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Utah Department of Commerce
Division of Securities

Attorneys for Respondents VYSN Capital, LLC and Shawn Blaine Smart

BEFORE THE DIVISION OF SECURITIES
OF THE DEPARTMENT OF COMMERCE
OF THE STATE OF UTAH

IN THE MATTER OF:

RIDGELAND WYOMING, INC.,
VYSN CAPITAL, LLC, BRYAN R.
FARRIS, SHAWN BLAINE SMART,
AND GARY FRANK LAWYER,

Respondents.

**OPPOSITION TO MOTION FOR A
PROTECTIVE ORDER AND TO
ADJUST SOME PRETRIAL
DEADLINES**

Docket No. SD-11-0052
Docket No. SD-11-0053
Docket No. SD-11-0054
Docket No. SD-11-0055
Docket No. SD-11-0056

Respondents Vysn Capital, LLC (“Vysn”) and Shawn Blaine Smart (“Smart”) (collectively referred to herein as “Respondents”), by and through their undersigned counsel of record, hereby submit this memorandum in opposition to the Division’s “Motion for a Protective Order and To Adjust Some Pretrial Deadlines.”

PROCEDURAL HISTORY

1. Respondents have previously moved to vacate the Scheduling Order in this matter and requested a new scheduling conference due to the delays that have been caused by the Division's repeated efforts to prevent Respondents from obtaining discovery.

2. As of this date the Court has ruled on the Motion to Quash filed by the victims, and narrowed the scope of the subpoenas. However, because there were no deadlines imposed for production, not a single document has been produced pursuant to these subpoenas.

3. Respondents' counsel has requested informal interviews with the witnesses, as is required by statute, but those requests were ignored until May 17, 2012 when Philip Martin, counsel to Jardine and Gillespie, responded that his clients "are unwilling to allow [Respondents] to do a fishing expedition to prepare you for a deposition or trial."

4. Respondents therefore are now permitted to depose these witnesses, but cannot do so until the requested documents are produced. Mr. Martin has not provided any date by which the requested documents will be produced.

5. Respondents have proposed June 12 and 13, 2012 for these depositions, but are still waiting for confirmation from the other parties that those dates are acceptable, and that the documents will be available before that time.

6. On May 2, 2012, immediately upon learning that their Farris and Ridgeland had settled with the Division, Respondents served discovery requests seeking documents that relate to this case, such as correspondence, account statements, disclosure documents and documents related to settlement negotiations. A copy of the Requests is attached as Exhibit A to the Division's Motion for Protective Order.

7. The Division thereafter filed a Motion for a Protective Order seeking to prevent Respondents from obtaining this information – information that may not be obtained from any other source. These discovery requests were necessary because these parties settled unexpectedly, and Respondents do not have any other way to access this information.

8. The parties to whom the discovery requests were directed, Ridgeland Wyoming, Bryan R. Farris and Gary Frank Lawyer, have not filed a motion for a protective order or otherwise objected to the discovery requests, and the time for response has not yet arrived. No documents have been produced.

9. Respondents Motion to Vacate the Scheduling Order in this matter is still pending, so it is unclear what deadlines currently apply.

DISCUSSION

Yet again the Attorney General's office has filed a motion in an attempt to prevent Respondents from obtaining discovery in this matter. Yet again they are stepping in and intervening in discovery directed towards other parties – parties the AG's office does not represent and who are represented by capable legal counsel. They have even gone so far as to file objections that the requests would be "burdensome, oppressive, annoying and cause undue expense" (Page 5). These are objections that can and should be made by the Ridgeland respondents, not the Division or the AG's office.

At the same time they are attempting to prevent this discovery, the Division's counsel is aggressively pushing an aggressive trial schedule that will make it virtually impossible for Respondents to obtain documents for their defense or otherwise prepare for trial. All of this appears to be a clear and coordinated attempt by the State of Utah to deny Respondents their constitutional right to due process of law.

A. The Discovery Requests

Among other things, the Requests seek correspondence between the Division and Ridgeland after the OSC was filed. This is information that is clearly discoverable and should have been produced automatically by the Division – regardless of whether it included settlement communications. Regardless of whether they have settled their case, Bryan R. Farris and Gary Frank Lawyer are *still going to be key witnesses* at the trial of this matter.

Respondents believe that there are communications between the Division and these parties wherein they agreed to testify in a way that would be favorable to the Division’s case as part of the consideration for their settlement. If so, this is clear evidence of bias and will be used to impeach these witnesses if appropriate. Rule 408 of the Utah Rules of Evidence only relates to admissibility not discoverability. The rule provides that offers of compromise cannot be admitted “either to prove or disprove liability for or the validity or amount of a disputed claim.” This type of evidence can, however, be offered for other purposes.

Rule 408(b) contains two key exceptions to the rule. Offers to compromise may be admitted for the purpose of “proving a witness’s bias or prejudice,” and that is the purpose for which this information is sought. Moreover, Rule 408 clearly provides that the court “is not required to exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.” This information is clearly discoverable, and the motion should be denied.

The Division states that this evidence should be protected because it is “not relevant to the issues” in this case. But Respondents are not required to take the Division’s word for whether these documents are relevant or not. The documents are clearly discoverable and should

be produced. As the court is well aware all admissibility rulings – including relevance objections – should be made at trial, not in the discovery stage of the case.

B. Requests for Admission

Again, the Division’s legal counsel is objecting to discovery that was not served on the Division, and appears to be filing motions and asserting objections on behalf of other parties. This is highly unusual and is an improper use of State resources. The Ridgeland Respondents are represented by competent counsel.

Moreover, as acknowledged by the Division, in situations where there are no rules the parties may conduct discovery under the Utah Rules of Civil Procedure. This is precisely such a circumstance. As there are no provisions permitting – or prohibiting – requests for admissions under the agency rules then the Court should permit them. Requests for admissions are clearly provided for by Rule 36 of the Utah Rules of Civil Procedure. These requests are not burdensome and could assist in getting to the bottom of certain facts in advance of the trial in this matter.

OPPOSITION TO MOTION TO ADJUST PRETRIAL DEADLINES

Respondents strongly believe that the entire scheduling order should be vacated and the hearing continued so that discovery can be conducted. As set forth in detail in Respondents Motion to Vacate, and above, Respondents’ efforts to conduct discovery have been held up by numerous motions filed by the Division and by the victims’ counsel. Only one of these motions has been ruled upon and not a single document has been produced. The current scheduling order should be vacated because Respondents need the Court to rule on all of the pending motions in this case and obtain the discovery they have sought in order to prepare for trial.

There are fundamental fairness and due process considerations here. R151-4-109(2)(b)(ii) provides that hearing can be continued “if the presiding officer finds that injustice would result from failing to grant the extension or continuance.” This is such a case. The Division’s efforts to force this case to trial without providing Respondents reasonable or adequate time to obtain discovery and prepare a defense would be a denial of due process and will likely result in a reversal of this case on appeal.

DATED this 23rd day of May 2012.

RAY QUINNEY & NEBEKER P.C.



Mark W. Fugsley

*Attorneys for Respondents Vysn Capital, LLC
and Shawn Blaine Smart*

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CERTIFICATE OF SERVICE

I hereby certify on this 23rd day of May 2012, a true and correct copy of the **OPPOSITION TO MOTION FOR A PROTECTIVE ORDER AND TO ADJUST SOME PRETRIAL DEADLINES** was served by U.S. First Class Mail, postage prepaid, to the following:

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A large, stylized handwritten signature in black ink, likely belonging to Mark D. Stubbs, is written over a horizontal line. The signature is highly cursive and loops around the line.