

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

ADMINISTRATIVE PROCEEDINGS RULINGS

Release No. 2159/December 19, 2014

ADMINISTRATIVE PROCEEDING

File No. 3-15918

In the Matter of

DENNIS J. MALOUF

ORDER

On November 10, 2014, third party UASNM, Inc., filed a Notice of Compliance and Request for Reconsideration (Request), representing that it had complied with a previously ordered subpoena as modified, providing itemized bills of the costs of compliance, and requesting reconsideration of the \$20,000 cap imposed by my October 28, 2014, Revised Order on Subpoena to UASNM, Inc. *See Dennis J. Malouf*, Admin. Proc. Rulings Release No. 1951A, 2014 SEC LEXIS 4168.

On December 10, 2014, Respondent opposed the Request (Opposition), and on December 17, 2014, UASNM replied.

Although UASNM and its counsel have submitted billing records for costs and fees in excess of \$20,000, I find no reason to reconsider my previous ruling. I agree that “the \$20,000 cap established by the Revised Order” should not be “removed because Respondent relied upon that cap when deciding to proceed with his request for documents.” *Opp.* at 2-3.

The parties appear to agree that the costs expended by UASNM “in compiling and reviewing documents for relevance and privilege” are recoverable. *Opp.* at 5. Based on a careful review of the billing records, there appear to be \$22,217 of attorneys’ fees that *may* be recoverable,¹ to the extent that they relate to the subpoena as modified by the September 22,

¹ A number of the other attorneys’ fees simply are not among the select costs that are reasonably recoverable. *See Opp.* at 5-7. I note that if UASNM had succeeded, outright, in its motion to quash, none of the expenses it incurred before would have been recoverable. This order does not imply, in any way, that the law firm billed UASNM excessively, just that only part of those fees are recoverable from Respondent under the narrow issue presented here.

2014, Order and subsequent limitations by Respondent. I have adjusted this figure to \$23,772.19 to reflect the state of New Mexico gross receipts tax of 7%.

Although the time and hourly rate for UASNM's employees Kirk Hudson and Joseph Kopczynski appear high for purposes of subpoena compliance, I do not agree that "Respondent should not be required to pay any of these charges." Opp. at 13. Instead, I have determined that a rate of \$55 per hour (such as that by a legal assistant sufficiently skilled to identify and compile responsive documents) is reasonable, and, as such, I will order reimbursement to UASNM for ninety hours at that rate (\$4,950).

Unfortunately, there was no definitive basis provided by either side reflecting the extent to which the review and production relates to documents previously produced to the Commission and/or in the state court litigation. Such categories were expressly exempted from the scope of the subpoena by the September 22, 2014, Order modifying it, and by Respondent's subsequent requests. For whatever reason, UASNM does not appear to have limited its search, review, or production of documents in accordance with these limits. Its failure to do so was at its own risk, and, as a result, I have opted to discount, by fifty-percent, the amount of work by UASNM's counsel and personnel expended to comply with the modified subpoena. Were an in-depth analysis to be carried out to determine the actual portion of documents that were not previously produced, it may be the case, as Respondent suggests, that the overall portion would be smaller than half; but, in the absence of such an analysis, I am convinced that a discount of half is at least reasonable.

While the use of two hard drives was not necessary, it does not follow that it was unreasonable, given that hard drives are often employed as a recognized means of document production. The shipping costs for filings, as opposed to document production, will not be reimbursed.

I ORDER that, no later than December 31, 2014, Respondent shall reimburse the following costs of subpoena compliance, above and beyond the costs that they have already reimbursed:² \$11,886.10 in attorneys' fees (including associated New Mexico gross receipts tax), \$2,475.00 for UASNM personnel time, and \$118.11 for hard drives to produce responsive documents.

Jason S. Patil
Administrative Law Judge

² Respondent has already reimbursed UASNM for the \$1,356 directed by my previous Order, and \$200 for production of documents sought from UASNM employees who were subpoenaed in their individual capacities. Those costs are not the subject of this order.