

FILED

2013 DEC 13 P 12:35

In re the Matter of:

**EDMUND C. SCARBOROUGH and
WALTER W. WOLF,**

Respondents.

) Docket No. 13-0084

)
) **OFFICE OF THE INSURANCE**
) **COMMISSIONER'S RESPONSE**
) **REGARDING WELLS FARGO**
) **SUBPOENA REQUEST AND**
) **MOTION TO STRIKE**

Hearings Unit, DIC
Patricia D. Peterson
Chief Hearing Officer

After the Washington State Office of the Insurance Commissioner ("OIC") requested that the Chief Hearing Officer issue a subpoena, Wells Fargo and Respondent Edmund C. Scarborough ("Respondent") filed responsive written opposition briefs. This responds to both, and also moves to strike a statement in Respondent's declaration submitted in support of his opposition to the subpoena request. For the reasons that follow, this motion should be granted, and the subpoena should be issued.

A. Respondent misstates the status of discovery and a CR 26(i) conference.

First, Respondent's opposition brief misstates the status of discovery and a conference held pursuant to CR 26(i). As previously noted in OIC's 11/27/13 Motion to Compel and OIC's 12/10/13 Reply in Support of the Motion to Compel, and in the declarations filed therewith, Respondent's statement in his opposition that "[t]he OIC agreed that certain discovery requests would be withdrawn or narrowed based on (1) representations by Scarborough regarding the limited number of bonds issued in Washington and the status of those bonds and (2) supplemental production of bonds" is inaccurate.

B. Respondent misstates the test for the scope of discovery.

Respondent's opposition also misstates the test for whether discovery exceeds the broad scope afforded under the law. Discovery is not limited to only "information that is 'relevant to the subject matter involved in the pending action,'" as asserted at page 6 of Respondent's opposition. Rather, discovery is permissible if "the information sought appears reasonably calculated to lead to the discovery of admissible evidence." CR 26(b)(1).

C. “Common interest doctrine” has no applicability here.

Citing *Sanders v. State*, 169 Wn.2d 827, 240 P.3d 120 (2010), Respondent’s opposition also asserts that the “common-interest doctrine” precludes OIC from conducting discovery into yet unspecified information he claims may exist, loosely described as “[c]onfidential communications between Scarborough and Wells Fargo or their legal representatives concerning their common interests as co-defendants in the Clarkston-Skyline litigation.” Respondent claims OIC’s proposed subpoena to Wells Fargo “encompasses confidential communications between [Respondent] and his legal representatives and those of Wells Fargo,” but does not explain what specific Wells Fargo documents or information he believes deserve “common-interest doctrine” protection or why. Because the doctrine has no application under these facts, Respondent’s assertions should be rejected.

Analysis of whether the “common-interest doctrine” applies to certain information claimed to be subject to the attorney-client privilege does not begin unless the information is found to be subject to the privilege. This privilege, codified in RCW 5.60.060(2), protects “communications and advice between attorney and client.” *Hangartner v. City of Seattle*, 151 Wn.2d 439, 452, 90 P.3d 26 (2004) (quoting *Kammerer v. W. Gear Corp.*, 96 Wn.2d 416, 421, 635 P.2d 708 (1981)); RCW 5.60.060(2)(a). This privilege “does not protect documents that are prepared for some other purpose than communicating with an attorney.” *Hangartner*, 151 Wn.2d at 452. To qualify for attorney-client privilege, a communication must be made in confidence. *Dietz v. John Doe*, 131 Wn.2d 835, 849, 935 P.2d 611 (1997).

Finding a matter to be subject to the attorney-client privilege is not as simple as seeing a communication between an attorney and a person who claims to be a client or that attorney. As the Washington Supreme Court has noted,

Because the privilege sometimes results in the exclusion of evidence otherwise relevant and material, and may thus be contrary to the philosophy that justice can be achieved only with the fullest disclosure of the facts, the privilege is not absolute; rather, it is limited to the purpose for which it exists. [...] As the United States Supreme Court has said:

The common-law principles underlying the recognition of testimonial privileges can be stated simply. “For more than three centuries it has now been recognized as a fundamental maxim that the public . . . has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.”

[...] Employing the attorney-client privilege to prohibit testimony must be balanced against the benefits to the administration of justice stemming from the general duty to “give what testimony one is capable of giving.”

Dietz, 131 Wn2d. at 843 (cites omitted.)

“The [court’s] determination of whether an attorney-client relationship exists is a question of fact.” *Dietz*, 131 Wn.2d at 844 (cite omitted.) The court’s determination will depend on such facts as what actually occurred between an attorney and the person, on whether the person held a subjective belief that the attorney-client relationship truly existed, and on whether the person is truly the attorney’s client – but a court will not only base its determination on an attorney’s mere say-so claiming that the attorney-client relationship existed; such “legal conclusions are interesting, but not dispositive.” *Dietz*, 131 Wn.2d at 844-45 (cites omitted.) Moreover, even if a person claims they held a subjective belief that the relationship existed, “the belief of the client will control only if it ‘is reasonably formed based on the attending circumstances, including the attorney’s words or actions.’”

Id.

Only after it has been determined that certain information or communications are indeed subject to the attorney-client privilege, the next salient question is whether that privilege has been waived by the presence of a third party or by the sharing of that information or communication with a third party. “[W]aiver may occur when the communication is made in the presence of third persons on the theory that such circumstances are inconsistent with the notion the communication was ever intended to be confidential.” *Dietz*, 131 Wn.2d at 850 (cites omitted.) While this waiver can ordinarily only be made by the client, it may also be made by the client’s attorney. “[W]hen the attorney ‘is authorized to speak and act for the client on particular matters, disclosures by the attorney that are within the scope of that

authority waive the privilege to the same extent as disclosures by the client.” *Id.*

While the presence of a third person during the communication waives the privilege (unless the third person is necessary for the communication), the privilege may be found to have *not* been waived if the client had “retained the attorney on a matter of ‘common interest.’” *Morgan v. City of Federal Way*, 166 Wn.2d 747, 757, 213 P.3d 596 (2009) (cite omitted.) This appears to form the root of the “common-interest doctrine.” But as noted in *Reed v. Baxter*, the Sixth Circuit decision cited with approval by the Washington Supreme Court in *Morgan*, “[i]t is clear that the attorney-client privilege will not shield from disclosure statements made by a client to his or her attorney in the presence of a third party.” *Reed v. Baxter*, 134 F.3d 351, 357 (6th Cir. 1998), citing 8 John Henry Wigmore, *Wigmore on Evidence* § 2311 (3d ed. 1940). While the “common-interest doctrine” is a possible exception to the general rule waiving attorney-client privilege, as the *Reed* court noted, such an exception cannot lie where attorney-client communications are had with third parties when some “disparity of interest[s]” exists among the parties. *Id.*

Respondent seems to believe his or his attorney’s sharing of certain unspecified attorney-client privileged communications with Wells Fargo waived the privilege, and then un-waived it by operation of the “common-interest doctrine.” But Respondent bears the burden of proving this doctrine applies, and the court needs to consider the facts surrounding the communication before it can even determine the validity of a claim that the common-interest doctrine saves otherwise waived attorney-client privilege claims. When a party claims the “common interest” doctrine serves as an exception to protect what would normally amount to a waiver of attorney client privilege, for each specific document or other communication the party claims the doctrine applies, the party asserting this protection bears the burden of affirmatively demonstrating how the document or communication implicates any common legal interest. *Morgan*, 166 Wn.2d at 757.

Nevertheless, full analysis of the “common-interest doctrine” here is, however, premature at best. While the “common-interest doctrine” authorizes Washington courts to consider whether the

facts show that the doctrine applies to specific documents and specific information alleged to be subject to the attorney-client privilege, Respondent has not yet provided any of the facts or documents needed to prove the doctrine is even relevant. Nor has any showing been made to establish that Wells Fargo has any information responsive to the subpoena that is even subject to the attorney-client privilege. Washington courts routinely recognize that the party asserting this privilege and this doctrine bears the burden of proving either apply. Indeed, in the *Sanders* case cited by Respondent, the Washington Supreme Court merely supported the trial court's decision to consider the doctrine's application "where relevant" and to "disputed documents." *Sanders*, 169 Wn.2d at 853-54. *Sanders* in no way stands for the proposition that the mere mention of "common-interest doctrine" can or should impede the issuance of an otherwise appropriate and lawful subpoena to a third party with whom Respondent enjoys no such attorney-client privilege, Wells Fargo.

Respondent has not provided none of the needed proof he bears the burden of submitting to establish the common-interest doctrine's application here. He has not shown that any particular information is truly subject to the attorney-client privilege, or that such information is even held by Wells Fargo, let alone responsive to the OIC's proposed subpoena. In the absence of a basis to fairly conclude that any specific, responsive information is subject to the attorney-client relationship, or that the common-interest doctrine prevents waiver, allusion and claims to the doctrine should be rejected.

D. Discovery to Wells Fargo is within the scope of discovery.

Respondent's purportedly "fully collateralized" bonds include "irrevocable trust receipts" issued by Wells Fargo, which are attached to and incorporated into his bonds along with a Wells Fargo letter printed on Wells Fargo letterhead. Essentially, aside from Respondent's own word that he is good for the bonding promises he makes, the only thing that even suggests Respondent's bonds may be trustworthy, or even just somewhat "collateralized," are the documents connecting Wells Fargo to these bonds. Some of these bonds even state they are "void" without the Wells Fargo documentation attached. Respondent argues "Wells Fargo's involvement with the Scarborough Bond Program is not

relevant to any issue in this proceeding,” but the fact that the nationally-recognized bank Wells Fargo has partnered with Respondent’s supposedly “fully collateralized” bonds *is* highly relevant here.

It is expected that one or more witnesses will testify about Wells Fargo’s name recognition and reputation and the weight they gave that in their decision to accept Respondent’s bonds. While many people whose job it is to decide whether to accept or reject one of Respondent’s bonds probably uniformly have no idea what an “irrevocable trust receipt” is or means, to many, Wells Fargo’s good name could make Respondent’s bonds appear trustworthy and legitimate. One or more witnesses responsible for deciding whether to accept or reject Respondent’s bonds are expected to testify that the Wells Fargo paperwork would have carried significant weight in their decision to accept Respondent’s bonds incorporating and relying on that paperwork.

Here, certain known facts combine with the lack of evidence about Respondent’s assets to give rise to legitimate and relevant questions about Wells Fargo’s true role and involvement with Respondent’s bonds. For example, in the SKYLINEPP04152011 bonds that are among the 22 or more bonds at issue in this matter, Section 13 of the Performance Bond and Section 16 of the Payment Bond state that “[t]he Owner agrees that the exclusive source of funds to pay any available claim under the terms of this bond is the assets represented by the attached Irrevocable Trust Receipt.”¹ The Wells Fargo “Irrevocable Trust Receipt” attached to and supporting those bonds represents that the bonds’ obligations are purportedly fixed and secured by 20,825.88 gross tons of “surface, previously mined, coal” purportedly located on a parcel of land in Nicholas County, West Virginia. With Wells Fargo’s ITR, the bond documents assert that the “total value of processed coal included in total tonnage” on these bonds is purportedly \$821,060.14. While he asserted in this bond that this land supposedly bears nearly \$1 million in valuable coal, the land appears to be real property Respondent purchased in 2007 for a stated consideration of just \$166,500. *See* attached Exhibit A (Special Warranty Deed conveying

¹ As detailed in OIC’s pending Motion to Compel, most discovery questions remain unanswered. Curiously, however, one that did include an answer stated that “[n]o [coal] sale has ever been made to satisfy a bond or financial guarantee claim.” As OIC’s reply in support of that motion noted, Respondent claims to have sold *thousands* of such bonds.

Nicholas County Property to Respondent.) In another instance, Respondent described his asset as an “allocated portion of \$191,350,000.00 of previously, mined, extracted, stockpiled, marketable, coal, located on the property of E.C. Scarborough, all of that certain lot of parcel of land in Kentucky District, Nicholas County, West Virginia.”² As detailed in OIC’s pending Motion to Compel, Respondent has been asked in discovery to provide testimony about his permits to mine or sell coal and the value of his coal, but by and large he has not provided answers.

Just the foregoing known facts – the property’s stated consideration, Respondent’s subsequent varying representations about the supposed value of coal on it, and questions about what assets truly are used as collateral – raise numerous relevant questions about the relationship between Wells Fargo and Respondent. Such questions include: Does Wells Fargo accept Respondent’s valuation of the coal on this \$165,500 parcel of West Virginia land? If documents state only coal pays claims, and no coal has ever been sold for claims and Wells Fargo never does anything, then why does Wells Fargo issue ITRs? What steps has Wells Fargo taken to determine the real and actual value of the pledged assets prior top issuing ITRs for bonds? Does Wells Fargo have any reason to question whether this land really bestows on Respondent a cash value of almost two tenths of a *billion* dollars available to pledge as liquid assets, let alone just \$1 million? What procedures does Wells Fargo follow as to determining Respondent’s asset (coal) value before it issues ITRs as part of its arrangement with Respondent? Does Wells Fargo verify alleged asset value before issuing ITRs? What information has Wells Fargo gathered and what due diligence has Wells Fargo do anything to verify alleged asset value at all? Does Wells Fargo even know whether any coal really exists on this property? Does Wells Fargo not know how its ITRs are being used – as part of Respondent’s bonds? Does Respondent’s “irrevocable trust receipt” arrangement with Wells Fargo have the capacity to deceive or confuse members of the public as to the supposed legitimacy or solvency of Respondent or his bonds? Has it mistakenly led consumers to believe that the bonds are “fully collateralized,” legitimate, or otherwise trustworthy? All

² *Tip Top Const. v. United States*, 563 F.3d 1338, 1340 (Fed. Cir. 2009).

such questions and others are highly relevant to the issues at hearing.³

A review of each of the 11 categories of information requested by OIC staff in its proposed, requested subpoena shows that each is reasonably tailored and calculated to lead to the discovery of admissible evidence and to help answer the foregoing and other relevant questions. While not an exhaustive list of reasons, going through those 11 categories, one sees ample reasons supporting them:

- 1) WHAT THE PROPOSED SUBPOENA REQUESTED: “All agreements and contracts relating to Edmund C. Scarborough.” SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of the information responsive to this request should be subject to attorney-client privilege. It will yield information that either is relevant or will lead to the discovery of admissible, relevant information like indemnity agreements and other evidence revealing the true arrangement between Wells Fargo and Respondent, and it will help identify witnesses who were parties to all agreements and to the negotiations that preceded the same.
- 2) WHAT THE PROPOSED SUBPOENA REQUESTED: “All communications from Edmund C. Scarborough, his attorneys, or his other representatives regarding Mr. Scarborough’s Washington bonds or his bonds involving Washington contractors, Washington projects, Washington contracts, or Washington owners.” SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these communications could be subject to attorney-client privilege. Such communications will yield such relevant and admissible information as communications about how Respondent’s bonds governed by the Insurance Code are administered and created, about the relationship between Wells Fargo and Respondent with respect to these bonds, and about the representations Respondent has made about his bond program and Wells Fargo’s role in the same.
- 3) WHAT THE PROPOSED SUBPOENA REQUESTED: “Every irrevocable trust receipt (“ITR”) for every Edmund C. Scarborough bond involving Washington contractors, Washington projects, Washington contracts, or Washington owners.” SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these ITRs could be subject to attorney-client privilege. While Respondent claims to have provided this, he has changed his answer in multiple declarations, and provided inconsistent information. For example, he has purportedly claimed to have written thousands of bonds; yet, in one declaration he only admitted writing a small number in Washington. In later testimony, he changed the

³ As Respondent knows, the issues at hearing also include whether Respondent has “misrepresent[ed] any terms of offered insurance, RCW 48.30.090, [...] [made] false or misleading statements and representations in or relative to the conduct of the business of insurance, RCW 48.30.040, [...] use[d] a name in a manner deceptively suggesting one is an authorized insurer, RCW 48.30.060, [...] advertise[d] assets except those actually owned and possessed by the insurer available for the payment of losses and claims, RCW 48.30.070(2), [or] [...] ma[d]e or disseminate[d] financial statements inaccurately stating financial condition, RCW 48.30.030.” See 11/27/13 Decl. Alan Michael Singer in support of Motion to Compel at Exh. C (November 1, 2013 letter to Respondent.)

number upwards to 22. Which testimony is correct? Is either correct? This request will elicit Wells Fargo's understanding of this relevant information, verify the accuracy of the true scope of Respondent's Washington activity, and help ensure that all relevant documents comprising Respondent's bonds are known.

- 4) WHAT THE PROPOSED SUBPOENA REQUESTED: "All indentures relating to Edmund C. Scarborough or ITRs between Mr. Scarborough and Wells Fargo Bank Northwest, N.A." SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these indentures could be subject to attorney-client privilege, and they relate to the bonds Wells Fargo issues for Respondent's bonds, which reference these indentures. Since the indentures squarely are part of Wells Fargo's ITRs, they are relevant and will reveal information about the relationship between Respondent and Wells Fargo. Respondent claims to have already provided one of these indentures, but obtaining all such indentures from Wells Fargo will elicit Wells Fargo's understanding of this relevant information, and will help ensure that all relevant documents comprising Respondent's bonds are known.
- 5) WHAT THE PROPOSED SUBPOENA REQUESTED: "All Trust Indenture and Security Agreements (including but not limited to "Surety Bond Trust No. 1") relating to Edmund C. Scarborough or ITRs between Mr. Scarborough and Wells Fargo Bank Northwest, N.A." SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these agreements could be subject to attorney-client privilege, and they relate to the bonds Wells Fargo issues for Respondent's bonds, which reference these indentures. Since these agreements appear to squarely form part of Wells Fargo's ITR relationship with Respondents, they are relevant and will reveal information about the relationship between Respondent and Wells Fargo. Respondent claims to have already provided one of these agreements; obtaining all such indentures from Wells Fargo will elicit Wells Fargo's understanding of this relevant information, and will help ensure that all relevant documents comprising Respondent's bonds are known.
- 6) WHAT THE PROPOSED SUBPOENA REQUESTED: "All documents keeping track of which coal is allocated for which of Mr. Scarborough's bonds." SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these documents could be subject to attorney-client privilege, and such bond logs or other documents keeping track of the allocating of which of Respondent's coal assets are for which bonds would appear to be needed for Wells Fargo and Respondent to ensure that the bonds are indeed "fully collateralized" as Respondent contends.
- 7) WHAT THE PROPOSED SUBPOENA REQUESTED: "All documents setting forth any security interests in any and all of Mr. Scarborough's assets, including any coal assets." SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these documents could be subject to attorney-client privilege, and such documents would reveal the true and full scope of the arrangement between Wells Fargo and Respondent. They would also lead to the discovery of admissible evidence regarding whether Respondent's bonds are "full collateralized" as Respondent maintains.
- 8) WHAT THE PROPOSED SUBPOENA REQUESTED: "All tonnage calculation open ITR reports related to Mr. Scarborough's bonds." SOME REASONS WHY THIS IS

APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these documents could be subject to attorney-client privilege, and such documents would reveal the true and full scope of the arrangement between Wells Fargo and Respondent. Such reports should exist, and would be needed to keep track of which of Respondent's coal assets are for which bonds so Wells Fargo and Respondent could ensure that the bonds are indeed "fully collateralized" as Respondent contends.

- 9) WHAT THE PROPOSED SUBPOENA REQUESTED: "All monthly or other periodic reports sent to Edmund C. Scarborough or to any of his agents, attorneys or other representatives."
SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these documents could be subject to attorney-client privilege, and such documents would reveal the true and full scope of the arrangement and the bond-related information sharing between Wells Fargo and Respondent. Such reports would also lead to the discovery of admissible evidence by containing information about the operation of Respondent's bond program, and about assets to be used to ensure that the bonds are indeed "fully collateralized" as Respondent contends.
- 10) WHAT THE PROPOSED SUBPOENA REQUESTED: "Documents setting forth any questions or hesitation on the part of Wells Fargo Bank Northwest, N.A. to continue doing business with Mr. Scarborough." SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these documents could be subject to attorney-client privilege. Such documents would reveal such relevant information as the true and accurate nature of the arrangement between Wells Fargo and Respondent, the due diligence undertaken by Wells Fargo to determine whether Respondent's bonds violated any state insurance laws, and Respondent's awareness of any questions raised about the legitimacy of his bonding activities.
- 11) WHAT THE PROPOSED SUBPOENA REQUESTED: "All documents setting forth analyses of the actual value of any and all of Mr. Scarborough's assets, including any coal assets."
SOME REASONS WHY THIS IS APPROPRIATE AND WITHIN THE SCOPE OF DISCOVERY: None of these documents could be subject to attorney-client privilege. Such documents would reveal such relevant information as the true and full scope of the arrangement between Wells Fargo and Respondent, Wells Fargo's due diligence undertaken prior to issuing any ITRs for Respondent's bonds, and the facts surrounding Wells Fargo's decision to undertake to issue any ITRs. Such documents would also lead to the discovery of evidence concerning whether the assets truly exist, and their value, as well as whether Respondent's bonds are indeed "fully collateralized" as Respondent contends.

In sum, since the information requested in the proposed subpoena is well within the scope of discovery, and as Respondent notes, the Administrative Procedures Act expressly authorizes the Chief Hearing Officer to "issue subpoenas." RCW 34.05.446(1) OIC requests that the subpoena be issued.

E. Wells Fargo's should be deemed to have waived certain objections.

Wells Fargo's only response to the proposed subpoena is that it will not assert any objections to

the proposed subpoena, but will wait until the subpoena has already been issued. Wells Fargo was invited to participate to indicate what objections it had, if any, to the issuance of a subpoena seeking 11 specific categories of documents. Any objections should not be delayed until that subpoena has been issued; such will merely delay the matter unnecessarily, and force parties to expend time and expense needlessly. Wells Fargo's conduct should be held to constitute a waiver of any such objections it may harbor to the specific categories of information listed, absent a showing of compelling good cause.

Waiver of known objections happens in Washington civil litigation whenever parties fail to assert or state those objections in a timely manner. A common example is waiver of affirmative defenses. Generally, a party must raise any "matter constituting an avoidance or affirmative defense" in the answer. CR 8(c). Thus, for example, failing to timely raise the statute of limitations can result in a waiver of that affirmative defense. *Davis v. Nielson*, 9 Wn. App. 864, 876, 515 P.2d 995 (1973). Our Washington Supreme Court has described that such waiver happens by operation of the common law doctrine of waiver. "We have reasoned that under the common law doctrine of waiver, waiver of affirmative defenses can occur under certain circumstances in two ways: if the defendant's assertion of the defense is inconsistent with the defendant's previous behavior and if defendant's counsel has been dilatory in asserting the defense." *Oltman v. Holland Am. Line USA, Inc.*, 163 Wn.2d 236, 246, 178 P.3d 981 (2008).

Here, Wells Fargo knew exactly what the subpoena seeks – it was provided a copy prior to the prehearing conference about that. Yet, rather than object, it merely lodged a reservation to later make objections. The effect will be to prolong this issue and force all parties to incur needles further expense. If Wells Fargo had any legitimate objections to the proposed subpoena, it was represented by competent counsel, it was given the opportunity to raise those objections, and it was even invited to the prehearing conference to voice those objections. Wells Fargo has voiced no objections. Moreover; its preference to not object, but to instead essentially wait, re-group once a subpoena has been issued, and then at that point espouse whatever objections it can articulate will cause prejudice to OIC. This will

force delay, expense, and waste of resources litigating a matter piecemeal. Yet, “[t]he doctrine of waiver is sensible and consistent with . . . our modern day procedural rules, which exist to foster and promote ‘the just, speedy, and inexpensive determination of every action.’” *Lybbert v. Grant County*, 141 Wn.2d 9, 39, 1 P.3d 1124 (2000) (quoting CR 1)). Given this, any of Wells Fargo’s later-espoused objections should be deemed waived absent good cause.

F. OIC moves to strike language from Respondent’s declaration.

While other parts of Respondent’s self-serving declaration testimony supporting his subpoena opposition should be subjected to scrutiny, and will be in greater detail at the time of the hearing, at this time OIC requests that one part be stricken and ignored. At page 2 of his “amended” opposition, and paragraph 4 of his “amended” declaration, Respondent asserts that “[t]he City accepted Bond number SKYLINEPP05112011 after what the City’s counsel described as ‘legal review on a number of fronts.’” OIC staff hereby asks and moves for this unreliable hearsay to be stricken. It is plainly not just hearsay, but hearsay within hearsay. ER 801(c) (“Hearsay” is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.) The abuse of discretion standard applies to review of a trial court’s decision on a motion to strike a declaration or affidavit allegedly containing inadmissible evidence. *W.R. Grace & Co. v. Dep’t of Revenue*, 137 Wn.2d 580, 591, 973 P.2d 1011 (1999). Here, striking this testimony would be well within this discretion, and appropriate, as the statement lacks any indicia of reliability. Whatever degree of rigor was applied or not applied when undertaking to decide whether to accept or reject any of Respondent’s bonds, and by whom, and what review did or did not occur prior to deciding to accept this or any other of Respondent’s bonds, whether “legal” or not, or even whether by an attorney or not, are not questions that should be answered based on Respondent’s hearsay within hearsay of what another party’s lawyer once may have commented about. These are questions to be answered based on reliable evidence presented at hearing from percipient witnesses – perhaps including the persons who actually conducted or were charged with conducting this review. While hearsay can be accepted “if in

the judgment of the presiding officer it is the kind of evidence on which reasonably prudent persons are accustomed to rely in the conduct of their affairs," RCW 34.05.452(1), Respondent's self-serving remark of what another party's lawyer thinks the evidence may or may not show is unreliable hearsay and should be stricken.

Respectfully submitted this 13th day of December, 2013.



Alan Michael Singer
OIC Staff Attorney

OFFICE OF THE INSURANCE COMMISSISONER'S RESPONSE REGARDING
WELLS FARGO SUBPOENA REQUEST AND MOTION TO STRIKE

EXHIBIT "A"

TO HAVE AND TO HOLD the same, together with all appurtenances thereunto belonging, unto the Grantee, with covenants of special warranty of title.

DECLARATION OF CONSIDERATION VALUE

Under the penalties of fine and imprisonment as provided by law, the undersigned Grantors do hereby declare that the total consideration paid for the conveyance herein made is \$166,500.00.

WITNESS the following signatures and seals:

Berry L. Mullens
HARRY L. MULLENS

Melissa J. Mullens
MELISSA J. MULLENS

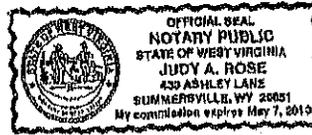
STATE OF WEST VIRGINIA,

COUNTY OF NICHOLAS, to-wit:

I, Judy A. Rose, a Notary Public in and for the aforesaid County and State, do hereby certify Berry L. Mullens and Melissa J. Mullens, whose names are signed to the writing above, bearing date on the 29th day of October, 2007, have this day acknowledged the same before me.

My commission expires May 7, 2013
Judy A. Rose
Notary Public

This document was prepared by:
Randall W. Galford
Attorney at Law
1047 Arbuckle Road
Summersville, WV 26651
State Bar ID # 1323
304-872-0496



STATE OF WEST VIRGINIA, Nicholas County Commission Clerk's Office 10/31/2007. The foregoing deed together with the certificate of its acknowledgment, was this day presented in said office and admitted to record.

Teste: *[Signature]* Clerk
[Signature] B19

6352 Cypress Garden Blvd Weston, W. Va. 25404
33284

Doc ID: 002350990003 Type: DEED
Recorded: 10/31/2007 at 02:34:28 PM
Fee Amt: \$1,120.00 Page 1 of 3
Excise Tax: \$1,095.00
Stamp: DEED
Nicholas County Clerk
Wanda Hendrickson County Clerk
BK 444 Pg 427-429

SPECIAL WARRANTY DEED

THIS SPECIAL WARRANTY DEED made this the 22nd day of October 2007,
by and between, Barry L. Mullens, and Melissa J. Mullens, his wife, Grantors, and,
E.C. SCARBOROUGH, Grantee;

WITNESSETH:

That for and in consideration of the sum of Ten Dollars (\$10.00), cash in hand
paid, and other good and valuable considerations, the receipt and sufficiency of all of
which are hereby acknowledged, the said Grantors do hereby grant and convey, unto the
Grantee with covenants of SPECIAL WARRANTY OF TITLE, all of that certain lot or
parcel of land in Kentucky District, Nicholas County, West Virginia, more particularly
bounded and described as follows:

"Beginning at a point on the old rail road grade
right-of-way and in Laurel Creek, where said
right-of-way crosses Laurel Creek; thence, in an
Easterly direction with said rail road grade
right-of-way and corner to Mullens tract;
thence, through Mullens tract and with Plum
Creek Timberlands to a point between the two
said permits; thence, in a Westerly direction to a
point between mining permit R707 and R 644
and in Laurel Creek; thence, with Laurel Creek
in a Northerly direction to the point of
beginning, containing 115.41 acres more or less
and being the entire acreage of permit R 707."

Being a portion of the same tract or parcel of real estate conveyed to Barry L.
Mullens and Weymouth L. Mullens, by deed dated the 15th day of November, 1996, and
of record in the office of the Clerk of the County Commission of Nicholas County, West
Virginia, in Deed Book 374 at page 680.

This conveyance is expressly made and accepted upon and subject to the following
covenants, which shall be binding upon and enforceable against the Grantee and the
Grantee's successors and assigns, and shall be deemed covenants running with the land

and which, by execution of this Special Warranty Deed, Grantee does acknowledge and accept:

1. The property hereby conveyed has been held for mining or mining related purposes. The Grantee agrees that no claim shall ever be asserted against the Grantor, or any company or entity presently or formerly associated with or operating under the Grantor, for damages, injunctive relief or regulatory relief arising directly or indirectly out of any surface or subsurface conditions or occurrences, known or unknown, now existing or hereafter occurring or discovered and whether or not such condition or occurrence arises out of or is the result of mining related activities on the property hereby conveyed.
2. The Grantee assumes all risk and responsibility for any injuries or damages sustained by any person or to any property, in whole or in part, resulting from, arising out of, or in any way connected with the possession or use by Grantee of the property hereby conveyed.
3. The Grantor does not warrant or represent subjacent or lateral support of the surface or subsurface of the property hereby conveyed.
4. The Grantor does not warrant or represent that the property conveyed or the improvements thereon are safe, habitable or otherwise suitable for the purpose for which they are intended to be used by the Grantee, or for any other purpose whatsoever. The Grantee has inspected the property hereby conveyed and the improvements thereon and agrees to accept the same in their "as is, where is" condition, with all faults.
5. The Grantor does not warrant or make any representations regarding the quality or quantity of coal located in, on or under the property hereby conveyed, including, but not limited to, any coal located in the existing impoundment on the property hereby conveyed, nor does the grantor warrant or represent the availability of the any particular rights regarding the extraction of coal from the property hereby conveyed.

This conveyance is made SUBJECT to all covenants, easements and reservations of record affecting the property hereby conveyed, including, but limited to, the obligations set forth in that certain deed dated November 15, 1996, by and between THE LADY H COAL COMPANY, INC., CONSOLIDATED SEWELL, INC., and SEWELL COAL COMPANY and BARRY L. MULLENS and WEYMOUTH L. MULLENS, of record in the Clerk of the County Commission office of Nicholas County, West Virginia in Deed Book 374, at page 680.

TO HAVE AND TO HOLD the same, together with all appurtenances therunto belonging, unto the Grantee, with covenants of special warranty of title.

DECLARATION OF CONSIDERATION VALUE

Under the penalties of fine and imprisonment as provided by law, the undersigned Grantors do hereby declare that the total consideration paid for the conveyance herein made is \$166,500.00.

WITNESS the following signatures and seals:

Barry L. Mullens
BARRY L. MULLENS

Melissa J. Mullens
MELISSA J. MULLENS

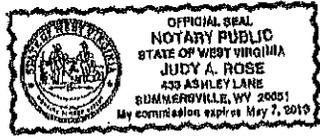
STATE OF WEST VIRGINIA,

COUNTY OF NICHOLAS, to-wit:

I, *Judy A. Rose*, a Notary Public in and for the aforesaid County and State, do hereby certify Berry L. Mullens and Melissa J. Mullens, whose names are signed to the writing above, bearing date on the 29th day of October, 2007, have this day acknowledged the same before me.

My commission expires *May 7, 2013*
Judy A. Rose
Notary Public

This document was prepared by:
Randall W. Galford
Attorney at Law
1047 Arbuckle Road
Summersville, WV 26651
State Bar ID # 1323
304-872-0496



STATE OF WEST VIRGINIA, Nicholas County Commission Clerk's Office 10/31/2007. The foregoing Deed together with the certificate of its acknowledgment, was this day presented in said office and admitted to record.
Tessie *Henderson* Clerk
Henderson BTG