

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES



_____)
In the Matter of)
)
ECM BioFilms, Inc.,)
a corporation, also d/b/a)
Enviroplastics International,)
Respondent.)
_____)

DOCKET NO. 9358

ORDER DENYING MOTION BY NON-PARTY FOR COST REIMBURSEMENT

I.

On November 14, 2014, non-party Biodegradable Products Institute (“BPI”) filed a Motion for Cost Reimbursement (“Motion”) seeking reimbursement for costs incurred in locating and producing documents in compliance with the subpoena served upon it by Respondent ECM BioFilms, Inc. (“Respondent” or “ECM”).¹ Respondent filed its Opposition to the Motion on November 11, 2014 (“Opposition”). For the reasons set forth below, the Motion is DENIED.

II.

BPI states that Respondent directed a subpoena to BPI requesting production of documents; that counsel for BPI conferred with Respondent’s counsel in an effort to narrow the scope of production; that BPI produced responsive documents to Respondent; that BPI sent an invoice to Respondent for the costs it incurred in collecting, reviewing and transmitting documents; and that Respondent has not paid the invoiced amount. BPI argues that non-party witnesses may be compensated to cover the cost of producing documents in response to a subpoena, citing FTC Operating Manual §10.13.6.4.7.8. BPI further argues that the Federal Rules of Civil Procedure may be consulted for guidance and interpretation of FTC Rules where no other authority exists and that Rule 45 of the Federal Rules of Civil Procedure requires the court to protect a non-party by requiring the party seeking discovery to bear enough of the expenses of complying with the subpoena so that compliance with the subpoena does not impose a significant expense on the non-party.

¹ BPI served its Motion on Respondent on November 7, 2014, and also on that date provided a courtesy copy of its Motion to the Office of Administrative Law Judges. Due to procedural issues, the Motion was not accepted for filing until November 14, 2014.

Respondent argues that BPI has made no showing that the Respondent's subpoena was unreasonable and has failed to allege any factual basis that would justify an award of costs. Respondent states that, although it worked with BPI to narrow the scope of certain discovery requests, at no point did Respondent agree to pay BPI's costs. BPI never formally objected to Respondent's subpoena; never filed a motion to quash or limit the subpoena; and never filed a motion for a protective order.²

III.

BPI relies upon Section 13.6.4.7.8 of the FTC's Operating Manual, which states: "Third party witnesses may move for recompense to cover the cost of producing voluminous records in response to a subpoena. When appropriate, the ALJs have entered such an order; in such event, the proponent of the subpoena must tender payment." FTC Operating Manual § 13.6.4.7.8. "[T]he Manual offers only guidance, not a rule; moreover it is directed only at the FTC staff." *In re Int'l Ass'n of Conference Interpreters*, 1995 FTC LEXIS 307 (Nov. 1, 1995); FTC Operating Manual § 1.1 ("This Operating Manual (OM) provides the Commission's staff with guidance in processing matters within the agency and in carrying out law enforcement assignments.").

"Where the Federal Rules of Civil Procedure are similar to the Commission's Rule of Practice, those rules and case law interpreting them may be useful[, though not controlling,] in adjudicating a dispute. *In re L.G. Balfour Co.*, No. 8435, 61 F.T.C. 1491, 1492, 1962 FTC LEXIS 367, *4 (Oct. 5, 1962)." *In re Gemtronics, Inc.*, 2010 FTC LEXIS 40, *10 (April 27, 2010). In the circumstances presented here, Rule 45 of the Federal Rules of Civil Procedure does not warrant the issuance of an order compelling Respondent to reimburse BPI for its expenses of complying with Respondent's subpoena.

The Commission, in *In re Int'l Tel. & Tel. Corp.*, 97 F.T.C. 202, 1981 FTC LEXIS 75 (March 13, 1981), held that a "subpoenaed party is expected to absorb the reasonable expenses of compliance as a cost of doing business, but reimbursement by the proponent of the subpoena is appropriate for costs shown by the subpoenaed party to be unreasonable." 1981 FTC LEXIS 75, at *3. See *In re R.R. Donnelley & Sons Co.*, 1991 FTC LEXIS 268, at *1-2 (June 6, 1991) (holding that subpoenaed party "can be required to bear reasonable costs of compliance with the subpoena"). To determine whether expenses are "reasonable," the Administrative Law Judge "should compare the costs of compliance in relation to the size and resources of the subpoenaed party." *Int'l Tel. & Tel.*, 1981 FTC LEXIS 75, at *3.

In support of its request for costs, BPI avers that it produced 4,357 pages of documents and that its costs in collecting, reviewing, and copying the requested documents totaled \$5,060. BPI has not provided information on the costs of compliance in relation to the size and resources of BPI.

² Because the Motion is decided on the substantive issues, Respondent's arguments regarding the procedural defects of the Motion need not be, and are not, addressed.


Respondent asserts that the information requested was relevant to ECM's technology, and testing of competing additive technologies; and that the BPI documents produced were directly relevant to issues in this case, with several BPI documents admitted as exhibits in this case.

Respondent served its subpoena on BPI on January 24, 2014. BPI did not move to quash or limit the subpoena at any time after it was served. The question of whether ECM's subpoena imposed an undue burden will not be addressed ten months after the subpoena was served. BPI has not met its burden of demonstrating that the costs of compliance were unreasonable.

IV.

For the reasons set forth above, BPI's Motion is DENIED.

ORDERED:



D. Michael Chappell
Chief Administrative Law Judge

Date: November 18, 2014