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PROCUREMENT APPEALS

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OFFICE OF PUBLIC ACCOUNTABILITY

PROCUREMENT APPEAL

IN THE APPEAL OF	)	<b>Docket No. OPA-PA-09-012</b>
	)	
	)	<b>OBJECTION TO SUBPOENA</b>
Z4 CORPORATION	)	<b>DUCES TECUM</b>
	)	
Appellant.	)	
_____	)	

**OBJECTION**

Z4 Corporation ("Z4"), hereby objects, pursuant to GRCP 45 (c)(2)(B) and 45(c)(3)(A) to a certain "Subpoena Duces Tecum" ("Subpoena") served on Z4 on or about July 15, 2010, by the Appellee the Department of Education (the "DOE"), in the above-entitled Procurement Appeal, for reasons more fully explained below.

**SUPPORTING MEMORANDUM**

The subject Subpoena purports to command Z4 to gather numerous documents and permit inspection thereof on July 19, 2010 at 9:30 a.m. at the hearing on Z4's Statement of Costs and Reasonable Profit and Motion for Attorneys' Fees. The

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Subpoena calls for production of a voluminous amount of records in *one (1) business day*.

Accordingly, Z4 objects to the Subpoena on the following grounds:

1. **The Subpoena Subjects Z4 to Undue Burden [GRCP 45(c) (3)(A)(iii)]**

Z4 has a duty to exercise due diligence in responding to the Subpoena. During the short time frame available Z4 faces a major burden and expense in attempting to comply with the Subpoenas in good faith, including the preparation of the instant memorandum and combing through and reviewing hundreds of document.

2. **The Subpoenas Fail to Allow Reasonable Time for Compliance [GRCP 45(c)(3)(A)(i)]**

Cases interpreting the applicable rules confirm that what constitutes “reasonable” notice of a discovery event depends upon the circumstances of each case. Nevertheless, courts and commentators agree that **“ten days notice is customarily expected.”** In re Stratosphere Corp. Securities Litigation, 183 F.R.D. 684, 687 (D. Nev.1999); William W. Schwarzer, *et al.*, *Federal Civil Procedure Before Trial* ¶ 11:1436 (The Rutter Group 2005) (“What is ‘reasonable’ depends on the circumstances of the case, but at least 10 days’ notice is customarily expected.”).

In the instant case, the notice given was only *one (1) working day*, respectively, before the document production event. This is plainly insufficient notice. In the Stratosphere case, *supra*, the court held that the notice of a deposition was unreasonably short where the non-party deponent was not served with subpoena until six days before the scheduled deposition, even though plaintiffs knew that he was contesting any taking of his deposition, and where defendants were apparently not served until five days before the deposition. In Mann v. Univ. of Cincinnati, 824 F. Supp 1190, 1202 (S.D.

Ohio 1993), the court held that one week was not reasonable notice absent any showing of urgency for such short notice. No such showing has been made here.

3. **The Subpoena Fails to Contain the Required Text Mandated by GRCP 45(a)(1)(D)**

Rule 45(a)(1)(D) expressly requires that the full text of subdivisions (c) and (d) of the Rule 45 be set forth in the subpoena. Such was not done in the instant subpoena. This rule exists for a reason, to provide recipients with clear notice of their rights and obligations in response to a subpoena. The Rule is all the more important inasmuch as those rights and obligations were substantially changed in June 2007, upon adoption of the revised version of Rule 45. The OPA may quash or decline to enforce a subpoena which fails to contain the required recitations. Productos Mistolin, S.A. v. Mosquera, 141 F.R.D. 226, 228 (D.P.R. 1998).

Parties purporting to invoke the subpoena power of the OPA cannot ignore, but must strictly comply with, the applicable rules and statutes, in good faith, or face the consequences for their failure to do so. *See Theofel v. Farey Jones*, 341 F.3d 978 (9<sup>th</sup> Cir. 2003) (noting that informing a person of his right to object is “a good start” but not the end of the obligation of one invoking the subpoena power to exercise reasonableness.).

4. **Rule 45 Objections Excuse Z4 From the Obligation to Comply Pending Resolution of the Dispute**

Under GRCP Rule 45(c)(2)(B), “If objection is made, the party serving the subpoenas shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order by the court by which the subpoena was issued.” Accordingly,

it is respectfully submitted that Z4 official served with the Subpoena need not comply with them.

**CONCLUSION**

For the reasons stated herein, the OPA should note the above-referenced objection and fashion appropriate relief in order to protect Z4 from the undue burden imposed by the Subpoena served in this case.

Respectfully submitted this 16<sup>th</sup> day of July, 2010.

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By:   
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