

**UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION**

In re:

PATRIOT COAL CORPORATION, *et al.*,

Debtors.

Chapter 11

Case No. 12-51502-659

(Jointly Administered)

Hearing Date:

April 17, 2013 at 9:00 a.m.

Hearing Location:

Courtroom 7 North

**UMWA'S OPPOSITION TO IRL F. ENGELHARDT'S EMERGENCY
MOTION TO QUASH SUBPOENA FOR DEPOSITION**

The United Mine Workers of America ("UMWA"), by its attorneys The Previant Law Firm, S.C., by Frederick Perillo, Yingtao Ho and Sara J. Geenen, files the following Opposition to the Emergency Motion filed by Irl F. Engelhardt, seeking to Quash a Subpoena for Deposition served upon Engelhardt on Saturday, April 13, 2013 for his appearance at a deposition on April 24, 2013¹. For the reasons stated herein, the Court must deny Engelhardt's Motion to Quash Subpoena for Deposition.

BACKGROUND

1. On July 9, 2012, the Debtors filed a petition for relief under Chapter 11 of the Bankruptcy Code.

¹ The Subpoena originally served on Engelhardt commanded his appearance at a deposition on April 19, 2013, at 9:00 a.m. at the offices of Shucat, Cook & Warner, St. Louis, MO. Following service of the subpoena, attorneys for Engelhardt contacted the undersigned counsel for the UMWA and counsel for Engelhardt and the UMWA agreed to postpone the deposition to April 25, 2013.

2. On March 14, 2013, the Debtors filed their Motion to Reject Collective Bargaining Agreements and to Modify Retiree Benefits Pursuant to 11 U.S.C. §1113, 1114 of the Bankruptcy Code. [Dkt. No. 3214]. (“1113/1114 Motion”). The hearing on Debtors’ 1113/1114 Motion is set for April 29 through May 2, 2013. The hearing must be held during this week, since the Court does not have another full week available for the hearing through the end of May, 2013.

3. On March 19, 2013, the Court held a status conference with all parties involved. During that status conference, the parties agreed to disclose witnesses for the hearing on Debtors’ 1113/1114 Motion by March 28, 2013.

4. On March 28, 2013, counsel for the UMWA disclosed its potential witnesses to counsel for the Debtors by electronic message. The UMWA’s list of potential adverse examination of witnesses included Mr. Irl Engelhardt, who was a senior executive of first Peabody and then Patriot during the transition between Peabody and Patriot, and then served as the Chief Executive Officer of Patriot in 2012. (“Engelhardt”).

5. Pursuant to the Court’s schedule, the parties disclosed Expert witnesses on April 3, 2013, and exchanged Expert witness reports on the same date. Within the day or two days following the exchange of expert witness reports, the parties established a deposition schedule for most depositions in connection with the Debtors’ 1113/1114 Motion and 1113/1114 hearing starting on April 29, 2013.

6. During those discussions between counsel for the UMWA and the Debtors regarding the deposition schedule in the first week in April, the Debtors took the position that they were not responsible for producing Mr. Engelhardt because he was no longer an employee of the Debtors.

7. The UMWA immediately commenced a search to locate Mr. Engelhardt. The UMWA eventually located an address in Florida, as well as one at 901 Kent Road, St. Louis, Missouri.

8. On April 8, 2013, pursuant to FRCP 45, counsel for the UMWA issued a Subpoena to Irl Engelhardt, 901 Kent Road, St. Louis, MO 63124, commanding his appearance at a Deposition scheduled to take place on April 19, 2013 at 9:00 a.m. at the offices of Schuacat, Cook & Warner.

9. The UMWA, through counsel, contacted Pro-Serve, LLC, St. Louis, MO, to obtain service of the Subpoena on Engelhardt (Moore Aff ¶3).

10. The first attempt at service upon Mr. Engelhardt was made at 901 Kent Road, St. Louis, MO 63124, on April 10, 2013, at 11a.m. by one a Pro-Serve LLC Process Server, Tracy Tunell. On that date, Mr. Tunell spoke with a woman at the home at 901 Kent Road, who identified herself as Mrs. Engelhardt and advised that her husband, Irl Engelhardt, was "at the farm on a tractor" and would not return until Sunday at 8pm. Mrs. Engelhardt also stated that Mr. Engelhardt knew what it was and that it was coming (referring to the subpoena). She also stated that she would accept the subpoena for him (Moore Aff ¶4).

11. In order to establish personal service upon Mr. Engelhardt, Mr. Tunell did not leave the subpoena with Mrs. Engelhardt, and instead made a second attempt at service at 11:30am at 901 Kent Road, on April 11, 2013. On April 11th, a woman who identified herself as the housekeeper answered the door and stated that no one was home and that Mrs. Engelhardt was "gone for the day." The housekeeper would not call Mrs. Engelhardt, nor tell Mr. Tunell where she was because she stated did not want to lose her job (Moore Aff ¶5).

12. Pro-Serve LLC owner, Timothy H. Moore, made a third attempt at service on Mr. Engelhardt at a farm in Pinckneyville IL, on April 11, 2013. The original address Pro-Serve obtained for the farm was a wooded lot. Moore located the right house at 5810 Canary Rd., Pinckneyville, IL, and spoke with a woman who stated that she was not an Engelhardt and that there were no Engelhardts in the residence. Moore asked where they were to which she repeated that they were not home. She refused to provide any additional assistance (Moore Aff ¶6).

13. Moore then proceeded to Mr. Engelhardt's brother's residence where he spoke with a roofer who was working on a ladder on the side of the house. Moore asked if anyone was home to which he replied that he had not seen anyone since the day before and did not know where to find the residents of the home (Moore Aff ¶7).

14. Mr. Tunell made a fourth attempt to serve Mr. Engelhardt at the 901 Kent Street residence on April 12, 2013 at 11:15 a.m., however no one answered the door (Moore Aff ¶8).

15. The fifth attempt at service on Mr. Engelhardt was made on April 13, 2013, by Pro-Serve Process Server Ryan Jones. On the 13th, Mr. Jones arrived at the farm house located at 5810 Canary Rd. around 8:30am and began ringing the doorbell and knocking on the doors. No one answered or responded (Moore Aff ¶9).

16. Mr. Jones then drove on the gravel road to an "out" building/barn where he was confronted by two individuals on ATV's dressed in full camouflage. He asked for Mr. Irl Engelhart and was told by the two individuals they did not know where he was. Jones was then promptly ordered and escorted off the property by the men who identified themselves as the property owners. The two individuals also informed Mr. Jones that they were calling the Police (Moore Aff ¶10).

17. Mr. Jones then responded to the Police station and advised officers of his presence and intent regarding Mr. Engelhardt. Mr. Jones then conducted an investigation in the town square and talked to several individuals in the area. He received information that led to Mr. Engelhardt's son's farm/residence located at/near 5401-5413 Goldeneye Rd, Perry County Il (Moore Aff ¶11).

18. Mr. Jones then traveled to the farm/residence on Goldeneye Rd. Upon arriving at the residence, Mr. Engelhardt waved, then walked to Jones while identifying himself as Irl Englehardt. Mr. Jones served Mr. Engelhardt with the subpoena at 11:35am, April 13, 2013 (Moore Aff ¶12).

ARGUMENT

19. "A party seeking to quash a subpoena bears "a particularly heavy" burden." DatCard Systems, Inc. v. PacsGear, Inc., 2011 U.S. Dist. LEXIS 67648, 3-4 (D. Minn. 2011). Engelhardt has failed to meet the heavy burden imposed by FRCP 45 to quash the Deposition Subpoena served upon him on April 13, 2013, and his Motion must therefore be denied.

20. As counsel for Mr. Engelhardt acknowledges, Rule 45, Fed. Rule Civ. P. and its bankruptcy rule equivalent does not set forth a minimum amount of time prior to the deposition that the subpoena must be served. Whether service is reasonable, instead, depends on the specific facts and circumstances of the case. Robinson v. Metro. Life Ins. Co., 2013 U.S. Dist. LEXIS 50373 (E.D. Cal. 2013).

21. The argument by counsel for Mr. Engelhardt, that anything less than fourteen days from the day of service is presumably unreasonable, is based upon a blatant misrepresentation of the holding of the sole case it cites for that proposition, Brown v. Hendler, 2011 WL 321139 *2 (S.D.N.Y, 2011). Brown, which actually involved a subpoena that required

an appearance nine days after service, stated in dicta that many courts find 14 days advanced notice presumably reasonable. There is no legal or logical basis for counsel for Mr. Engelhardt to automatically make the jump that because 14 days advanced notice is presumably reasonable, anything less than 14 days advanced notice is presumably unreasonable. Rather, the dicta in Brown clearly means that when notice is less than 14 days, whether notice is reasonable depends on the facts and circumstances of the case. Indeed, counsel for Mr. Engelhardt has failed to cite to a single case where the Court held 11 days advanced notice is unreasonable.

22. Indeed, in the only case cited by Mr. Engelhardt that found 10 days notice was unreasonable, In re Sulfuric Acid Antitrust Litigation, 231 F.R.D. 320, 327 (N.D. Ill. 2005), the Court found that 10 days notice appeared reasonable, except for the fact that the party noticing the deposition picked a date that the schedules of the deponents and a number of the lawyers could not accommodate.

23. In the case at bar, Mr. Engelhardt was served on April 13th for a deposition on April 25th, so that even when April 13th is disregarded, the deposition will occur on the twelfth day after he was served. In reality Mr. Engelhardt has had substantially more than 12 days notice that he would be deposed, given that the process server by the UMWA had spoken to his wife and housekeeper on April 10th and 11th, respectively. Mr. Engelhardt therefore should have known, in advance of the actual service date, that a process server was attempting to serve a subpoena upon him; and should have at least suspected that the subpoena would concern the Patriot bankruptcy.

24. Moreover, in this case the UMWA made nine attempts to serve him during the four days between April 10th and 13th, 2013, before successfully serving him on April 13th, 2013.

25. April 25th is the latest date that the UMWA can depose Mr. Engelhardt and be able to obtain a transcript that is useful during the April 29th – May 2nd, 2013 sec. 1113/1114 hearing. At the earliest, the UMWA will be able to obtain a final transcript for the deposition of Mr. Engelhardt on April 26, 2013, which will give it only two days to analyze the transcript and designate portions for use during the trial; while it is also performing all of the other necessary preparations for a week-long 1113/1114 hearing involving at least 12 witnesses, whose outcome will dramatically affect the future standards of living of employees and retirees represented by the UMWA.

26. Given the special circumstances of this case, the Court should therefore find that 11 days notice is sufficient to meet the requirements of Rule 45, Fed. Rule Civ. P. and its bankruptcy rule equivalent.

27. Moreover, the UMWA has not sought to take a duces tecum deposition of Mr. Engelhardt and has not sought to require anyone to produce Mr. Engelhardt as a witness in a Rule 30(b)(6) deposition. Rather, the deposition of Mr. Engelhardt will be based upon his recollection of the relevant events, as may be refreshed by documents that the UMWA and other parties may show to Mr. Engelhardt during the course of his deposition. There is thus no basis for Mr. Engelhardt's claim that he will need to review seven years worth of documents in order to prepare for his deposition. Mr. Engelhardt is free to say he does not know, when that response is appropriate given the state of his recollection.

28. With respect to the portion of the deposition covering Mr. Engelhardt's tenure as a Patriot employee, his claim of the need to review agreements concerning potential privilege issues is grossly overblown. His deposition is likely to be designated confidential in its entirety, just like every other deposition that has been taken in connection with both the 1113/1114

motions, and the earlier CERP/AIP motions. Each participant in the deposition, both in person and over the telephone, will have signed a confidentiality agreement required by Patriot and authorized by the Court. Pursuant to the same arrangement at earlier depositions the parties have already discussed many topics that Patriot would consider extremely confidential, such as its projections of future financial performance and the compensation of the proposed CERP/AIP participants. There is thus no reasonable basis for Mr. Engelhardt's concern that, with his testimony at his deposition, he will breach any confidentiality agreement with Patriot. Additionally, given that Patriot's counsel will be present at Mr. Engelhardt's deposition, and Patriot's counsel have zealously protected Patriot's attorney client privilege during the depositions so far, there is little need for Mr. Engelhardt to be concerned that his deposition testimony will disclose attorney client privileged communications. The existing infrastructure to protect the confidential information of the participants further alleviates the need for new, additional procedures to protect confidential commercial information known to Mr. Engelhardt.

29. With respect to Mr. Engelhardt's confidentiality obligations to Peabody, the UMWA's questioning of Mr. Engelhardt in connection with the Peabody/Patriot spinoff will largely be limited to discussing future Patriot management's evaluation of the solvency of the newly formed Patriot given its large ratio of acquired retirees to employees, how management's evaluation played out in subsequent years, as shown by Patriot's financial performance, as well as whether Patriot has exacerbated its retiree obligations by making payments for retirees who contractually should have been assumed by Peabody. Questioning concerning Patriot's financial performance will be based upon publically available Form 10-Ks and similar publically available documents filed by Patriot. Similarly, any questioning concerning the lessening of Peabody's legacy liabilities following the Patriot spinoff will be based upon publically available documents.

30. With respect to Peabody and Patriot management's evaluation of the likely prospects for Patriot given its large ratio of retirees to employees, documents on the subject have already been produced by Patriot to the UMWA and other interested parties, without any objection from Peabody. For example, a solvency opinion obtained by Peabody concerning the viability of Patriot following its spinoff from Peabody was placed by Patriot into the data room in late 2012.

31. Moreover, in questioning Mr. Engelhardt the UMWA is concerned with his own, as well as the impressions of other top management at Peabody and Patriot concerning the future prospects of Patriot, rather than advice obtained by top Patriot management from counsel. Moreover, given that protecting the confidentiality of Patriot will not be a concern, given the tight confidentiality parameters already in place in the instant bankruptcy proceeding; Mr. Engelhardt will be able to devote all of his time to recalling the applicability of the attorney client privilege to Peabody's evaluation of the future viability of Patriot; so that the next 7 days will be plenty of time for him to prepare to testify on that narrow subject.

32. Additionally, counsel for Peabody will be free to attend the deposition, and assert any appropriate privileges on behalf of Peabody. Mr. Engelhardt's apparent worry that he will be solely responsible for defending Peabody's attorney client privilege is thus grossly overstated.

33. To the extent that Mr. Engelhardt's concerns extend to information deemed by Peabody and/or Patriot to be confidential, as opposed to information that is protected by one or more privileges recognized by law, that a concern for protecting confidentiality does not equate to privilege, and that information and documents are not shielded from discovery on the sole basis that they are confidential. Secure Energy, Inc. v. Coal Synthetics, 2009 U.S. Dist. LEXIS 79266 (E.D. Mo. 2009) (citing Federal Open Mkt. Comm. v. Merrill, 443 U.S. 340, 362 (1979)).

Moreover, where a protective order has been entered in the case, objection that the information is confidential and proprietary, and therefore should not be disclosed should be overruled. Id. at *9. Any concern on the part of Mr. Engelhardt that he will disclose “confidential”, as opposed to privileged information therefore does not provide a basis for him to either to refuse to answer questions during the deposition, or for his motion to quash. Mr. Engelhardt’s tasks of preparing for his deposition on privilege issues is thus further simplified, by the fact that there are very limited testimony on which he can assert a privilege recognized by law.

34. For the above reasons, there is little risk that Mr. Engelhardt’s deposition will result in the improper disclosure of legally privileged information, a risk that is further alleviated by the seven days that Mr. Engelhardt will have to prepare himself to address the limited privilege issues that may arise. On the other hand, the information that the UMWA will seek to question Mr. Engelhardt upon will be highly relevant to the upcoming 1113/1114 motions, especially with respect to the equity of granting the motions.

35. As explained by the UMWA’s opposition to the 1113/1114 motions, If Patriot entered into the Peabody and Magnum transactions knowing that the retiree obligations are unsustainable, then that factor would weigh against the equity of permitting Patriot to reject its retiree health obligations through 1114. See in re UAL Corp., 307 B.R. 80 (Bankr. N.D. IL. 2004) (authorizing an examiner to investigate whether debtor promised retiree health benefits in exchange for early retirement, while intending to move to reduce the benefits later). Peabody/Patriot management’s expectations concerning the viability of Patriot, and in particular Patriot’s ability to assume the retiree health obligations for the retirees that it is assuming, is thus central to the equity of Patriot’s 1114 motion. Any knowledge of Mr. Engelhardt on the same

subject, in connection with Patriot's acquisition of the retirees of Magnum, is similarly relevant to the equity of Patriot's 1114 motion.

36. One of the central issues in the 1113/1114 litigation will be the reasonableness of Patriot's coal price projections. Given Mr. Engelhardt's likely involvement in overseeing the setting of coal prices, possibly both with respect to Patriot's July 2012 DIP projections and the November, 2012 five year plan, his knowledge of how the coal prices were projected, as well as the reasonableness and oversight of the process Patriot used will be information essential to determining the persuasiveness of the coal pricing projections by Patriot and the UMWA.

37. A third example of the central relevance of Mr. Engelhardt's testimony is that he was Patriot's CEO when Patriot negotiated its DIP financing. Whether Patriot negotiated the EBITDA/liquidity covenants to make 1113/1114 relief inevitable, and thus forestall the possibility of reaching a consensual resolution with the UMWA is directly relevant to the merits of Patriot's 1113/1114 motions.

CONCLUSION

38. For the above stated reasons, and without citing to every possible relevance of Mr. Engelhardt's testimony to the instant 1113/1114 motions, it is clear that the relevance of Mr. Engelhardt's testimony substantially outweighs any legitimate concerns that he has that his deposition testimony will violate legally protected privileges. Mr. Engelhardt's motion to quash therefore should be denied in its entirety.

Dated this 16th day of April, 2013.

s/Sara Geenen
Frederick Perillo (Wis. Bar
fp@previant.com
Yingtao Ho
Sara Geenen
The Previant Law Firm, s.c.

1555 N River Center Dr., Suite 202
Milwaukee, WI 53212
(414) 271-4500
Fax: (414) 271-6308

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing document was filed on April 16, 2013 using the Court's CM/ECF system and that service will be accomplished upon all counsel of record by operation of that system.

s/ Sara Geenen

AFFIDAVIT OF TIMOTHY H. MOORE

STATE OF MISSOURI)
) SS
COUNTY OF ST. LOUIS)

I, TIMOTHY H. MOORE, being first duly sworn, on oath, state as follows:

1. My name is Timothy H. Moore. I make this affidavit on personal knowledge, in good faith, and I affirm that I am competent to testify to the matters stated herein.

2. I am the owner of Pro-Serve LLC, 6614 Clayton Road, St. Louis, MO 63117.

3. The Previant Law Firm, S.C., contacted me to serve a Subpoena in Case No. 12-51502, In re Patriot Coal Corp., Inc., on Irl Engelhardt, 901 Kent Road, St. Louis, MO 63124.

4. The first attempt at service upon Mr. Engelhardt was made at 901 Kent Road, St. Louis, MO 63124, on April 10, 2013, at 11a.m. by one a Pro-Serve LLC Process Server, Tracy Tunell. Mr. Tunell spoke with a woman at the home at 901 Kent Road, who identified herself as Mrs. Engelhardt and advised that her husband, Irl Engelhardt, was "at the farm on a tractor" and would not return until Sunday at 8pm. Mrs. Engelhardt also stated that Mr. Engelhardt knew what it was and that it was coming (referring to the subpoena). She also stated that she would accept the subpoena for him.

5. In order to establish personal service upon Mr. Engelhardt, Mr. Tunell made a second attempt at service at 11:30am at 901 Kent Road, on April 11, 2013. On April 11th, a woman who identified herself as the housekeeper answered the door and

stated that no one was home and that Mrs. Engelhardt was "gone for the day." The housekeeper would not call Mrs. Engelhardt, nor tell Mr. Tunell where she was because she stated did not want to lose her job.

6. I personally made a third attempt at service on Mr. Engelhardt at a farm in Pinckneyville IL, on April 11, 2013. The original address I obtained for the farm was a wooded lot. I located the right house at 5810 Canary Rd., Pinckneyville, IL, and spoke with a woman who stated that she was not an Engelhardt and that there were no Engelhardts in the residence. I asked where they were to which she repeated that they were not home. She refused to provide any additional assistance.

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8. Mr. Tunell made a fourth attempt to serve Mr. Engelhardt at the 901 Kent Street residence on April 12, 2013 at 11:15 a.m., however no one answered the door.

9. The fifth attempt at service on Mr. Engelhardt was made on April 13, 2013, by Pro-Serve Process Server Ryan Jones. On the 13th, Mr. Jones arrived at the farm house located at 5810 Canary Rd. around 8:30am and began ringing the doorbell and knocking on the doors. No one answered or responded.


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identified themselves as the property owners. The two individuals also informed Mr. Jones that they were calling the Police.

11. Mr. Jones then responded to the Police station and advised officers of his presence and intent regarding Mr. Engelhardt. Mr. Jones then conducted an investigation in the town square and talked to several individuals in the area. He received information that led to Mr. Engelhardt's son's farm/residence located at/near 5401-5413 Goldeneye Rd, Perry County II.

12. Mr. Jones then traveled to the farm/residence on Goldeneye Rd. Upon arriving at the residence, Mr. Engelhardt waved, then walked to Jones while identifying himself as Irl Englehardt. Mr. Jones served Mr. Engelhardt with the subpoena at 11:35am, April 13, 2013. A copy of the Subpoena and Proof of Service is attached hereto as Exhibit A.

Dated this 16th day of April, 2013,

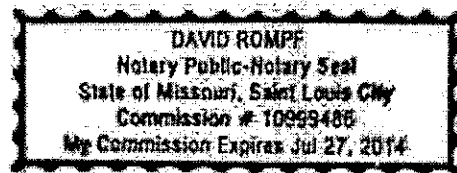


Timothy H. Moore

Subscribed and sworn to before me
this 16th day of April, 2013.



Notary Public, State of Missouri
My Commission expires 7/27/2014



B256 (Form 256 - Subpoena in a Case under the Bankruptcy Code) (12/07)

UNITED STATES BANKRUPTCY COURT

Eastern

District of

Missouri

In re Patriot Coal Corp., Inc.

SUBPOENA IN A CASE UNDER THE BANKRUPTCY CODE

Case No. * 12-51502

To: Irl Engelhardt
901 Kent Road
St. Louis, MO 63124

Chapter 11

YOU ARE COMMANDED to appear in the United States Bankruptcy Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY

COURTROOM

DATE AND TIME

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case. *

PLACE OF DEPOSITION

DATE AND TIME

Schueat, Cook & Warner
1221 Locust St #250, St Louis, MO 63103

April 19, 2013 at 9:00 a.m.

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

* The deposition will occur before a court reporter.

PLACE

DATE AND TIME

YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES

DATE AND TIME

Any organization not a party to this proceeding that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Rule 30(b)(6), Federal Rules of Civil Procedure, made applicable in bankruptcy cases and proceedings by Rules 1018, 7030, and 9014, Federal Rules of Bankruptcy Procedure.

ISSUING OFFICER SIGNATURE AND TITLE

DATE

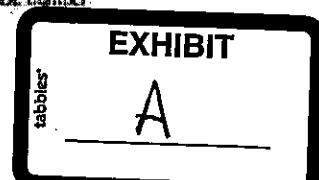
Sara J. Greenen

April 8, 2013

ISSUING OFFICER'S NAME, ADDRESS, AND PHONE NUMBER

Sara J. Greenen, The Proffant Law Firm, 1555 N River Center Dr, Suite 202, Milwaukee, WI 53212, 414.271.4500

* If the bankruptcy case is pending in a district other than the district in which the subpoena is issued, state the district under the case number.



12256 (Form 256 - Subpoena in a Case under the Bankruptcy Code) (12-07)

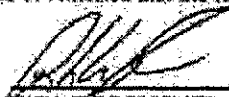
PROOF OF SERVICE

SERVED	DATE A.M. 1:57 / 4/13/13	PLACE UN NAMED FARM 5401 - 9403 GOLDENVEE RD FERRY COUNTY IL
SERVED ON (PRINT NAME) IRL ENGELHARDT	MANNER OF SERVICE PERSONAL SERVICE	
SERVED BY (PRINT NAME) RYAN W LOUES	TITLE SPS	

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on 4/13/13
DATE


SIGNATURE OF SERVER
2358 SOCASA DR APT C FLO MO
ADDRESS OF SERVER
65031

Rule 45, Federal Rules of Civil Procedure, Subdivisions (c), (d), and (e), as amended on December 1, 2007, made applicable in cases under the Bankruptcy Code by Rule 9016, Federal Rules of Bankruptcy Procedure

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Unfair Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.
(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanding person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) Those acts may be required only as directed by the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;
(ii) requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly conducts business to person — except that, subject to Rule 45(c)(3)(B)(ii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;
(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosure of trade secrets or other confidential research, development, or commercial information;
(ii) disclosure an unreviewed expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or
(iii) a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot be otherwise met without such testimony; and
(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) Documents. A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them as categorized in the demand.

(B) Form for Producing Electronically Stored Information Not Specified. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nevertheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(3)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

(i) expressly make the claim; and
(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim must notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly review, withhold, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt.

The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(e)(1)(A)(ii).