

**United States District Court, Northern District of Illinois**

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|---|--|---|---------|
| <b>Name of Assigned Judge or Magistrate Judge</b> | John W. Darrah   | <b>Sitting Judge if Other than Assigned Judge</b> |         |
| <b>CASE NUMBER</b>                                | 09 C 7852  | <b>DATE</b>                                       | 2/22/11 |
| <b>CASE TITLE</b>                                 | IKB Deutsche Industriebank AG v. Magnetar Capital, LLC |   |         |

**DOCKET ENTRY TEXT**

Defendant’s Motion for Non-Party Production and Protective Order Expenses [78] is granted. Defendant is awarded a total of \$159,004.22. Defendant’s Motion for an Order Modifying IKB’s Third-Party Subpoena to Preclude Depositions [79] is denied. Status hearing set for 3/3/11 is stricken.

■ [ For further details see text below.]

Docketing to mail notices.

**STATEMENT**

On December 18, 2009, IKB filed an application in this Court pursuant to 28 U.S.C. § 1782, seeking discovery from Magnetar. IKB, a defendant in litigation pending in the United Kingdom, sought information from Magnetar regarding Magnetar’s dealings with the plaintiff in the U.K. litigation, Calyon. On December 22, 2009, the Court granted IKB’s application and authorized IKB to issue a subpoena to Magnetar. On April 8, 2010, in response to objections by Magnetar, the Court modified the order, limiting the scope of the subpoena. On November 10, 2010, the Court entered a protective order limiting disclosure of materials produced pursuant to the subpoena.

Before the Court is Magnetar’s Motion for Non-Party Production and Protective Order Expenses. Magnetar seeks \$139,829.22 in expenses in complying with IKB’s subpoena and \$19,175.00 in expenses for litigating Magnetar’s motion for a protective order.

Magnetar seeks expenses for complying with IKB’s subpoena under Rule 45(c) of the Federal Rules of Civil Procedure. Magnetar identifies \$139,829.22 expended in complying with IKB’s subpoena. Specifically, Magnetar spent \$1,016.22 on electronic searches and related costs, \$110,693.50 on attorney review of potentially responsive documents, \$2,376.00 in the actual production of the documents, and \$25,743.50 for fees and expenses incurred in connection with drafting and negotiating the protective order.

Magnetar argues that two sub-parts of Rule 45(c) justify this relief. Magnetar argues that it is entitled to reimbursement under Rule 45(c)(1), which allows the court to impose sanctions against a party or attorney that issues or serves a subpoena that imposes an undue burden. Fed. R. Civ. P. 45(c)(1). IKB responds that the Court ruled in its April 8, 2010 Order, that IKB’s subpoena, as modified, did not pose an undue burden. For that reason, Magnetar is not entitled to relief under Rule 45(c)(1).

However, Magnetar also seeks relief under Rule 45(c)(2)(B)(ii), which provides that if a non-party objects to a subpoena, the Court’s order enforcing the subpoena “must protect [the non-party] from significant expense resulting from compliance.” Fed. R. Civ. P. 45(c)(2)(B)(ii). As previously stated, under this rule, the Court must protect a non-party from significant expense in complying with a subpoena. IKB does not dispute that \$139,829.22 is a significant amount, nor does it contest that Magnetar spent this amount in

## STATEMENT

complying with the subpoena. Rather, IKB argues that expenses are not justified because the Court has already found that the subpoena did not present an undue burden. However, whether a non-party has incurred significant expense is a separate and distinct question from the issue of undue burden. Here, the burden of the subpoena, as modified, was justified by IKB's need for the information sought. Nonetheless, Rule 45(c)(2)(B)(ii) still requires the Court to prevent Magnetar from incurring significant expense as a result of its compliance. *See Linder v. Calero-Portocarrero*, 251 F.3d 178, 182 (D.C. Cir. 2001) (Rule 45's requirement that a non-party be reimbursed for significant expenses in complying with discovery is mandatory).

Therefore, pursuant to Rule 45(c)(2)(B)(ii), Magnetar is awarded \$139,829.22 in expenses for complying with IKB's subpoena.

Magnetar next argues that IKB should be required to reimburse Magnetar for Magnetar's costs and attorneys' fees in obtaining a protective order. Rule 26(c)(3) provides that Rule 37(a)(5) governs the award of expenses in connection with a motion for a protective order. *See Davis v. City of Springfield*, 2009 WL 1542801, at \*5 (C.D. Ill. June 1, 2009). Rule 37(a)(5) provides that where a motion for a protective order is granted, the court must order the opposing party to pay the movant's reasonable expenses, including attorneys' fees, unless the opponent's position was substantially justified. Fed. R. Civ. P. 37(a)(5); *Rickels v. City of South Bend*, 33 F.3d 785, 787 (7th Cir. 1994).

IKB argues that Rules 26(c)(3) and 37(a)(5) pertain only to protective orders concerning the production of documents, not to protective orders concerning the confidentiality of documents. However, IKB cites no case in support of this position, and this distinction cannot be drawn from the text of the two rules.

IKB next argues that Magnetar was not the prevailing party. IKB notes that the Court granted in part and denied in part Magnetar's motion and ultimately entered a jointly prepared protective order. This argument is not convincing. Magnetar moved for a protective order, IKB opposed the issuance of any protective order and an order was issued. It can be fairly said that Magnetar prevailed on the motion, even if the order that was entered was not word for word what Magnetar had proposed.

Finally, IKB argues that its opposition to the protective order was substantially justified. IKB fails to support this assertion. IKB cites one case, *Wang v. Hsu*, 919 F.2d 130 (10th Cir. 1990), that it claims supports its position that Magnetar had waived its right to seek a protective order. The holding in this case does not support IKB's argument. IKB also alleges that the Court's statements at a hearing held on August 26, 2010, support its assertion that the Court had previously denied Magnetar's motion for a protective order.

IKB's arguments are unpersuasive. In its response brief opposing Magnetar's motion for a protective order, IKB raised a number of objections, including the objections that Magnetar's motion should have been brought under Rule 60(b) and that Magnetar had not demonstrated the need for a protective order. The protective order was entered over these objections, and IKB does not defend them now. Thus, IKB's opposition to the issuance of a protective order was not substantially justified. Magnetar is therefore awarded expenses of \$19,175.00 in connection with litigating the issuance of a protective order.

Also before the Court is Magnetar's Motion for an Order Modifying IKB's Third-Party Subpoena to Preclude Depositions. Magnetar offers no convincing reason for further modification of the subpoena, as modified by the Court's April 12 Order. Discovery, including depositions, shall continue in compliance with the limits set out in that Order. Magnetar's motion for modification is denied, provided that Magnetar may file a motion seeking expenses for the depositions once discovery is complete.