

STATE OF NEW MEXICO
ENERGY, MINERALS AND NATURAL RESOURCES DEPARTMENT
OIL CONSERVATION DIVISION

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OIL CONSERVATION
DIVISION

IN THE MATTER OF THE APPLICATION
OF MEWBOURNE OIL COMPANY FOR
CANCELLATION OF A DRILLING PERMIT
AND APPROVAL OF A DRILLING PERMIT
LEA COUNTY, NEW MEXICO.

CASE NO. 13492
ORDER R-12343

**RESPONSE OF CHESAPEAKE OPERATING, INC. TO
MOTION TO ENFORCE SUBPOENA DUCES TECUM AND FOR SANCTIONS**

Chesapeake Operating, Inc. ("Chesapeake") submits its Response in opposition to the Motion of Kaiser-Francis Oil Company's ("Kaiser") Motion to Enforce Subpoena Duces Tecum and For Sanctions ("Motion to Enforce"), as follows:

INTRODUCTION

Kaiser's Motion to Enforce is a frivolous attempt to portray Chesapeake as having violated the Division's Order entered on May 26, 2005 overruling Chesapeake Motion for Protective Order and requiring it to provide documents requested in the Kaiser's subpoena that was the object of the motion. Nothing could be further from the truth.

Chesapeake has not, as Kaiser contends, refused to produce *any* documents. Instead, the record establishes that while Chesapeake has not "immediately" produced documents as requested by Kaiser, Chesapeake has timely provided the documents as ordered and has been more than reasonable and cooperative in providing documents and information that Kaiser requested. Had Kaiser followed standard discovery motion practice and professional obligations and raised these issues with Chesapeake's counsel

prior to the filing the Motion to Enforce, any concerns Kaiser may have concerning Chesapeake's production of documents could have easily been resolved. Chesapeake encourages Kaiser to withdraw the motion and should it fail to do, requests that Division order that the subpoena be quashed in its entirety and that Chesapeake be allowed to recover its costs and fees in responding to the Motion as part of its cost of drilling the KF "4" State Well No. 1.

I. CHESAPEAKE HAS NOT VIOLATED THE DIVISION'S ORDER AND BEEN MORE THAN REASONABLE IN PROVIDING DOCUMENTS AND INFORMATION IN RESPONSE TO KAISER'S SUBPOENA.

The Motion to Enforce is premised on the notion that because Kaiser's lawyer demanded the production of documents "at the earliest opportunity" and Chesapeake has not met Kaiser's demands, Chesapeake violated the Division's Order No. R-12343-A. Chesapeake has not violated the Division's Order or any conceivable conception of what constitutes good faith in this context. The Division's Order did not specify any date for production and certainly did not require Chesapeake to produce documents by any date that might be demanded by Kaiser's counsel. The record demonstrates that following the issuance of the Division's Order on May 24, 2005 Chesapeake has been more than reasonable in responding to Kaiser's request for the production of documents, promptly providing Kaiser with all documents needed to evaluate the progress of drilling the well in question as demonstrated by the following facts:

1. Chesapeake's land personnel have been involved in frequent communication with Kaiser concerning the progress of drilling of the KF "4" State Well No. 1 from May 26, 2005 forward.
2. Standard drilling reports were provided May 26, 2005, from inception of the well to date.

3. After Chesapeake provided the daily summary drilling reports and Kaiser requested more detailed reports, Chesapeake began providing the rig reports on June 2, 2005.

4. Chesapeake provided Kaiser with all the mud logs and wireline logs by e-mail on June 3, 2005.

See Affidavit of Lynda Townsend, attached hereto as Exhibit "A". Therefore, Chesapeake's Land personnel have been in regular communication with Kaiser concerning the progress of the well and have responded to all requests for information the same day they have received a request. *Id.*, ¶¶ 3, 4. Kaiser has been timely provided with all responsive information pertaining to the progress of drilling the well and Chesapeake is in the process of obtaining all documents in its possession that relate to the issue of its good faith in drilling the well and expects to provide them to Kaiser's counsel no later than June 9, 2005. *Id.*, ¶ 7.

Generally a party must be allowed 14 days to comply with a subpoena. See Rule 1-045(C)(2), NMRA 2005. Since the Division's Order denying Chesapeake's Motion for Protective Order was issued on May 26, 2005, Chesapeake should have until June 10, 2005 to respond to the subpoena, since the Division's Order did not require any specific time period for production.¹ As requested by Kaiser's counsel, Chesapeake immediately began providing Kaiser with the daily drilling reports and the Motion to Enforce acknowledges that Kaiser has been provided the drilling reports. Therefore, Chesapeake has timely and cooperatively provided information to Kaiser in compliance with the Division's Order; the Motion to Enforce should be denied in its entirety.

¹ The 14 day period excludes the Memorial Day holiday which also fell within this period and hampered Chesapeake's ability to gather and produce information.

II. KAISER'S FAILURE MAKE A GOOD FAITH EFFORT TO RESOLVE THE MATTERS RAISED IN THE MOTION PRIOR TO ITS FILING REQUIRES THAT THE MOTION BE DENIED.

While the Motion to Enforce cites clearly inapplicable cases authorizing the so-called death penalty sanction of dismissal for failure to comply with a discovery order under Rule 37 of the Rules of Civil Procedure, Kaiser has failed to demonstrate its own compliance with that rule. Under Rule 37, Kaiser was required to state in the Motion that moving counsel made a good faith effort to resolve this issue prior to filing this Motion. *See* Rule 1-037(A)(4), NMRA 2005. Similarly Rule 1-007.1(C) NMRA 2005 requires that opposed motions recite that concurrence with opposing counsel was requested. Prior to filing its Motion, Kaiser did not attempt to contact Chesapeake's counsel to try and resolve the matters presented in the Motion, although it apparently contacted counsel for Samson Resources as it indicated that Samson joins in the motion. *See* Motion to Enforce, ¶ 13.

The abject failure of Kaiser to try and resolve the matters presented in the Motion to Enforce prior to its filing is sufficient grounds for its denial. Although the Rules of Civil Procedure are not applicable, common courtesy and the professional obligations of counsel appearing before the Division require that a similar good faith consultation requirement be imposed. The Lawyer's Creed of Professionalism applicable to all attorneys practicing law in the State of New Mexico before any tribunal, includes the following standards of conduct:

D. With respect to the courts and other tribunals:

- I will communicate with opposing counsel in an effort to avoid litigation or to resolve litigation;

- I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

Kaiser failed to follow the dictates of professionalism before filing its Motion to Enforce.

The Creed of Professionalism and the requirement for good faith consultation in Rule 1-037 are based on the common sense notion that requiring parties "to personally engage in sincere, substantive discussions regarding discovery disputes will lead to fewer discovery misunderstandings among the litigating parties and improved judicial economy." *See, e.g., Shuffle Master, Inc. v. Progressive Games, Inc.*, 170 F.R.D. 166, 171 (D. Nev. 1996) (interpreting Fed. R. Civ. P. 37(a)(2)). *Id.* at 173. For this reason, courts have routinely denied motions to compel when it is apparent that the movant has not in fact attempted in good faith to resolve the discovery dispute prior to filing the motion with the court. *Id.* at 172 (denying motion to compel responses to interrogatories because movant had not conferred personally with the opposing party to meaningfully discuss the dispute); *see also Haselhorst v. Wal-Mart Stores, Inc.*, 163 F.R.D. 10, 11 (D. Kan. 1995) (plaintiff's motion to compel denied because, "[b]ased on the facts set forth by the defendant, the court finds that plaintiff's counsel has failed to adequately confer prior to the filing of the motion"); *Ballou v. University of Kansas Medical Center*, 159 F.R.D. 558, 560 (D. Kan. 1994) (plaintiff's motion to compel denied because "the court cannot find that plaintiff made a reasonable effort to resolve the dispute before bringing the motion to compel"). A 'reasonable effort to confer' "requires that counsel converse, confer, compare views, consult and deliberate." *Fears v. Wal-Mart Stores, Inc.*, 2000 U.S. Dist. LEXIS 7877, 2000 WL 715819, at *1 (D. Kan. May 30, 2000) (*quoting Porter v. Brancato*, 1997 U.S. Dist. LEXIS 4005, *2, No. 96-2208- KHV, 1997 WL 150050, at *1 (D. Kan. Feb. 24, 1997)). Had Kaiser made an effort to resolve issues in the Motion

to Enforce prior to filing it, the issues set forth in the Motion might have been resolved without involving the Division. Kaiser's failure to make a good faith attempt to resolve the matters presented in its motion requires that it be denied.

III. KAISER'S REQUEST FOR SANCTIONS SHOULD BE DENIED.

No basis exists for any award of sanctions, much less the sanction of the dismissal of Chesapeake's Application for Compulsory Pooling in Case No. 13493 and Case No. 13505 and canceling Chesapeake's APD for the KF "4" State Well No. 1 and Cattleman "4" State Com Well No. 1. The Division's Rules do not authorize dismissal of an applicant's Authority for Permit to Drill or an Application for Compulsory Pooling that have been filed in separate proceedings before the Division based on the failure to comply with a subpoena in a separate, albeit related proceeding.

Were the Rules of Civil Procedure applicable, it is clear that Kaiser's request for sanctions of this nature would be unavailable. As noted above, Kaiser failed to confer in good faith before filing its motion. Further, as demonstrated above, Chesapeake has *not* violated the terms of any order. The sanction of dismissal for violation of a discovery order under Rule 1-037(B) is only authorized "when the failure to comply is due to the willfulness, bad faith, or fault of the disobedient party. A willful violation of SCRA 1-037 occurs when there is a conscious or intentional failure to comply with the rule's requirements. A finding of willfulness may be based upon either a willful, intentional, and bad faith attempt to conceal evidence or gross indifference to discovery obligations." *Medina v. Foundation Reserve Insurance Co., Inc.*, 117 N.M. 163, 166, 870 P.2d 125, 128 (1994). The sanction of dismissal is an extreme measure that cannot be imposed unless (1) a party fails to comply with a court order, and (2), "the failure to comply is due

to the willfulness, bad faith, or fault of the disobedient party.” *Id.* In determining whether to impose death penalty sanctions, “inflated...complaints about the severity of the discovery abuses” must be disregarded. *Gonzales v. New Mexico Dep’t of Health*, 2000-NMSC-029, ¶ 16, 129 N.M. 586, 11 P.3d 550. As demonstrated above, there has not been any refusal by Chesapeake to comply with an order of the Division and Chesapeake has been more than reasonable and cooperative in producing documents responsive to the subpoena to Kaiser.

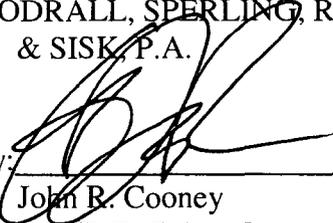
Moreover, an award of sanctions to Kaiser would countenance Kaiser’s utter disregard of the obligation to confer in good faith concerning discovery disputes. Prior to filing its Motion to Enforce, no effort was made to contact Chesapeake’s counsel and no deadline was imposed for production of documents before a motion would be filed. Instead, Kaiser’s attorney simply sent an email to Chesapeake’s counsel the day the Division entered its order requesting that Chesapeake fax copies of daily drilling reports to a designated representative of Kaiser and sent a letter indicating that Chesapeake’s “timely compliance was necessary.” At no time prior to filing the Motion to Enforce, did Kaiser ever inform Chesapeake that its compliance failed to meet the terms of the Divisions’ order or Kaiser’s own conception of timeliness. Instead, Kaiser simply filed the motion in the hopes of gaining an advantage in this proceeding through sharp discovery motion practice.

CONCLUSION

For the foregoing reasons, Chesapeake respectfully requests that Kaiser’s Motion to Enforce be denied and that the Division either quash the subpoena that is the object of the Motion or enter an order requiring Kaiser to pay Chesapeake’s attorney’s fees and

costs incurred in responding to the Motion as part of its costs recoverable from interest owners in any unit approved by the Division encompassing the for the KF "4" State Well No. 1 and such further relief as the Division deems just and proper.

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ATTORNEYS FOR CHESAPEAKE OPERATING, INC.
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WE HEREBY CERTIFY that a true and correct copy of the foregoing pleading was faxed and mailed to the following counsel of record this 6th day of June, 2005:

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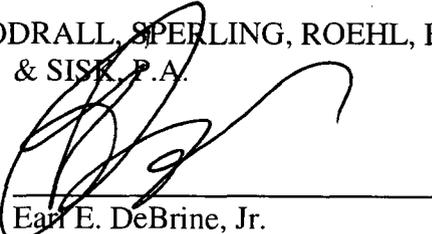
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By: 
Earl E. DeBrine, Jr.

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AFFIDAVIT OF LYNDA TOWNSEND

Lynda Townsend, being first duly sworn, deposes and states:

1. I am over the age of eighteen years, am competent to testify to the matters contained herein, and have personal knowledge thereof.

2. I am a Landman for Chesapeake Operating, Inc. ("Chesapeake"), and am familiar with the records pertaining to Chesapeake's drilling of the KF "4" State Well No. 1 ("Well") in Lea County, New Mexico.

3. Since the New Mexico Oil Conservation issued an order requiring the production of certain documents to Kaiser Francis Oil Company ("Kaiser"), I have been involved in frequent communications with Kaiser's employees concerning the drilling of the Well and responding to Kaiser's requests for information from May 26, 2005 forward.

4. Chesapeake has never refused to produce any documents to Kaiser. Instead, I have been working with Kaiser employees to provide the information they have requested. At no time did anyone from Kaiser complain that Chesapeake had failed to comply with the OCD's order or subpoena.

5. Chesapeake has been working diligently to comply with the OCD's order. On or about May 26, 2005, Chesapeake made arrangements for Kaiser to receive the daily drillings reports from the inception of drilling. After Kaiser expressed an interest in receiving more detailed reports, I made arrangements for Kaiser to receive the rig reports and they should have been receiving all of them as of June 2, 2005.

6. Chesapeake provided Kaiser with all the wireline logs and mud logs from the inception of drilling by e-mail on June 3, 2005.

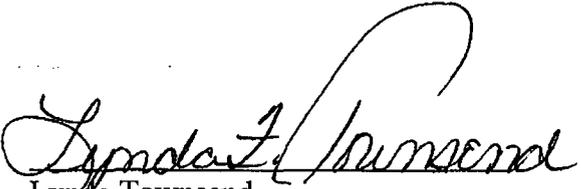
EXHIBIT

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7. Chesapeake is in the process of preparing for production of any remaining documents responsive to the subpoena, including its land files pertaining to the well. Chesapeake intends to provide all responsive documents to its counsel by June 8, 2005 for production to Kaiser.

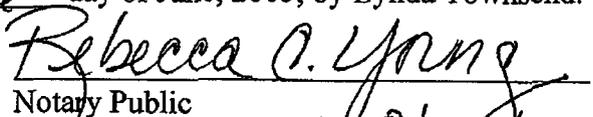
FURTHER AFFIANT SAYETH NOT.


Lynda Townsend

STATE OF OKLAHOMA)
COUNTY OF OKLAHOMA)ss.

Signed and sworn to before me this 6th day of June, 2005, by Lynda Townsend.




Notary Public
My Commission Expires: 8/12/08