

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF COMMERCE

In the Matter of the Certificate of Default  
and Order Issued to Terminal Transport

**ORDER GRANTING MOTION  
TO COMPEL AND MOTION TO  
EXTEND EXPERT REPORT DEADLINE**

Administrative Law Judge James E. LaFave held a hearing on the Department of Commerce's Motion to Compel and Motion to Extend the Expert Report Deadline on April 4, 2016. The motion record closed on that date.

Christopher M. Kaisershot, Assistant Attorney General, represented the Minnesota Department of Commerce (Department). Richard J. Reding, Larkin Hoffman Daly & Lindgren Ltd, appeared on behalf of Terminal Transport (Respondent). Michael J. Ahern and Kirsten Schubert, Dorsey & Whitney LLP, represent the Minnesota Insurance Guaranty Association (MIGA).

Based on the file and proceedings, and for the reasons articulated in the attached Memorandum, the Administrative Law Judge makes the following:

**ORDER**

1. The Department's Motion to Compel Discovery is **GRANTED** as more fully described in the Memorandum below. The Department's Motion to Extend the Expert Report Deadline is also **GRANTED**.
2. Respondent shall respond to the Department's discovery requests by **Monday, June 6, 2016**.
3. The parties shall identify expert witnesses and serve expert witness statements by **Tuesday, July 5, 2016**.
4. Any dispositive or non-dispositive motions shall be served and filed by **Tuesday, July 12, 2016**. The responding party shall have ten (10) working days in which to serve and file a written response. Any hearing on a motion shall be scheduled to be heard after the completion of the briefing deadlines for both parties. The procedure for motion practice is set forth in Minn. R. 1400.6600 (2015).
5. By **4:30 p.m. on Monday, October 10, 2016**, the parties shall exchange and file with this Office their proposed pre-labeled exhibits, an index of the proposed exhibits, and their witness list. The Department shall label its exhibits sequentially using numbers 1 through 99. Respondent shall label their exhibits sequentially using numbers

100 through 199. MIGA shall label its exhibits sequentially using numbers 200 through 299.

6. A hearing in this matter will be held at the Office of Administrative Hearings, 600 North Robert Street, St. Paul, Minnesota 55101, on **Monday, October 17, 2016**, beginning at **9:30 a.m.**, and continuing as necessary, on **October 18** and **October 19, 2016**.

Dated: May 4, 2016

  
JAMES E. LAFAVE  
Administrative Law Judge

## MEMORANDUM

### Motion to Compel

On March 11, 2016, the Department moved the Administrative Law Judge for an Order to Compel discovery.<sup>1</sup> The Department argues that “[t]he discovery requested by the Department is necessary for the proper presentation of the Department’s case and to rebut [Respondent’s] affirmative defense that it is insolvent.”<sup>2</sup> Respondent argues that it either does not keep the requested information in the ordinary course of business or it is not readily accessible.<sup>3</sup>

“The purpose of the discovery rules is to prevent unjust surprise so that all relevant facts may be ascertained before trial.”<sup>4</sup> According to the Minnesota Rules of Civil Procedure, parties may obtain discovery regarding any matter that is not privileged and is relevant to any claim or defense.<sup>5</sup> However, “[d]iscovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality.”<sup>6</sup> These factors include “the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.”<sup>7</sup> In general, a party must produce any documents in the party’s “possession, custody, or control.”<sup>8</sup>

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<sup>1</sup> Department’s Motion to Compel and Motion to Extend Expert Report Deadline (Mar. 11, 2016) (Department’s Motion).

<sup>2</sup> *Id.* at 7.

<sup>3</sup> Motion to Compel Hearing (Hearing) (April 4, 2016)

<sup>4</sup> *Sandberg v. Comm’r of Revenue*, 383 N.W.2d 277, 281 (Minn. 1986).

<sup>5</sup> Minn. R. Civ. P. 26.02(b).

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> Minn. R. Civ. P. 34.01.

At the Office of Administrative Hearings, “[a]ny means of discovery available pursuant to the Rules of Civil Procedure for the District Court of Minnesota is allowed.”<sup>9</sup> “[T]he party seeking discovery shall have the burden of showing that the discovery is needed for the proper presentation of the party’s case, is not for purposes of delay, and that the issues or amounts in controversy are significant enough to warrant the discovery.”<sup>10</sup>

First, the record evidence indicates that this discovery is needed for the proper presentation of the Department’s case.<sup>11</sup> Respondent’s claimed insolvency is the primary issue in this case. By claiming to be insolvent, and thereby seeking to avoid the otherwise applicable treble damages, Respondent has placed its financial health at issue. Therefore, expert analysis and scrutiny of Respondent’s finances is required. Next, there is no indication, nor does Respondent claim, that the Department is using discovery for purposes of delay. And lastly, the treble penalty in this case is in excess of \$500,000.<sup>12</sup> This amount is significant. Because Respondent’s solvency is the primary issue in this case, and the discovery sought relates directly thereto, the discovery is proportional when “the burden or expense of the proposed discovery [is] weighed against its likely benefit.”<sup>13</sup>

In sum, because the Department has demonstrated that this discovery is needed for the proper presentation of the party’s case, is not for purposes of delay, and the issues or amounts in controversy are significant enough to warrant discovery, the Administrative Law Judge grants the Department’s Motion to Compel, as discussed in detail below.

## ***INTERROGATORIES***

### **Interrogatory No. 1:**

Identify each Person who You expect to call as an expert witness at any hearing, and for each such witness, provide the following:

- (a) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (b) all the facts or data considered by the witness in forming them;
- (c) any exhibits that will be used to summarize or support them;
- (d) the witness’s qualifications, including a list of all publications authored in the previous 10 years;
- (e) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (f) a statement of the compensation to be paid for the study and testimony in the case.<sup>14</sup>

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<sup>9</sup> Minn. R. 1400.6700, subp. 2 (2015).

<sup>10</sup> *Id.*

<sup>11</sup> *See id.*

<sup>12</sup> Hearing.

<sup>13</sup> *See* Minn. R. Civ. P. 26.02(b).

<sup>14</sup> Exhibit (Ex.) 6.

**Answer:**

None at this time. Terminal Transport will supplement this interrogatory if and when an expert is retained.<sup>15</sup>

**Order:**

At the hearing, Respondent indicated, and the Department confirmed, that it has provided (a) and (c).<sup>16</sup> Respondent further stated that it will provide (b), (d), (e), and (f).<sup>17</sup> The Administrative Law Judge orders Respondent to provide the information requested in interrogatory No. 1.

**Interrogatory No. 4:**

State the full name, present address, and telephone number of every Person known to You who has knowledge of any facts relating to the above-entitled regulatory action and give a detailed statement of the facts believed to be known by each such Person.<sup>18</sup>

**Answer:**

Brent Coatney, owner, president of Terminal Transport  
Tracy Davenport, company comptroller (no longer employed by company)  
Mark Johnson, workers' compensation attorney<sup>19</sup>

**Supplemental Response:**

Brent Coatney and any other employee of Terminal referred to in Plaintiff's Interrogatories may be reached through undersigned counsel.  
Terminal does not have a current address for Ms. Davenport.  
Terminal's workers compensation attorney is Mark J. Freeman, Thill and Freeman, 5353 Wayzata Boulevard, Suite 208, St. Louis Park, MN, 55416, Phone 612-444-3981.<sup>20</sup>

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<sup>15</sup> Ex. 9.

<sup>16</sup> Hearing.

<sup>17</sup> *Id.*

<sup>18</sup> Ex. 6.

<sup>19</sup> Ex. 9.

<sup>20</sup> Ex. 14.

**Order:**

The Department first requests the “detailed statement of facts believed to be known by each such Person.”<sup>21</sup> In addition, assuming she has knowledge of relevant facts, the Department seeks the last-known contact information for Tracy Davenport.<sup>22</sup> The Administrative Law Judge orders Respondent to provide the information requested in Interrogatory No. 4.

**Interrogatory No. 5:**

State the full name, present address, and telephone number of every Person known to You who has knowledge of any facts relating to any loan from BRB Transportation, Inc., to Terminal Transport, Inc., and give a detailed statement of the facts believed to be known by each such Person.<sup>23</sup>

**Objection:**

Question is irrelevant and not likely to lead to relevant information.<sup>24</sup>

**Answer:**

Bill Coatney, Bill Jacobs (CPA), Tracy Davenport (former controller), Linda Gorton (current controller)<sup>25</sup>

**Supplemental Answer:**

See Answer to Interrogatory No. 4. Mr. Jacob (incorrectly referred to as Jacobs above) may be reached at the following address:

Cummings, Keegan & Co., PLLP  
600 South Highway 169  
Suite 1625  
St. Louis Park, MN 55426  
952-345-2500  
952-345-2566 Fax

**Interrogatory No. 6:**

State the full name, present address, and telephone number of every Person known to You who has knowledge of any facts relating to any loan from CLJMR, Inc., to Terminal Transport, Inc., and give a detailed statement of the facts believed to be known by each such Person.<sup>26</sup>

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<sup>21</sup> Hearing.

<sup>22</sup> *Id.*

<sup>23</sup> Ex. 6.

<sup>24</sup> Ex. 9.

<sup>25</sup> *Id.*

<sup>26</sup> Ex. 6.

**Objection:**

See objection to No. 5, above.<sup>27</sup>

**Answer:**

Brent Coatney, Bill Jacobs (CPA), Tracy Davenport (former controller),  
Linda Gorton (current controller)<sup>28</sup>

**Supplemental Answer:**

See Answer to Interrogatory No. 5 above.<sup>29</sup>

**Interrogatory No. 7:**

State the full name, present address, and telephone number of every Person known to You who has knowledge of any facts relating to any loan from Brent Coatney to Terminal Transport, Inc., and give a detailed statement of the facts believed to be known by each such Person.<sup>30</sup>

**Objection:**

See objections to Nos. 5 and 6, above.<sup>31</sup>

**Answer:**

Brent Coatney, Bill Jacobs (CPA), Tracy Davenport (former controller),  
Linda Gorton (current controller)<sup>32</sup>

**Supplemental Answer:**

See Answer to Interrogatory No. 5 above.<sup>33</sup>

**Order:**

Interrogatories 5, 6, and 7 relate to potential liabilities on Respondent's balance sheet, and are therefore relevant to an insolvency determination. The Department requests a detailed response to these interrogatories.<sup>34</sup> Respondent contends that it has provided the full list of individuals who have knowledge of these loans.<sup>35</sup> First, the Administrative Law Judge orders Respondent to confirm that the names of all persons

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<sup>27</sup> Ex. 9.

<sup>28</sup> *Id.*

<sup>29</sup> Ex. 14.

<sup>30</sup> Ex. 6.

<sup>31</sup> Ex. 9.

<sup>32</sup> *Id.*

<sup>33</sup> Ex. 14.

<sup>34</sup> Hearing.

<sup>35</sup> *Id.*

with knowledge of these loans has been provided to the Department. In addition, the Administrative Law Judge orders Respondent to provide any further information requested, and not yet provided, in Interrogatory Nos. 5, 6, and 7.

**Interrogatory No. 10:**

If You claim that the Department, including its counsel, investigators, employees, or representatives, made any admissions against interest, describe in complete factual detail the content of each and every said admission, Identify each and every Person making said admission, and Identify each and every witness to each and every said admission.<sup>36</sup>

**Answer:**

Representatives from both MIGA and the Department of Commerce indicated that the penalty provisions under which they used 300% penalty were solely to be applied against those entities or persons who were acting in bad faith and without good reason. They stated that Terminal was acting in good faith.<sup>37</sup>

**Order:**

At hearing, Respondent indicated that it has provided all information within its knowledge regarding Interrogatory No. 10.<sup>38</sup> The Administrative Law Judge orders Respondent to confirm it has nothing further to provide pursuant to this request.

***DOCUMENTS***

**Request No. 4:**

A copy of your general ledger as of May 31, 2012.<sup>39</sup>

**Objection:**

Document is irrelevant to these proceedings and not likely to lead to relevant information.<sup>40</sup>

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<sup>36</sup> Ex. 6.

<sup>37</sup> Ex. 9.

<sup>38</sup> Hearing.

<sup>39</sup> Ex. 6.

<sup>40</sup> Ex. 10.

**Request No. 5:**

A copy of your current general ledger.<sup>41</sup>

**Objection:**

See objection to Requests above.<sup>42</sup>

**Order:**

At hearing, the Department acknowledged that it has received the documents sought in Request Nos. 4 and 5.<sup>43</sup>

**Request No. 12:**

All Documents exchanged by and between You and MIGA (or any representatives acting on its behalf) related to [redacted] workers' compensation claim or work-related injury, including without limitation all payments to MIGA or demands from MIGA for payment.<sup>44</sup>

**Response:**

Documents responsive to this request are available for inspection and copying at the law offices of Larkin, Hoffman, Daly & Lindgren at a time convenient to the parties.<sup>45</sup>

**Request No. 17:**

All past-due notices or dunning letters that You have received from or on behalf of any of Your creditors since May 31, 2012.<sup>46</sup>

**Response:**

MIGA has sent several notices of amount due and overdue payments. The most recent copy is available for inspection at the law offices of Larkin, Hoffman, Daly & Lindgren at a time convenient to the parties.<sup>47</sup>

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<sup>41</sup> Ex. 6.

<sup>42</sup> Ex. 10.

<sup>43</sup> Hearing.

<sup>44</sup> Ex. 6.

<sup>45</sup> Ex. 10.

<sup>46</sup> Ex. 6.

<sup>47</sup> Ex. 10.

**Order:**

At the hearing, Respondent indicated that it has provided all information regarding document Request Nos. 12 and 17.<sup>48</sup> The Administrative Law Judge orders Respondent to confirm that it has provided all requested documents.

**Request No. 21:**

All Documents related to any loans from Brent Coatney to You, including promissory notes, invoices, proofs of payment or transfer of funds, loan agreements, pledges, guarantees, notes, and company records authorizing such loans.<sup>49</sup>

**Response:**

Documents responsive to this request are available for inspection and copying at the law offices of Larkin, Hoffman, Daly & Lindgren at a time convenient to the parties.<sup>50</sup>

**Request No. 22:**

All Documents related to any loans from BRB Transportation, Inc., to You, including promissory notes, statements, invoices, proofs of payment or transfer of funds, loan agreements, pledges, guarantees, notes, and company records authorizing such loans.<sup>51</sup>

**Response:**

Documents responsive to this request are available for inspection and copying at the law offices of Larkin, Hoffman, Daly & Lindgren at a time convenient to the parties.<sup>52</sup>

**Request No. 23:**

All Documents related to any loans from CLJMR, Inc., to You, including promissory notes, statements, invoices, proofs of payment or transfer of funds, loan agreements, pledges, guarantees, and company records authorizing such loans.<sup>53</sup>

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<sup>48</sup> Hearing.

<sup>49</sup> Ex. 6.

<sup>50</sup> Ex. 10.

<sup>51</sup> Ex. 6.

<sup>52</sup> Ex. 10.

<sup>53</sup> Ex. 6.

**Response:**

Documents responsive to this request are available for inspection and copying at the law offices of Larkin, Hoffman, Daly & Lindgren at a time convenient to the parties.<sup>54</sup>

**Order:**

As to Request Nos. 21-23, the Department seeks invoices or proof of payment/fund transfers.<sup>55</sup> The Department is concerned with the legitimacy of these loans.<sup>56</sup> Respondent stated that it would inquire regarding the availability of further documentation regarding these loans.<sup>57</sup> The Administrative Law Judge orders Respondent to produce the requested information or clarify that it has provided all relevant documentation.

**Request No. 30:**

All appraisal reports and any other supporting documentation for the market value of the equipment and other property owned by You between December 2011 through December 2015.<sup>58</sup>

**Request No. 31:**

All Documents that support the \$999,000 value listed for Revenue Equipment on Your November 30, 2011 Balance Sheet – Estimated Liquidation Value.<sup>59</sup>

**Request No. 32:**

All Documents that support the \$600,000 value listed for Revenue Equipment on Your November 30, 2011 Balance Sheet – Estimated Liquidation After Paying Secured Creditors.<sup>60</sup>

**Request No. 33:**

All Documents that support the \$1,000,000 value listed for Revenue Equipment on Your November 30, 2011 Balance Sheet – Estimated Fair Value After Paying Secured Creditors.<sup>61</sup>

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<sup>54</sup> Ex. 10.

<sup>55</sup> Hearing.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> Ex. 13.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

**Order:**

The Department seeks further detail regarding document Request Nos. 30-33.<sup>62</sup> At the hearing, Respondent stated that it has provided all relevant documentation in its possession.<sup>63</sup> Respondent agreed to supplement its responses if it locates further documentation.<sup>64</sup> The Administrative Law Judge orders Respondent to produce any further information or clarify that it has provided all relevant documentation.

**Request No. 34:**

Copies of the annual schedule(s) of fixed assets owned by You between December 2011 to the present, including all Documents which itemize the following for each fixed asset:

- a) Detailed description of the asset;
- b) Make, model, year, serial number and mileage for the asset;
- c) Date asset purchased;
- d) Purchase price for asset;
- e) Depreciation method for book and tax purposes; and
- f) Accumulated depreciation for book and tax purposes.<sup>65</sup>

**Response:**

Regarding document requests numbers 33-34, Respondent stated that “records related to Terminal’s equipment have been produced. Terminal does not have additional appraisal reports or other documentation. Terminal’s asset listings (documents 000001.pdf through 00023.pdf) contain information on the date the asset was acquired and the price at which it was acquired, as well as accumulated depreciation. Terminal has provided the information it has in its possession, custody, or control.”<sup>66</sup>

As to document Request No. 34 specifically, Respondent indicated that it:

objects to this request inasmuch as it is unduly burdensome and outside the limits of proportionality under Minn. R. Civ. P. 26.02(b) as made applicable to administrative procedures by Minn. R. 1400.6700, subp. 2. Terminal has listed its fixed assets as documents numbered 000001.pdf through 000023.pdf. This listing includes the type of asset, the date the asset was acquired, and the price at which it was acquired. Producing the serial numbers or mileage for each asset would be unduly burdensome, as not all assets remained in

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<sup>62</sup> Hearing.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> Ex. 13.

<sup>66</sup> Ex. 18.

Terminal's possession for the years relevant to the inquiry, and the mileage would naturally change from year to year. The Department has been provided with relevant information concerning the number, nature, and value of Terminal's fixed assets. Nevertheless, Terminal is willing to provide what mileage information it may have, and will provide the data when it can be collected.<sup>67</sup>

**Order:**

The Department seeks the model numbers of Respondent's sold vehicles, as well as mileage.<sup>68</sup> At the hearing, Respondent stated that it has provided all the documentation in its possession.<sup>69</sup> Respondent agreed to supplement its responses if it locates further documentation.<sup>70</sup> The Administrative Law Judge orders Respondent to produce any further information or clarify that it has provided all relevant documentation.

**Request No. 39:**

Native data files from your accounting system for all financial reports that have been requested by the Department.<sup>71</sup>

**Response:**

Respondent informed the Department that its "accounting system is a cloud-based system specific to the trucking and transportation industry. Terminal does not maintain or have access to the native files for this system."<sup>72</sup>

**Order:**

The Department seeks access to relevant files from Respondent's cloud-based accounting system.<sup>73</sup> Respondent contends that these files cannot be produced.<sup>74</sup> Dorsey & Whitney has offered its e-discovery expert to assist with any issues related to obtaining the accounting data.<sup>75</sup> The Administrative Law Judge orders Respondent to produce the requested information to the extent technologically feasible based on the opinion of Dorsey & Whitney's e-discovery expert.

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<sup>67</sup> *Id.*

<sup>68</sup> Hearing.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> Ex. 13.

<sup>72</sup> Ex. 18.

<sup>73</sup> Hearing.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

**Request No. 41:**

All loan statements and payment schedules not previously provided to the Department by You which comprise the liabilities on Your balance sheet, including promissory notes, between January 2012 to the present.<sup>76</sup>

**Request No. 42:**

All loan documents not previously provided to the Department by You which comprise liabilities on your balance sheet, including promissory notes, between January 2012 to the present.<sup>77</sup>

**Response:**

Regarding document request numbers 41-42, Terminal stated that it “has provided all loan documents in its possession or control. The Department’s statement that ‘no responsive data have been provided’ is entirely incorrect. Terminal provided the loan documents in its possession, and the Department has not identified any loans listed on Terminal’s balance sheet that have allegedly not been produced. Should the Department be aware of any such loans, Terminal will provide the missing documentation. However, Terminal believes that it has produced all relevant documents in its possession, custody, or control.”<sup>78</sup>

**Order:**

The Department seeks information regarding any other financial liabilities.<sup>79</sup> At the hearing, Respondent stated that it believes it has provided all relevant documentation in its possession.<sup>80</sup> Respondent agreed to supplement its responses if it locates further documentation.<sup>81</sup> The Administrative Law Judge orders Respondent to produce any further information or clarify that it has provided all relevant documentation.

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<sup>76</sup> Ex. 13.

<sup>77</sup> Ex. 13.

<sup>78</sup> Ex. 18.

<sup>79</sup> Hearing.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

### ***Motion to Extend Expert Report Deadline***

The Department contends that Respondent's "repeated delays and refusal to cooperate in discovery has prejudiced the Department's ability to comply with the expert report disclosure deadline."<sup>82</sup> The Administrative Law Judge agrees good cause exists for a reasonable continuance. It would be prejudicial to require the Department's experts to offer an opinion regarding Respondent's solvency without the opportunity to review pertinent financial information.

**J. E. L.**

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<sup>82</sup> Department's Motion at 19.