45 B.R. 621, 623 (Bankr. E.D. Pa. 1985) (citations omitted); *accord, e.g., Mid-Atlantic Recycling Techs., Inc v. City of Vineland*, 222 F.R.D. 81, 87 (D.N.J. 2004); *Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 145 F.R.D. 92, 96 (S.D. Iowa 1992). Phar-Mor follows up the conclusory assertion quoted above with suggestions that the documents sought will be voluminous and that deposition subpoenas will "almost certainly" follow the document subpoenas (Motion for Protective Order ¶ 3), and that "a number of third parties will file motions to quash the subpoenas in diverse jurisdictions across the country" (*id.* ¶ 5). Those statements represent speculation, not specific facts showing an undue burden on the parties subpoenaed or even on Phar-Mor. The discovery plan developed by the parties under Fed. R. Civ. P. 26(f) [Doc. #42], as modified by the court and adopted as an order on April 19, 2004, [Doc. #45], contains a limit on the number of depositions each party may take (20) and the duration of those

depositions (7 hours, with three permitted to last up to 14 hours).[3] McKesson cannot exceed those limitations without another order from this court. So there is already a limitation built into this proceeding that addresses Phar-Mor's expressed concern that it will have to deal with too many expensive depositions if the third-party document discovery proceeds.

Moreover, the entities from whom the documents are being subpoenaed have *not*, to the court's knowledge, objected to or otherwise sought relief from the subpoenas on the grounds of burdensomeness. To the extent the third parties have specific concerns of privilege or proprietary interest or expense, it is entirely appropriate that such issues be addressed in and by the issuing courts as contemplated by the rules. Such third party problems are not issues in which Phar-Mor necessarily even needs to involve itself.

Phar-Mor has not satisfied its "threshold showing that there is 'good cause' that [a protective] order issue" by making "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements." *Cooper v. Welch Foods, Inc.*, 105 F.R.D. 4, 6 (W.D.N.Y. 1984) (citations and internal quotation marks omitted). Accordingly, the Motion for Protective Order must be denied.

THEREFORE, for the foregoing reasons,

IT IS ORDERED that Plaintiff Phar-Mor, Inc.'s Motion for Protective Order [Doc. #88] is **DENIED.**

Mary Ann Whipple
United States Bankruptcy Judge

[3] Phar-Mor originally asserted that each party should be permitted to take up to 30 depositions [Doc. #42, ¶(2)(d)].