

**BEFORE THE  
ADMINISTRATIVE HEARING COMMISSION  
STATE OF MISSOURI**

<b>FILED</b>
September 15, 2023
ADMINISTRATIVE HEARING COMMISSION

DELTA EXTRACTION, LLC,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. 23-0608
	)	
DEPARTMENT OF HEALTH AND	)	
SENIOR SERVICES, <i>et al.</i> ,	)	
	)	
Respondents.	)	

**PETITIONER’S SUGGESTIONS IN OPPOSITION TO RESPONDENT’S MOTION TO CONTINUE AND ADOPT SCHEDULING ORDER**

Petitioner respectfully requests the Commission deny Respondent’s Motion to Continue and Adopt Scheduling Order. There is no prejudice to Respondent if the hearing goes forward as planned on September 29. Respondent has not filed a motion for protective order, but instead is participating in discovery. Further, Petitioner’s Amended Complaint does not substantially expand the issues to be considered at hearing—all of the claims in the Amended Complaint rely on common facts.

**I. Respondent’s complaints about discovery are moot as Respondent has chosen to participate fully in discovery.**

The majority of Respondent’s complaints are about the pace of discovery in this matter, however, Respondent has done nothing to shield itself from discovery. Respondent has not filed a protective order asking this Commission to limit or prohibit written discovery or stop the depositions from moving forward.

Despite an order from this Commission granting Petitioner’s Motion for Expedited Discovery, Respondent failed to comply with Petitioner’s requests for expedited discovery. *See* Order, August 31, 2023. But, Petitioner has been flexible, understanding that the timeframe in which it requested discovery was short. If Respondent had requested more time, Petitioner would have agreed. Respondent has represented to Petitioner that it will be providing discovery on September 15. *See* Exhibit 1. Respondent’s choice to participate in discovery and provide

responses and objections on September 15 moots any complaints it may have that underlie its Motion to Continue the hearing.

It also appears that Respondent complains about the number of depositions Petitioner seeks to take. Petitioner's Motion for Expedited Discovery (which the Commission granted) specified which four depositions Petitioner intended to take. Petitioner is taking three of those four and is abiding by the four hours per deposition that Petitioner represented in the Motion. Petitioner had made Respondent aware that it would be taking three depositions and had never agreed to a limit of two. *See* Respondent's Mot. at Ex. A. Regardless, Respondent did not file a protective order (as Petitioner's Motion suggested they could do in the case of burdensomeness). It has represented to Petitioner that it will produce all three witnesses. *See* Ex. 1. Any reasons to continue the hearing due to depositions are moot as Respondent has agreed to discovery.

**II. There is no prejudice to Respondent due to Petitioner filing its Amended Complaint.**

Respondent complains that it is prejudiced by Petitioner filing an Amended Complaint, but Respondent does not demonstrate any such prejudice in its motion. The Amended Complaint was necessitated by actions the *Respondent* took, not some new theory discovered by *Petitioner*. The claims added in the Amended Complaint are based on a common set of facts that Respondent should be well aware of and prepared to address in both discovery and at the September 29 hearing.

**A. The Order of Immediate Suspension, Notice of Administrative Hold, and Notice of Recall share a set of common facts.**

Respondent requests a continuance because "Petitioner has also expanded the number of issues to be resolved since the pre-hearing conference." R. Mot. at 2. Respondent is correct, Petitioner did amend its complaint due to actions taken by the *Respondent* not based on some new theory or evidence of which Respondent is not aware. As Petitioner made the Commission and Respondent aware at the pre-hearing conference, Petitioner intended to amend its complaint to include the Notice of Administrative Hold and the Notice of Recall. Petitioner made such amendment because its challenge to those two penalties was dismissed by the Cole County Circuit Court. Respondent did not object to Petitioner's intent to amend its petition at the pre-hearing conference nor could it have because these three penalties are interrelated.

The Order of Immediate Suspension, Notice of Administrative Hold, and Notice of Recall share a common set of facts. Each of these notices indicate that they were imposed on

Petitioner because there are credible reports of inversion and failure to compliantly test products. *See* Am. Pet. Exs. A, B, and C. In fact, as Respondent points out, the administrative hold was issued the same day as the Order of Immediate Suspension and the Notice of Recall was issued shortly thereafter. R. Mot. at 1. It would make little sense to not address these three penalties together, particularly in light of the fact that Petitioner is required to exhaust its administrative remedies in challenges to all three penalties.

It appears Respondent's only objection to addressing all three of these penalties at the September 29 hearing is that there is also an Amended Notice of Pending Revocation that addresses some of the same issues. But, the practical effect of Respondent's suggestion is that Petitioner is denied the opportunity to address penalties it is facing right now. The only party facing any prejudice in that situation is Petitioner.

**B. The constitutional claims in the amended complaint do not substantially expand the scope of the issues at hearing.**

Respondent further complains that the two constitutional claims added to the Amended Petition expand the scope of the issues at hearing. Similar to the discussion above, these claims are based on the substance and application of the Order of Immediate Suspension, Notice of Administrative Hold, and Notice of Recall. It should not be particularly burdensome for Respondent to gather discovery, assuming there is much to gather.

As Respondent and the Commission are well aware, this Commission does not have authority to resolve constitutional claims. *See State Tax Com'n v. Administrative Hearing Com'n*, 641 S.W.2d 69, 75 (Mo. banc 1982). Petitioner included those claims in its Amended Complaint in order to preserve them and serve limited discovery. Petitioner does not intend to take up substantial time during discovery or the September 29 hearing on these claims. They are best preserved for Circuit Court.

**III. Conclusion**

Respondent chose to participate in discovery and did not seek a protective order. Due to this, any of its complaints of prejudice due to discovery sought in this matter are moot. In addition, the Amended Complaint Petitioner filed includes claims that are all based on a common set of facts. There is no prejudice to Respondent to have the hearing on September 29 on Plaintiff's Amended Complaint. For these reasons, Petitioner respectfully requests the Commission deny Respondent's Motion to Continue and to Adopt a Scheduling Order.

STINSON LLP

By: /s/ Charles W. Hatfield  
Charles W. Hatfield, No. 40363  
Alixandra S. Cossette, No. 68114  
Alexander C. Barrett, No. 68695  
230 W. McCarty Street  
Jefferson City, MO 65101  
Phone: (573) 636-6263  
Fax: (573) 636-6231  
chuck.hatfield@stinson.com  
alixandra.cossette@stinson.com  
alexander.barrett@stinson.com

HUSCH BLACKWELL LLP

By: /s/ Lowell D. Pearson  
Lowell D. Pearson, No. 46217  
Alexa B. Barton, No. 71779  
235 East High Street, Suite 200  
P. O. Box 1251  
Jefferson City, MO 65102  
Phone: (573) 635-9118  
Fax: (573) 634-7854  
lowell.pearson@huschblackwell.com  
allee.barton@huschblackwell.com

*Attorneys for Petitioner*

**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing document was filed via this Administrative Hearing Commission's electronic filing system on this 15th day of September, 2023, and emailed to the following:

Joshua E. Douglass  
Mickes O'Toole, LLC  
117 W. 20<sup>th</sup> Street, Suite 201  
Kansas City, Missouri 64108  
[jdouglass@mickesotoole.com](mailto:jdouglass@mickesotoole.com)

*Attorneys for Respondent Missouri Department  
Of Health and Senior Services*

*/s/ Charles W. Hatfield*  
\_\_\_\_\_  
*Attorney for Petitioner*

# **EXHIBIT 1**

## **Cossette, Alixandra S.**

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**From:** Josh Douglass <jdouglass@mickesotoole.com>  
**Sent:** Tuesday, September 12, 2023 3:01 PM  
**To:** Hatfield, Charles; Bethany Kirk  
**Cc:** Cossette, Alixandra S.; allee.barton@huschblackwell.com;  
lowell.pearson@huschblackwell.com; Barrett, Alexander C.  
**Subject:** RE: 23-0608: Delta Extraction, LLC v. Department of Health and Senior Services

External Email – Use Caution

We planned on producing the witnesses as set out in the NODs. However, we can move Heather's depo to 1. That's fine.

We are still on track to produce documents on Friday as previously indicated.

-----Original Message-----

**From:** Hatfield, Charles <chuck.hatfield@stinson.com>  
**Sent:** Tuesday, September 12, 2023 2:36 PM  
**To:** Bethany Kirk <bkirk@mickesotoole.com>; Josh Douglass <jdouglass@mickesotoole.com>  
**Cc:** Cossette, Alixandra S. <alix.cossette@stinson.com>; allee.barton@huschblackwell.com;  
lowell.pearson@huschblackwell.com; Barrett, Alexander C. <alexander.barrett@stinson.com>  
**Subject:** RE: 23-0608: Delta Extraction, LLC v. Department of Health and Senior Services

Counsel, just checking in on discovery.

We will produce documents tomorrow as per your document requests.

We sent you a document request asking for your documents to be produced on the 6th. I had an email from Josh saying you would produce on the 15th. But I want to make sure that is still the plan. If you intend to object to the requests, I would appreciate getting those sooner than Friday.

We noticed up depositions for next week, but we are flexible on dates. For Monday, we noticed Heather for 9 a.m. but would like to move her to 1 p.m. Let us know if that's ok and if you have preferences on timing for the other two.

Charles W. Hatfield  
Partner

STINSON LLP  
230 W. McCarty Street  
Jefferson City, MO 65101-1553  
Direct: 573.636.6827 \ Mobile: 573.230.2610 \ <https://www.stinson.com/people-ChuckHatfield>

Assistant: <mailto:STL.LSSTeam10@stinson.com> \ 314.345.7040

<http://www.stinson.com/>

-----Original Message-----

**From:** Bethany Kirk <bkirk@mickesotoole.com>  
**Sent:** Thursday, September 07, 2023 11:52 AM

To: Hatfield, Charles <chuck.hatfield@stinson.com>  
Cc: Mary Gebhart <mgebhart@mickesotoole.com>; Cossette, Alixandra S. <alix.cossette@stinson.com>;  
allee.barton@huschblackwell.com; lowell.pearson@huschblackwell.com; Barrett, Alexander C.  
<alexander.barrett@stinson.com>; Josh Douglass <jdouglass@mickesotoole.com>  
Subject: RE: 23-0608: Delta Extraction, LLC v. Department of Health and Senior Services

External Email - Use Caution

Good morning,

It appears that the issues between the parties will either be resolved or complicated by the outcome of the pending Amended NOPR. If there isn't a resolution, we assume you would want to engage in additional discovery and amend the complaint. We would be agreeable to a much faster than normal process, with discovery closing 45 days after you amend and hearing 15 days after the close of discovery.

Best regards,

Bethany Kirk | Senior Counsel  
Mickes O'Toole, LLC  
Main: (314) 878-5600 | Direct: (314) 300-3554  
12412 Powerscourt Drive, Suite 200 | St. Louis, Missouri 63131 bkirk@mickesotoole.com |  
<http://www.mickesotoole.com/> .

-----Original Message-----

From: Hatfield, Charles <chuck.hatfield@stinson.com>  
Sent: Thursday, September 7, 2023 11:30 AM  
To: Bethany Kirk <bkirk@mickesotoole.com>  
Cc: Mary Gebhart <mgebhart@mickesotoole.com>; Cossette, Alixandra S. <alix.cossette@stinson.com>;  
allee.barton@huschblackwell.com; lowell.pearson@huschblackwell.com; Barrett, Alexander C.  
<alexander.barrett@stinson.com>; Josh Douglass <jdouglass@mickesotoole.com>  
Subject: Re: 23-0608: Delta Extraction, LLC v. Department of Health and Senior Services

[You don't often get email from chuck.hatfield@stinson.com. Learn why this is important at  
<https://aka.ms/LearnAboutSenderIdentification> ]

We will consult with the client on that. How long of a continuance would you like?

From: "Bethany Kirk" <bkirk@mickesotoole.com<mailto:bkirk@mickesotoole.com>>  
Subject: 23-0608: Delta Extraction, LLC v. Department of Health and Senior Services  
Date: 07 September 2023 10:57  
To: "Hatfield, Charles" <chuck.hatfield@stinson.com<mailto:chuck.hatfield@stinson.com>>  
Cc: "Mary Gebhart" <mgebhart@mickesotoole.com<mailto:mgebhart@mickesotoole.com>>, "Cossette, Alixandra S." <alix.cossette@stinson.com<mailto:alix.cossette@stinson.com>>,  
"allee.barton@huschblackwell.com<mailto:allee.barton@huschblackwell.com>" <allee.barton@huschblackwell.com<mailto:allee.barton@huschblackwell.com>>,  
"lowell.pearson@huschblackwell.com<mailto:lowell.pearson@huschblackwell.com>" <lowell.pearson@huschblackwell.com<mailto:lowell.pearson@huschblackwell.com>>, "Barrett, Alexander C."



<alexander.barrett@stinson.com<mailto:alexander.barrett@stinson.com>>, "Josh Douglass"  
<jdouglass@mickesotoole.com<mailto:jdouglass@mickesotoole.com>>

External Email - Use Caution

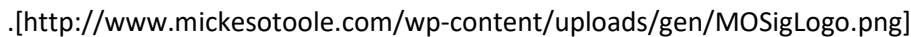
Good morning,

Please see the attached Respondent's Motion for Continuance and Scheduling Order, with exhibits, that we intend to file today.

We have indicated that Petitioner is not in agreement to this request. If there is agreement, please let me know by 4:00 pm today.

Best regards,

Bethany Kirk | Senior Counsel  
Mickes O'Toole, LLC  
Main: (314) 878-5600 | Direct: (314) 300-3554  
12412 Powerscourt Drive, Suite 200 | St. Louis, Missouri 63131  
bkirk@mickesotoole.com<mailto:bkirk@mickesotoole.com> |  
<http://www.mickesotoole.com/><<http://www.mickesotoole.com/>>





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Charles W. Hatfield  
Partner

STINSON LLP  
230 W. McCarty Street  
Jefferson City, MO 65101-1553  
Direct: 573.636.6827 \ Mobile: 573.230.2610 \ Bio<<https://www.stinson.com/people-ChuckHatfield>>

Assistant: [STL.LSSTeam10@stinson.com](mailto:STL.LSSTeam10@stinson.com)<<mailto:STL.LSSTeam10@stinson.com>> \ 314.345.7040

STINSON.COM<<http://www.stinson.com/>>

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