

UNITED STATES TAX COURT  
WASHINGTON, DC 20217

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DIAMOND PACKAGING CORPORATION, )  
)  
Petitioner, )  
)  
v. ) Docket No. 27463-10.  
)  
COMMISSIONER OF INTERNAL REVENUE, )  
)  
Respondent )

**ORDER**

On August 1, 2012, petitioner filed an Emergency Motion for Protective Order requesting that the Court bar respondent from continuing to attempt to obtain informal discovery from petitioner's clients.<sup>1</sup> Petitioner maintains that respondent's actions circumvent the Court's rules and procedures governing discovery, are unduly burdensome, and have unnecessarily tarnished petitioner's reputation. On August 23, 2012, respondent filed an objection to petitioner's motion. Respondent acknowledges that he informally requested documents from six of petitioner's corporate clients, but asserts that petitioner has failed to show "good cause" justifying the issuance of a protective order.

Rule 103(a)<sup>2</sup> provides in relevant part that, upon good cause shown, the Court may issue any order which justice requires to protect a party or other person from annoyance, embarrassment, oppression, or undue burden or expense. The moving party generally bears the burden of establishing good cause for the issuance of a protective order. In re Terra Int'l Inc., 134 F.3d 302, 306 (5th Cir. 1998); see Greenberg's Express, Inc. v. Commissioner, 62 T.C. 324, 326 (1974). "Good cause" normally contemplates a particular and specific demonstration of fact as distinguished from stereotyped and conclusory statements. General Dynamics Corp. v. Selb Mfg. Co., 481 F.2d 1204, 1212 (8th Cir. 1973). Unsupported and bare allegations of potential harm are insufficient to meet the burden of showing good cause under Rule 103. Greenberg's Express, Inc. v. Commissioner, *supra* at 326.

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<sup>1</sup>A review of the pleadings shows that the parties disagree whether petitioner is entitled to credits for "increasing research activities" that it claimed pursuant to I.R.C. sec. 41 for the taxable years 2003 and 2005.

<sup>2</sup>Unless otherwise indicated, Rule references are to the Tax Court Rules of Practice and Procedure. Rule 103 is derived from Rule 26(c) of the Federal Rules of Civil Procedure, see 60 T.C. 1057, 1122 (1973), and the Court looks to cases construing Rule 26(c) of the Federal rules for guidance on the breadth of application of Rule 103. Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 917 (1985).

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In the light of the record presented, we reject petitioner's argument that respondent's informal requests for documents circumvent the Court's rules governing discovery. To the contrary, the Court has not prescribed rules specifically relating to informal pretrial discovery of potential witnesses. See Seawright v. Commissioner, 117 T.C. 294, 301 n. 6 (2001). Moreover, it has been the Court's longstanding policy to encourage the parties to attempt to attain the objectives of discovery through informal consultation and communications. Rule 70(a); see Branerton Corp. v. Commissioner, 61 T.C. 691, 692 (1974); Ash v. Commissioner, 96 T.C. 459, 463 (1991). There has been no showing that respondent's requests are tantamount to the more formal administrative summons that the Court considered in Ash v. Commissioner, *supra* at 469-471. Although petitioner complains that respondent did not consult with petitioner before issuing the informal requests, the Court is not persuaded that this factor provides justification for a protective order.

Petitioner also asserts that respondent's informal document requests have imposed "massive and unreasonable costs" on its clients.<sup>3</sup> Respondent counters that four of the six clients in question are ready, willing, and able to respond to the document requests and they expressed no reservations about doing so to respondent. Respondent reports that two of the clients have determined they have no responsive materials and respondent indicates he will not pursue the matter further. The Court has previously observed that, while party witnesses must generally bear the burden of discovery costs, the rationale for this general rule is inapplicable where the discovery demands are made on nonparties. See Grandbouche v. Commissioner, 99 T.C. 604, 618 (1992), quoting United States v. Columbia Broad. Sys., Inc., 666 F.2d 364, 371-372 (9th Cir. 1982), for the proposition that nonparty witnesses are powerless to control the scope of litigation and discovery, and should not be forced to subsidize an unreasonable share of costs of a litigation to which they are not a party. Although the Court might consider providing relief to a nonparty witness that incurs unreasonable costs in the course of responding to a party's informal request for documents, the record presented in this case does not justify any such relief because petitioner's motion is not supported by an affidavit, declaration, or similar documentation demonstrating that petitioner's clients are in fact subject to unreasonable costs.

Petitioner's final argument, that respondent's informal document requests create "a stigma against petitioner that has already harmed its business interests", is also unavailing. We agree with respondent that alleged harm to a party's reputation generally is not sufficient to show good cause for the issuance of a protective order under Rule 103. See Willie Nelson Music Co. v. Commissioner, 85 T.C. 914, 921 (1985) (a showing that information in the public record would harm a party's reputation is generally not sufficient to support the issuance of a protective order under Rule 103). Moreover, petitioner has failed to demonstrate any harm (financial or otherwise) that it has suffered or will suffer if its motion for protective order is denied. *Id.* at 925. Petitioner's mere allegations of harm are insufficient to demonstrate good cause.

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<sup>3</sup>It is worth noting that petitioner does not assert that its clients have no information relevant to the resolution of the issue in dispute or that respondent is engaged in an unwarranted fishing expedition.

In accordance with the foregoing and upon due consideration, it is

ORDERED that petitioner's Emergency Motion for Protective Order, filed August 1, 2012, is denied.

**(Signed) Daniel A. Guy, Jr.  
Special Trial Judge**

Dated: Washington, D.C.  
September 13, 2012