

1 PRESTON DuFAUCHARD
California Corporations Commissioner
2 WAYNE STRUMPFER
Deputy Commissioner
3 ALAN S. WEINGER
Lead Corporations Counsel
4 ALEX M. CALERO (SBN 238389)
Corporations Counsel
5 CALIFORNIA DEPARTMENT OF CORPORATIONS
1350 Front Street, Room 2034
6 San Diego, California 92101
Telephone: (619) 525-4044

7 Attorneys for the People of the State of California

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9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 FOR THE COUNTY OF SAN DIEGO

11 THE PEOPLE OF THE STATE OF
12 CALIFORNIA, by and through the
CALIFORNIA CORPORATIONS
13 COMMISSIONER,

14 Petitioner,

15 vs.

16 MID AMERICA ENERGY, INC., and GARY
M. MILBY President,

17 Respondents.

Case No.: GIC 879831

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF PETITION
FOR ORDER TO COMPEL COMPLIANCE
WITH SUBPOENA DUCES TECUM AND
SETTING AN ORDER TO SHOW CAUSE
RE: SAME

(GOV. CODE, §§ 11187-11188; CORP.
CODE, § 25531)

Hearing Date:
Hearing Time:
Dept:
Judge:

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21 Petitioner, Preston DuFauchard, Corporations Commissioner for the State of California,
22 acting in the name of the People of the State of California, hereby submits the following
23 Memorandum of Points and Authorities in support of this PETITION FOR ORDER TO COMPEL
24 COMPLIANCE WITH SUBPOENA DUCES TECUM AND ORDER TO SHOW CAUSE RE:
25 SAME, pursuant to Corporations Code section 25531 and Government Code sections 11187 and
26 11188.

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I. STATEMENT OF FACTS

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2 This matter concerns the offer and sale of securities that may be in violation of the Corporate
3 Securities Law of 1968 (Corp. Code, §§ 25000 et seq.) (“CSL”) and in violation of a lawfully issued
4 Desist and Refrain Order and stipulation thereto.

5 On May 5, 2006 as a result of a lawful investigation, the California Department of
6 Corporations (“Department”) issued upon Respondents MID AMERICA ENERGY, INC., a Nevada
7 Corporation, GARY M. MILBY, the company president, (collectively “RESPONDENTS”) and other
8 parties a Desist and Refrain Order for the offer and sale of unqualified, nonexempt securities within
9 the State of California and fraud in the offer and sale of said securities. (A true and correct copy of
10 the May 5, 2006 Desist and Refrain Order is attached as Exhibit A.) On July 24, 2006,
11 RESPONDENTS stipulated to the May 5, 2006 Desist and Refrain Order. (A true and correct copy
12 of the Stipulation to the Desist and Refrain Order is attached as Exhibit B.)

13 The Department is informed and believes that RESPONDENTS continue to offer and sell oil
14 and gas well projects, including Black Gold #8, L.L.C and Eagle Oil #7, L.L.C., in the State of
15 California. The offer and sale of said securities may be in violation of the CSL, the May 5, 2006
16 Desist and Refrain Order and stipulation thereto.

17 On November 3, 2006, the California Corporations Commissioner (“Commissioner”), by and
18 through his agents Alex M. Calero, Corporations Counsel, and Jon Wroten, Corporations Examiner,
19 issued upon RESPONDENTS a Subpoena Duces Tecum requiring the production of certain
20 documents related to the business activities of Respondent MID AMERICA ENERGY, INC. and
21 relevant to the Department’s investigation. (A true and correct copy of the Subpoena Duces Tecum
22 and Proof of Service are attached as Exhibit C.) The Subpoena required documents to be produced to
23 the Sacramento office of the Department by December 4, 2006.

24 The Department sent the Subpoena, via certified mail return receipt requested, to Respondent
25 MID AMERICA ENERGY, INC.’s agent for service of process at 6100 Neil Road, Suite 500, Reno,
26 NV 89511 and to RESPONDENTS’ last known business address at 321 Victor Reiter Parkway,
27 Portland, TN 37148. On November 14, 2006, the Department received confirmation of receipt of the

1 Subpoena by MID AMERICA ENERGY, INC.'s agent for service of process. (Exhibit C.)
2 However, the U.S. Postal Service returned the Subpoena sent to RESPONDENTS' last known
3 business address, 321 Victor Reiter Parkway, Portland, TN 37148, as "NOT DELIVERABLE."
4 (Exhibit C.)

5 On December 8, 2006, the Department discovered that RESPONDENTS established a new
6 business address at 103 Bluegrass Commons Blvd., Hendersonville, TN 37077-0738. The address of
7 Respondent MID AMERICA ENERGY, INC.'s agent for service of process has remained the same.
8 (A true and correct copy of the Nevada Secretary of State Record Re: Mid America Energy, Inc. is
9 attached as Exhibit E.)

10 On December 11, 2006, the Department sent, via certified mail return receipt requested, a
11 letter to RESPONDENTS, at 103 Bluegrass Commons Blvd., Hendersonville, TN 37077-0738,
12 notifying them of their failure to comply with the Subpoena and extending the date of production to
13 January 2, 2007. On December 14, 2006, the letter was successfully received. (A true and correct
14 copy of the December 11, 2006 notice and Proof of Service are attached as Exhibit D.)

15 As of the date of this Petition, RESPONDENTS have failed to produce the documents
16 requested in the Subpoena. Further, RESPONDENTS have failed to contact the Department to seek
17 an extension of time or indicate that the requested documents are forthcoming. GARY M. MILBY,
18 listed as President, is in charge of running and operating MID AMERICA ENERGY, INC. and in that
19 capacity oversees the administration of company books and records. RESPONDENTS have not
20 given, nor does there appear to be any explanation for their continued ignoring of and failure to
21 comply with the Subpoena.

22 II. ARGUMENT

23 **A. THE COMMISSIONER IS AUTHORIZED TO COMPEL THE PRODUCTION OF** 24 **DOCUMENTS**

25 Corporations Code sections 25000 et seq. provide that the Department shall administer the
26 provisions of the Corporate Securities Law ("CSL"). Pursuant to section 25600, the Commissioner is
27 the Chief Officer of the Department. Both the Corporations Code and Government Code expressly

1 authorize the Commissioner to engage in investigations to enforce the provisions of the CSL.¹
 2 Further, the Commissioner has the authority to issue subpoenas to compel the production of books,
 3 records or other documents, which he deems relevant or material to any such investigation. (Corp.
 4 Code, § 25531, subds. (a) & (c); Gov. Code, §§ 11181, subds. (a) & (e), 11182.)

5 On November 3, 2006, the Commissioner, by and through his agents Alex M. Calero,
 6 Corporations Counsel, and Jon Wroten, Corporations Examiner, issued a Subpoena on
 7 RESPONDENTS after learning of possible continued violations of the CSL, the May 5, 2006 Desist
 8 and Refrain order and stipulation thereto. (Exhibit C.) Therefore, the Subpoena, being legally
 9 issued, compels Respondents to produce the documents described therein.

10 **B. RESPONDENTS HAVE FAILED TO COMPLY WITH THE SUBPOENA,**
 11 **REGULARLY ISSUED, AND THE COURT SHOULD ORDER COMPLIANCE**

12 **1. This Court has Jurisdiction to Order Compliance**

13 The Department must petition the Court to order the RESPONDENTS to comply with the
 14 Subpoena Duces Tecum. The Department lacks the power to enforce its own subpoena and must
 15 seek an order to comply from the superior court. (*Dibb v. County of San Diego* (1994) Cal.4th 1200,
 16 1218.) Corporations Code section 25531, subdivision (d), provides the basis for the Department to
 17 seek enforcement of a subpoena through the superior court, stating:

18 In case of contumacy by, or refusal to obey a subpoena issued to, any person,
 19 the superior court, upon application by the commissioner, may issue to the person an
 20 order requiring him to appear before the commissioner, or the officer designated by
 21 him, there to produce documentary evidence, if so ordered, or to give evidence
 touching the matter under investigation or in question. Failure to obey the order of
 the court may be punished by the court as a contempt.

22 (Corp. Code, § 25531, subd. (d).)

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 26 ¹ Corporations Code section 25531, subdivision (a), in relevant part, provides “[t]he commissioner in his discretion . . . may make such
 27 public or private investigations within *or outside* of this state as he deems necessary to determine whether any person has violated or is
 28 about to violate any provision of this law”; Government Code section 11180, in relevant part, provides “[t]he head of each department
 may make investigations . . . concerning . . . [a]ll matters relating to the business activities and subjects under the jurisdiction of the
 department.” (Corp. Code, § 25531, subd. (a) [emphasis added] and Gov. Code, § 111180.)

1 Further, the superior court of the county where the Department is conducting its investigation
2 has jurisdiction to compel the production of documents on behalf of the Department. (Gov. Code, §
3 11186.)

4 Corporations Counsel Alex M. Calero, located in the San Diego office of the Department, is
5 investigating RESPONDENTS’ potential violation of the CSL, the May 5, 2006 Desist and Refrain
6 Order, and stipulation thereto, and thus the Superior Court of the County of San Diego has
7 jurisdiction to hear the instant Petition.

8 **2. The Department Regularly Issued the Subpoena and the Court can Properly**
9 **Order Compliance**

10 RESPONDENTS must appear before the court and show cause for their noncompliance.
11 Upon the filing of a petition with the court, the court “shall enter an order directing the person to
12 appear before the court at a specified time and place and then and there show cause why he or she has
13 not . . . produced or permitted the inspection or copying of the papers or other items. (Gov. Code, §
14 11188.) Government Code sections 11187 and 11188 set forth the procedure by which a department
15 head may petition the superior court to compel a person to comply with a subpoena issued pursuant to
16 section 11181. Government Code section 11187, in relevant part, provides:

17 (a) . . . the head of the department may petition the superior court in the
18 county in which the . . . investigation is pending . . . for an order compelling the
19 person to . . . produce and permit the inspection and copying of the papers or other
20 items required by the subpoena before the officer named in the subpoena.

21 (b) The petition shall set forth all of the following:

22 (1) That due notice of the time and place for . . . the production of the papers
23 or other items . . . was given.

24 (2) That the person was subpoenaed . . . in the manner prescribed in this
25 article.

26 (3) That the person failed and refused to . . . produce or permit the inspection
27 or copying of the papers or other items required by subpoena before the officer in the
28 cause or proceeding named in the subpoena

(Gov. Code, § 11187.)

At the show cause hearing, “[i]f it appears to the court that the subpoena was regularly issued
. . . by the head of the department, the court shall enter an order that the person appear before the
officer named in the subpoena at the time and place fixed in the order . . . to produce and permit the

1 inspection and copying of the required papers.”² (Gov. Code, § 11188.) The hearing on the order to
2 show cause is limited to determining whether the subpoena conforms to legal and constitutional
3 standards. (*People ex rel Franchise Tax Bd. v. Superior Court* (1985) 164 Cal.App.3d 526, 539.)

4 Nevada law requires every corporation created under its laws to name a registered agent for
5 service of legal process and provides that service upon said agent is equivalent to service upon the
6 corporation itself. (Nev. Rev. Stat., § 14.020.) Further, under California law, service upon a foreign
7 corporation’s registered agent for service of process, via certified mail return receipt requested,
8 satisfies legal notice. (Civ. Proc., §§ 415.40 & 416.10; *Cruz v. Fagor America, Inc.* (2007) 146
9 Cal.App.4th 488, 496–502.)

10 If a witness named in the subpoena “does not reside or conduct business in this state,” the
11 Department head may seek to compel the witness’ production of documents in the manner provided
12 for the enforcement of a deposition notice to a nonparty described in the Code of Civil Procedure.
13 (Gov. Code, § 11187, subd. (c).)

14 In the instant case, although MID AMERICA ENERGY, INC. is a Nevada corporation with
15 its business address in Tennessee, the court has personal jurisdiction over RESPONDENTS. MID
16 AMERICA ENERGY, INC. and its President GARY M. MILBY conduct business in the State of
17 California. RESPONDENTS have offered and sold said securities to California residents as early as
18 August 2005, resulting in the sale of securities to at least 12 California residents raising at least
19 \$852,000. (True and correct copies of Form D Exemption Notices and Form U-2 Uniform Consent
20 to Service of Processes are attached as Exhibits F & G.) Further, RESPONDENTS have submitted to
21 the jurisdiction of this Court and the Commissioner. Specifically, RESPONDENTS consented to the
22 jurisdiction of the Department in the Stipulation to the May 5, 2006 Desist and Refrain Order
23 (Exhibit B) and executed agreements consenting to commencement of an action relating to the sale of
24 said securities, including Eagle Oil #7, L.L.C. and Black Gold #8, L.L.C., in any court of competent
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27 ² “The term ‘Regularly Issued’ means in accordance with the provisions of sections 11180, 11181, 11184 and 11185 of
28 the Government Code providing for the matters which may be investigated, the acts authorized in connection with
investigations, and the service of process.” (*Fielder v. Berkeley Properties Co* (1972) 23 Cal.App.3d 30, 39.)

1 jurisdiction within the State of California. (Exhibit F & G.) Thus, this Court can compel
2 RESPONDENTS to produce the documents sought in the Department's Subpoena.

3 On May 5, 2006, the Department issued on RESPONDENTS and other parties a Desist and
4 Refrain Order. On July 24, 2006, RESPONDENTS stipulated to the Desist and Refrain Order.

5 The Department is informed and believes that RESPONDENTS continue to offer and sell
6 securities, which may be in violation of the CSL, the May 5, 2006 Desist and Refrain Order and the
7 stipulation thereto.

8 On November 3, 2006 pursuant to Corporations Code section 25531 and Government Code
9 sections 11180 – 11182, the Commissioner issued a Subpoena on RESPONDENTS. The Subpoena
10 required the production of certain documents related to the business activities of Respondent MID
11 AMERICA ENERGY, INC. and relevant to the Department's investigation.

12 Pursuant to Nevada and California law, the Department sent the Subpoena, via certified mail
13 return receipt requested, to Respondent MID AMERICA ENERGY, INC.'s registered agent for
14 service of process, at 6100 Neil Road, Suite 500, Reno, NV 89511, and received confirmation of
15 receipt on November 14, 2006. (Exhibit C.) The Department also attempted to serve the Subpoena
16 at RESPONDENTS' last known business address, 321 Victor Reiter Parkway, Portland, TN 37148,
17 which was returned to the Department by the U.S. Postal Service as "NOT DELIVERABLE."
18 (Exhibit C.) On December 11, 2006, the Department sent a letter to RESPONDENTS new business
19 address, 103 Bluegrass Commons Blvd., Hendersonville, TN 37077-0738, notifying
20 RESPONDENTS of their failure to produce the documents by the stated date of production and
21 extending the date of production to January 2, 2007. The letter was confirmed received on December
22 14, 2006. (Exhibit D.) Thus, the Department has properly served the Subpoena on RESPONDENTS.

23 The Subpoena clearly required RESPONDENTS to produce documents on December 4, 2006
24 at the Sacramento office of the Department. Further, the Subpoena clearly identified the documents
25 to be produced. (Exhibit D.) However, as of the date of this Petition, RESPONDENTS have failed
26 to produce any of the documents requested in the Subpoena or offered any explanation for their
27 noncompliance.

1 Due to RESPONDENTS' failure to respond to the Subpoena, the Department respectfully
2 requests that this Court set a hearing to order RESPONDENTS to show cause for failing to produce
3 the requested documents. If at that time the Court finds that the Subpoena was regularly issued, the
4 Department requests that this Court order RESPONDENTS to produce the documents identified in
5 the Subpoena Duces Tecum.

6 **III. CONCLUSION**

7 The Commissioner is authorized under the Corporations Code and Government Code to issue
8 subpoenas for books, records and other documents. The Subpoena Duces Tecum issued upon
9 RESPONDENTS was regularly issued by the Commissioner in furtherance of an investigation into
10 the possible violation of the CSL. RESPONDENTS conduct business in the State of California and
11 further have submitted to the jurisdiction of this Court and the Commissioner. The Corporations
12 Code and Government Code authorize this Court to compel respondents to comply with the
13 Subpoena Duces Tecum.

14 The People of the State of California, by and through the California Corporations
15 Commissioner therefore respectfully request that this Court:

- 16 1. Set a hearing for Order to Show Cause, pursuant to Government Code section 11188, as
- 17 to why Respondents, MID AMERICA ENERGY, INC. and GARY M. MILBY, have not
- 18 complied with the Subpoena Duces Tecum, and
- 19 2. Order Respondents, MID AMERICA ENERGY, INC. and GARY M. MILBY, to
- 20 produce the documents described in the Subpoena Duces Tecum.

21 Dated: February 8, 2007

22 PRESTON DuFAUCHARD
23 California Corporations Commissioner

24
25 By: _____
26 ALEX M. CALERO
27 Corporations Counsel
28 Attorney for the People of California