

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

FILED IN DISTRICT COURT  
OKLAHOMA COUNTY

Oklahoma Department of Securities )  
ex rel. Irving L. Faught, )  
Administrator, )  
Plaintiff, )  
v. )  
Nicholas P. Yukich, III, )  
Nick's Oil & Gas Corp, and )  
NUCO Energy, LLC, )  
Defendants. )

DEC 31 2014

TIM RHODES  
COURT CLERK

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Case No. CV-2014-2093  
Judge Roger Stuart

**OPPOSITION TO DEFENDANT NUCO ENERGY, LLC'S, MOTION TO DISMISS**  
**AND**  
**AUTHORITY IN SUPPORT**

Plaintiff, Oklahoma Department of Securities ("Department") ex rel. Irving L. Faught, Administrator, respectfully requests this Court deny Defendant NUCO Energy, LLC's ("NUCO") *Motion to Dismiss* ("Motion"). The Department filed its *Application to Enforce Subpoena Compliance* ("Application") to enforce an administrative subpoena duces tecum issued by the Administrator to NUCO on March 5, 2014 (the "Subpoena"). In its Motion, NUCO argues it should be dismissed from this case based on an alleged "insufficiency of process [and] insufficiency of service of process" of the Subpoena and "as a result, failure to state of claim which relief can be granted [sic] and lack of jurisdiction." Motion at Introductory Paragraph and ¶¶ 1 – 8. NUCO's Motion should be denied.

**Relevant Facts**

1. Jerry Griggs ("Griggs") is NUCO's last known registered agent in Oklahoma. See Application at "Exhibit B".

2. Griggs, as conceded to in his affidavit, is the “Manager” of NUCO. Motion at “Exhibit A”, ¶ 2.

3. In the Motion, NUCO asserts the Subpoena was received and signed for by Janel Yukich (“Yukich”) and references “Exhibit F” of the Application as proof of that assertion. Motion at ¶ 8. NUCO then relies on this assertion in an attempt to evidence the Subpoena was improperly served on NUCO. Motion at ¶ 8. *This assertion is incorrect.* “Exhibit F” to the Application, signed for by Yukich, is a demand letter to NUCO, not the Subpoena. Compare Application “Exhibit D” (Return receipt for the Subpoena) and “Exhibit F” (Return receipt for the demand letter).

4. The Subpoena, as stated in the Application at par. 7, was sent to NUCO in accordance with 660:2-7-3(e) of the Rules of the Oklahoma Securities Commission and the Administrator of the Department of Securities (“Rules”), Okla. Admin. Code §§ 660:1-1-1 through 660:25-7-1 (2013). *The Subpoena was signed for by Griggs.* Application at “Exhibit D” (Return receipt signed by Griggs).

5. The Motion does not claim insufficiency of process or service of process regarding the Department’s pleading—the Application—itsself.

#### **Argument and Authorities**

The Department respectfully requests the Court deny the Motion on the following grounds: 1) NUCO’s defense of failure to state a claim upon which relief can be granted is without merit as the Department’s claim—enforcement of the *properly served* Subpoena—is statutorily authorized, along with the relief requested; 2) NUCO provides no facts or argument disputing the sufficiency of process or service of process as to the Application; and 3) the Court has proper jurisdiction. Additionally, NUCO’s conclusory

allegation that the “Definitions and Instructions contained in the Subpoenas [sic]...constitute an undue burden and far exceed the scope and spirit of Rules [sic]” is not a defense, much less one authorized under 12 O.S. 2012(B). However, in so far as the Court would entertain such a “defense,” the Subpoena does not impose an undue burden on NUCO nor exceed the “scope or spirit” of the Rules.

### **I. The Department States a Valid Claim**

The Department’s action may only be dismissed, based on failure to state a claim upon which relief can be granted, if it appears without a doubt the Department can prove no set of facts in support of a claim entitling relief. *Brown v. Founders Bank & Trust Co.*, 890 P.2d 855, 860-61 (Okla. 1994)(citations omitted).

NUCO appears to assert its 2012(B)(6) defense based on the alleged insufficiency of process and service of process relating to the Subpoena. Motion at Introductory Paragraph and ¶¶ 1 – 8. However, service of the Subpoena was proper, sufficient and in accordance with the Oklahoma Uniform Securities Act of 2004 (“Act”), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (2011), Rules and case law. The Application states a claim upon which relief can be granted

As stated by the Oklahoma Supreme Court, “[t]he burden of affording proper notice rests on the plaintiff”, in this case, the Department. *Bomford v. Socony Mobil Oil Co.*, 440 P.2d 713, 719 (Okla. 1968). When more than one statute addresses a subject matter—as is the case here where service of the Subpoena, issued under the Act, is addressed by the Act, Rules and Title 12—the Oklahoma Supreme Court has ruled that:

Where there are two provisions of the statutes, one of which is special and particular and clearly includes the matter in controversy, and where the special statute covering the subject prescribes different rules and procedure from those in the general statute, it will be held, that the special

statute applies to the subject-matter, and that the general statute does not apply.

*State ex rel. Moore v. O'Bannon*, 182 Okla. 173, ¶ 6 (1938). Further, general laws are excluded when specific statutes are applied. *Waddle v. Waddle*, 868 P.2d 751, 753 (Okla. Civ. App. 1994)(citation omitted). It is undisputed that proper service of the Subpoena is predicated upon compliance with 660:2-7-3(e) of the Rules that states: "Subpoenas shall be served in the manner provided by law." Application at ¶ 7; Motion at ¶ 4. It is also undisputed that, pursuant to 660:2-7-3(e) of the Rules, the Subpoena must be served in accordance with 12 O.S. § 2004.1(B). Application at Note 1; Motion at ¶¶ 4 – 6.

NUCO asserts that: 1) service of the Subpoena was improper because Yukich signed for it and Yukich is not "the person named in the subpoena", or an authorized agent, as required by 12 O.S. § 2004.1(B)(2); and 2) the Subpoena did not include language required by 12 O.S. § 2004.1(B)(1). Motion at ¶¶ 7 – 9. NUCO is incorrect on both assertions.

As described above in paragraphs 1 – 4, Yukich did not sign for the Subpoena. Griggs, the last known registered agent and "Manager" of NUCO, signed for the Subpoena thereby complying with the statutory requirements of 12 O.S. § 2004.1(B)(2) that delivery must be made upon the person named therein. NUCO's assertion that Yukich, and not Griggs, signed for the Subpoena is incorrect.

In its Motion, NUCO cites 12 O.S. § 2004.1(B)(1) for the proposition that the Subpoena required the inclusion of the following language:

In order to allow objections to the production of the documents and things to be filed, you should not produce them until the date specified in this subpoena, and if an objection is filed, until the court rules on the objection.

Motion at ¶ 9. However, the Act, a specific statute, does NOT require such language for a subpoena issued under the same. The Act, in Section 1-602(D), specifically addresses the procedure for any person requesting relief from a subpoena. Further, 660:2-7-3(g) of the Rules sets forth the right of any person compelled to furnish documentary evidence to the Department to be advised, subject to confidentiality laws, as to the purpose and scope of an investigation. Because the requirements of the Act speak to the relief to, and the rights of, any person subject to a subpoena issued under the same, the language of the Act and Rules control and not that of the general statute, Title 12.

## **II. Service of the Application is Proper and Uncontested**

NUCO does not state any fact or make any argument as to the sufficiency of process or service of process of the Application. NUCO only asserts alleged defects of process and service of process as to the Subpoena. As shown above, the Subpoena was properly served on NUCO.

## **III. The Court has Jurisdiction**

The Motion claims a general defense of “lack of jurisdiction” but does not specify which enumerated jurisdictional defense NUCO invokes, 12 O.S. 2012(B)(1), (2), or both. Motion at Introductory Paragraph. NUCO does not appear to contest the Court’s exercise of personal jurisdiction. Instead, NUCO appears to assert this Court lacks subject-matter jurisdiction based on its claim the Subpoena was improperly and insufficiently served. As the Oklahoma Supreme Court stated:

Subject matter jurisdiction is invoked by the pleadings filed with the court. Where the pleadings state a case over which the jurisdiction of the court extends, jurisdiction attaches and the court has the power to hear and

determine the issues involved.

*In re A.N.O.*, 91 P.3d 646, 649 (Okla. 2004)(citations omitted). In addition to a court's "power and authority...to hear and determine causes of the kind in question", a court must also possess the "power...to decide the particular matter and render the particular judgment at issue." *Id.*

The Application clearly cites the statutory foundation of this Court's subject-matter jurisdiction over the Department's action as well as the power to decide and render the relief the Department seeks. Application at pgs. 5 – 6. Section 1-602(C) of the Act states that the Administrator "may apply to the district court of Oklahoma County...to enforce compliance [with the Subpoena.]" Further, this section of the Act clearly enumerates the relief this Court may order including the granting of "any other necessary or appropriate relief." Because NUCO does not contest the Court's exercise of personal jurisdiction and the Department clearly, and unequivocally, invokes this Court's subject-matter jurisdiction through the statutory provision cited in the Application, this Court has jurisdiction over this action.

#### **IV. The Subpoena is not Unduly Burdensome and is within the Scope and Spirit of the Rules**

Although not available as an enumerated defense under 12 O.S. § 2012(B), NUCO asserts that the Subpoena, through its "Definitions and Instructions" section ("D&I"), "constitute[s] an undue burden and far exceed[s] the scope and spirit of Rules [sic]." Motion at ¶ 10. NUCO then provides an "example" by referencing language in the Subpoena's cover letter:

Documents required by this Subpoena must be produced in an electronic and native format in accordance with the [D&I] sections of the Subpoena. (Emphasis omitted)

Application at “Exhibit D”, cover letter ¶ 2. This language, in turn, derives from instruction no. 2 of the D&I that states:

Documents required by the [S]ubpoena must be produced in an electronic format. The documents shall be in their native format with all associated metadata.<sup>1</sup>

Compliance with a subpoena issued by the Department must not be unreasonably burdensome. *State ex rel. Oklahoma Bar Ass’n v. Gasaway*, 863 P.2d 1189, 1199 (Okla. 1993)(citations omitted). The Act and Rules are silent as to the form of production relating to subpoenas issued under the Act. Therefore, the general statute, Sections 3224 through 3237 of Title 12, the “Oklahoma Discovery Code” (“ODC”), controls. *State ex rel. Moore v. O’Bannon*, 182 Okla. 173, ¶ 6 (1938). Section 3234(B)(3)(c) of the ODC states that the Subpoena may “specify the form or forms in which electronically stored information is to be produced.”

The Rules are silent as to the allowable scope of the Subpoena, the Act is not. Section 1-602(B) of the Act states the Administrator may “require the production of any records that the Administrator considers relevant or material to the investigation or proceeding.” Disclosure of documents obtained by the Department, including documents leading to the Administrator’s judgment of what records are relevant or material to an investigation, are confidential and shall not be made available to the public—including NUCO—unless ordered by the Administrator, disclosed pursuant to Subchapter 9 of Chapter 2 of the Rules or as otherwise provided by law. 660:2-7-3(h) of the Rules.

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<sup>1</sup> Assistance complying with subpoenaal technical requirements may be attained by calling the Department’s IT office at (405) 280-7710. The subpoenaed person shall, at all times, retain the legal obligation and responsibility of complying with the [Subpoena]. (footnote from cited instruction)

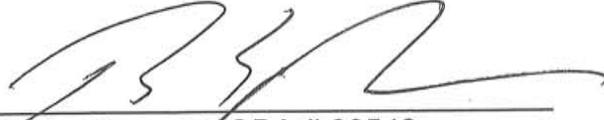
Because of the language cited in the Motion, the undue burden NUCO asserts is presumably based on the Subpoena's format instruction and scope. The Subpoena's format instruction does not impose an undue burden on NUCO merely by its existence. As authorized by Section 3234(B)(3)(c) of the ODC, the Subpoena may, and does, specify the format in which electronically stored information ("ESI") must be produced. At no point has NUCO informed the Department or this Court that any of the documents requested are not kept as ESI or of any reason why producing ESI in its native format is somehow unreasonably burdensome. If some, or all, responsive documents are in fact not kept as ESI, the Department is more than willing to confer with NUCO regarding the production of these documents in another format. NUCO provides no argument as to why the subpoenaed documents would not be relevant or material to the Department's investigation of possible offers and sales of securities in violation of the Act as authorized by Section 1-602(B) of the same. As evidenced by the issuance of the Subpoena, the Administrator believes the records at issue are relevant and material based on confidential documents obtained by the Department. Accordingly, the Subpoena is within the scope and "spirit" of the Rules and should be enforced.

**WHEREFORE**, the Department respectfully requests this Court deny NUCO's request to be dismissed from the above-captioned case.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES  
IRVING L. FAUGHT, ADMINISTRATOR

By:

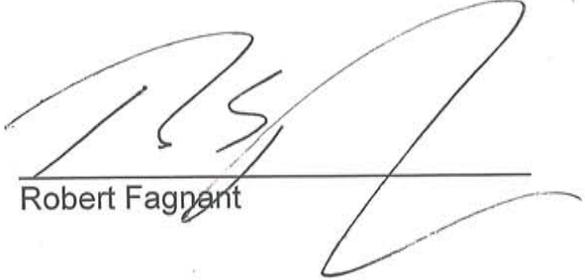


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**CERTIFICATE OF MAILING**

The undersigned hereby certifies that on the 31st day of December, 2014, a true and correct copy of the above and foregoing *Opposition to Defendant NUCO Energy, LLC's, Motion to Dismiss* was mailed electronically and with postage prepaid thereon, via first-class US mail, addressed to:

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