

UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF KENTUCKY  
Pikeville Division

<b>IN RE:</b>	:	
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<b>ALMA ENERGY, LLC</b>	:	<b>Chapter 7</b>
	:	<b>Case No: 07-70370</b>
	:	<b>Judge Joseph M. Scott</b>
	:	
<b>Debtor</b>	:	
_____	:	
	:	
<b>PHAEDRA SPRADLIN, solely in her capacity as Chapter 7 Trustee of Alma Energy, LLC and THC KENTUCKY COAL VENTURE I, LLC,</b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>Adversary Proceeding No: 09-7005</b>
	:	
<b>vs:</b>	:	
	:	
<b>PIKEVILLE ENERGY GROUP, LLC, et al.,</b>	:	
	:	
<b>Defendants.</b>	:	
_____	:	

**ORDER OVERRULING DEFENDANTS'  
MOTION FOR PROTECTIVE ORDER**

This matter is before the Court on a Motion for Protective Order ("Motion") (Doc. 575) filed by Defendants Banner Industries of N.E., Inc. ("Banner Industries"), Pikeville Energy Group, LLC ("Pikeville Energy"), and Gary J. Richard ("Richard") (collectively "Defendants"). The Motion relates to a Notice of Taking of Oral Deposition of William D. Bishop Pursuant to Rule 30(b) of the Federal Rules of Civil Procedure ("Notice") (Doc. 572) filed on December 1, 2011, by the Plaintiff THC Kentucky Coal Venture I, LLC. Subpoenas (Docs. 573 & 582) were also filed and served on William D. Bishop on December 1, 2011 and December 13, 2011.

Plaintiffs have scheduled the deposition of Mr. Bishop for January 6, 2012, at 11:15 a.m. in Louisville, Kentucky. The sole remaining basis for Defendants' Motion is that the deposition is scheduled to take place in Louisville, Kentucky, rather than Lexington, Kentucky, as preferred by Defendants.<sup>1</sup> Defendants argue that Plaintiff has scheduled the deposition in Louisville solely as

<sup>1</sup> Defendants initially made two other objections: (i) the subpoena (Doc. 573) was incorrectly

a convenience to Plaintiff's attorney, Roger C. Simmons, and Plaintiff's corporate representative, Mr. Fleischman, both of whom will likely fly from Baltimore to Louisville.

Defendants point out that (i) this adversary is pending in Lexington; (ii) Mr. Bishop's business address is in Lexington; (iii) Defendants' counsel are in Lexington; (iv) Plaintiff has an attorney located in Lexington; and (v) Plaintiff's expert, Mr. Enderle, whom Defendants also want to depose, has his business address in Lexington. At this time, there is nothing in the record indicating that Mr. Enderle's deposition has been scheduled.

Defendants assert being required to go to Louisville for their expert's deposition causes them undue hardship and expense because their counsel and expert will have to travel to Louisville for the depositions of expert witnesses. Defendants state the cost of having to pay their attorneys to travel to Louisville and back will exceed \$2,000.

Counsel for the Plaintiffs, Roger C. Simmons, states that the date of January 6, 2012, was agreed on by the parties for Mr. Bishop's deposition, and that, knowing Defendants also wanted to take the deposition of Mr. Enderle, Mr. Simmons sent an email to Defendants' counsel suggesting the depositions of both experts be held on January 6, 2012, in Louisville, Kentucky. After receiving no response to his email, Plaintiff noticed the deposition of Mr. Bishop and issued the subpoena. Some days later, Defendants' counsel sent an email back to Mr. Simmons "demanding" that the subpoena be withdrawn because Defendants had not agreed to a deposition in Louisville.

Plaintiffs assert that the Motion should be denied because (i) Defendants have no standing to quash the subpoena; (ii) driving only 70 miles each way to the deposition in Louisville is not an undue hardship on Defendants or Mr. Bishop; and (iii) Mr. Bishop has not raised any objections to the subpoena.

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issued by this Court rather than the U.S. Bankruptcy Court for the Western District of Kentucky in Louisville, and (ii) Mr. Bishop had not been paid his witness fee and mileage. Plaintiff addressed both of these issues by reissuing the Subpoena (Doc. 582) from the bankruptcy court in Louisville and tendering a check to Mr. Bishop for witness fees and mileage at the time the second Subpoena was served.

Federal Rule of Civil Procedure 45, made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 9016 provides in relevant part:

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue 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.

...

(3) Quashing or Modifying a Subpoena.

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

...

(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 transacts business in person.

FED. R. CIV. P. 45(c) (emphasis added). The Federal Rules protect the person subpoenaed from undue burden and expense. Here, Defendants are not being deposed. Similarly, Federal Rule of Civil Procedure 26(c)(1), made applicable to this adversary proceeding by Federal Rule of Bankruptcy Procedure 7026, protects the party or person “*from whom discovery is sought . . . from annoyance, embarrassment, oppression, or undue burden or expense.*” FED. R. CIV. P. 26(c)(2). “Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action, unless the objecting party claims some personal right or privilege with regard to the documents sought.” 9A Charles Alan Wright & Arthur R. Miller, FEDERAL PRACTICE & PROCEDURE § 2459 (3d ed. 2011) (quoted in *Mann v. Univ. of Cincinnati*, Nos. 95-3195, 95-3292, 1997 WL 280188, at \*4 (6th Cir. May 27, 1997)). Defendants have not claimed any personal right or privilege with respect to the documents to be produced by Mr. Bishop at his deposition.

Even if Defendants do have standing to quash the subpoena, they have not stated sufficient cause to quash the subpoena. FED. R. CIV. P. 45(c)(3)(A)(ii) limits the distance a third party must travel to answer a subpoena to 100 miles. Therefore, it seems logical that the 70

miles to travel from Lexington to Louisville does not constitute an undue burden or expense even on a third party—let alone a party to the lawsuit.

**IT IS, THEREFORE, ORDERED AND ADJUDGED** that the Motion is **OVERRULED**.

**Copy to:**

Michael J. Gartland, Esq.  
Roger C. Simmons, Esq.  
Joe F. Childers, Esq.  
Richard A. Getty, Esq.  
Ellen Arvin Kennedy, Esq.

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***The affixing of this Court's electronic seal below is proof this document has been signed by the Judge and electronically entered by the Clerk in the official record of this case.***



**Signed By:**  
**Joseph M. Scott, Jr.**  
**Bankruptcy Judge**  
**Dated: Thursday, December 29, 2011**  
**(jms)**