

**STATE OF WASHINGTON
SNOHOMISH COUNTY DISTRICT COURT**

CASCADE EVERGREEN EVERETT SOUTH

STATE OF WASHINGTON

Plaintiff,

vs.

MARK FLANIGAN, ET AL.

Defendants.

NO. 5303A – 15D

MEMORANDUM OPINION

**NON-PARTY DRAEGER'S
MOTION TO QUASH SUBPOENA**

I. INTRODUCTION

The Court has previously designated the above-captioned matter as the 'lead case' for purposes of these consolidated motions involving the Draeger Alcotest 9510. Cases from all four of the Snohomish County District Court Divisions have been consolidated in this motion. Defendants' Exhibit 7 is the calendars for all four Divisions containing a listing of the consolidated cases.

II. FACTS

The State of Washington has commenced the process of replacing aging Datamaster breath test machines with the Draeger Alcotest 9510. The parent company for the manufacturer is Draeger Safety AG and Co., a foreign corporation with its principle place of business in Germany. Draeger Safety Diagnostics, Inc., (Draeger) is a Delaware corporation with its principle place of business in Texas. Draeger does business in the State of Washington but has no offices and no employees here.

In eleven separate cases filed in all four divisions of Snohomish County District Court, various defense counsel have obtained and served a Subpoena Duces Tecum upon Draeger. Other than the defendant name and associated cause number, those subpoenas are virtually identical. An illustrative copy of the served subpoena was admitted as an attachment to Defendants' Exhibit 2 and is attached to this memorandum opinion.

Draeger asserts that the subpoenas should be quashed because defendants have failed to comply with the requirements of the Uniform Act on Witness Outside of the State, RCW Chapter 10.55. Defendants assert that, by virtue of doing business and having a registered agent in the State of Washington, Draeger subjects itself to the jurisdiction of this Court and the subpoenas were lawfully issued.

III. ISSUE

Should Draeger's motion to quash subpoenas in these consolidated cases be granted because the moving parties have not complied with the Uniform Act on Witness Outside of the State, RCW Chapter 10.55?

IV. ANALYSIS

No Independent Sixth Amendment Right

Defendant asserts that, regardless of the applicability of RCW Chapter 10.55, defendants have an independent Sixth Amendment right to compel the attendance of an out-of-state witness. Under the Sixth Amendment, Washington's subpoena powers do not extend outside of the State of Washington. *Minder v. Georgia*, 183 US 559 (1902); *State v. Wimbish*, 100 Wn. App, 78 (2000). There is no independent Sixth Amendment right to compel the attendance of an out-of-state witness.

Minimum Contacts Analysis is Not Relevant

Defendants alternatively argue that non-party Draeger has subjected themselves to the jurisdiction of this Court by doing business in the State of Washington. Under the theory propounded by defendants, because Draeger is doing business in Washington, this Court would have the authority to issue a subpoena to an out-of-state witness. Defendants cite to *International Shoe v. Washington*, 326 US 310 (1945) and *State v. Wimbish*, 100 Wn.App 78 (2000) in support of their theory.

International Shoe is an axiomatic case regarding the establishment of state court jurisdiction over an out-of-state defendant. If Draeger were a party, the 'minimum contacts' requirement from *International Shoe* is met. Washington has jurisdiction because Draeger is doing business in the State of Washington. However, that jurisdiction is predicated upon Draeger as a party to the litigation, not merely a witness. Because Draeger is not a party in this matter, the issues raised in *International Shoe* are not relevant to this determination.

RCW Chapter 10.55 Governs Subpoena for Witness Outside of Washington

Under Washington law, the process for the issuance of a subpoena to a witness residing outside of the State of Washington is governed by the Uniform Act on Witness Outside of the State under RCW Chapter 10.55. All fifty states within the United States are member states of the Uniform Act and the codification of the participation of the State of Texas can be found within Section 24.28 of the Texas Code of Criminal Procedure. The relevant Washington provisions are found within RCW sections 10.55.010 and 10.55.060 as set forth below:

RCW 10.55.010 Definitions.

"Witness" as used in this chapter shall include a person whose testimony is desired in any proceeding or investigation by a grand jury or in a criminal action, prosecution or proceeding. The word "state" shall include any territory of the United States and the District of Columbia. The word "summons" shall include a subpoena, order or other notice requiring the appearance of a witness.

RCW 10.55.060 Witness from another state summoned to testify in this state.

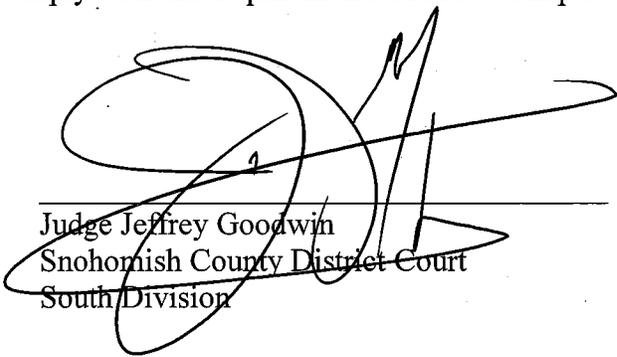
If any person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness either for the prosecution or for the defense, in a criminal action pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his or her attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he or she shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he or she is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he or she shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

V. ORDER

The facts of this case fall squarely within the requirements of RCW Chapter 10.55. Draeger is a witness in this matter, not a party. Draeger's principle place of business is in the State of Texas. There is no evidence that defendants have complied with the requirements of RCW 10.55.060 to secure the presence of a witness from the State of Texas. Draeger's motion to quash subpoenas issued in these consolidated matters that do not comply with the requirements of RCW Chapter 10.55 is granted.

DATED this 16th day of December, 2015.



Judge Jeffrey Goodwin
Snohomish County District Court
South Division

We Concur:

Judge Anthony Howard
Everett Division

Commissioner Rick Leo
Cascade Division

If any person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness either for the prosecution or for the defense, in a criminal action pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his or her attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he or she shall be tendered the sum of ten cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending and five dollars for each day that he or she is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he or she shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

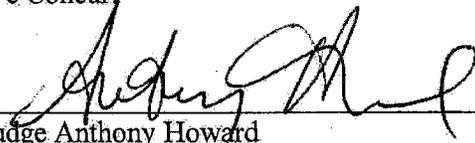
V. ORDER

The facts of this case fall squarely within the requirements of R CW Chapter 10.55. Draeger is a witness in this matter, not a party. Draeger's principle place of business is in the State of Texas. There is no evidence that defendants have complied with the requirements of RCW 10.55.060 to secure the presence of a witness from the State of Texas. Draeger's motion to quash subpoenas issued in these consolidated matters that do not comply with the requirements of RCW Chapter 10.55 is granted.

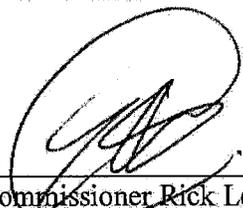
DATED this 16th day of December, 2015.

Judge Jeffrey Goodwin
Snohomish County District Court
South Division

We Concur:



Judge Anthony Howard
Everett Division



Commissioner Rick Leo
Cascade Division

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IN THE DISTRICT COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF SNOHOMISH
EVERETT DIVISION

STATE OF WASHINGTON,) Case No.: 3357A-15D
)
Plaintiff,) SUBPOENA DUCES TECUM
VS.)
)
JOSEPH ZISKOVSKY,)
)
Defendant.)

TO: Draeger Safety Diagnostics, Inc., Custodian of Records
C/O Corporation Service Company
300 Deschutes Way S.W. Ste 304
Tumwater, WA 98501

YOU ARE HEREBY COMMANDED to appear in Snohomish County District Court, Everett Division, 3000 Rockefeller Ave., Everett, Washington, 98201 on Aug 28, 2015 at 8:30 A.M./P.M., then and there to give testimony on behalf of the defendant in the above-entitled cause and you are further directed and commanded to bring with you the following papers, documents and items relating to the Draeger Alcotest 9510 breath test machine and the Draeger Alcotest 9510 Measurement System Software Version 8322798 0.7; Configuration File Software Version 8322796 2.3 as used in the State of Washington, viz.:

1. Two Draeger Alcotest 9510 breath testing machines as would be delivered to the Washington State Patrol (WSP) according to the specifications/customization outlined in the most recent contract between Draeger and the State of Washington which would be ready for use in the field by WSP with the most recent version of the WSP software installed not to precede the following:
 - i. Windows CE 5.5 8322797
 - ii. Measurement System Software 8322798 0.7 (aka Renesas M16 Binary)
 - iii. Configuration File Software 8322796 2.3
 - iv. Bootloader 1.5 8323536

- 1 2. A complete set of tagged and labeled build-tree snapshots, as one would find on a Draeger
2 developer's workstation or build machine, of all sources including any and all of the
3 following:
- 4 a. Textual (Human-Readable) objects, to include but not limited to:
 - 5 i. files of source code, written in high-level languages such as C++, C#, mid-level
6 languages such as IL or JVM, and/or assembler languages such as Renesas M16;
 - 7 ii. Makefiles (files used to command the compilers and linkers in the build/compile/link
8 process), script files used to link executable code objects, Platform Builder files used
9 to direct the process of image creation for Windows CE, and/or layout files to
10 provide memory mapping/allocation for the created image.
 - 11 b. Binary objects, to include but not limited to:
 - 12 i. Pictorial images, such as icons, photographs, pictographs, background/desktop
13 patterns, logos, scanned documents, video clips;
 - 14 ii. Pre-compiled binaries (as often provided by third-party Independent Software
15 Vendors), such as device drivers, encryption keys, BLOBs, data store files, digital
16 signatures, font files;
 - 17 iii. Sample data for calibration or sensor pre-compensation.
 - 18 c. The aforementioned Textual and Binary objects are to include all components necessary
19 to build, compile and/or assemble all of the following software images or their functionally
20 equivalent current versions:
 - 21 i. Windows CE 5.5 8322797
 - 22 ii. Measurement System Software 8322798 0.7 (aka Renesas M16 Binary)
 - 23 iii. Configuration File Software 8322796 2.3
 - 24 iv. Bootloader 1.5 8323536
- 25 All of the aforementioned items are to be the same items as used to build the released
software as provided to the State of Washington or any sub-entity thereof, in computer
readable, high level language on CD ROM media for DOS/Windows or Linux based
systems or in any computer readable form, if it exists in such a form, or may be converted to
such a form, otherwise in such form as it currently exists, together with any instructions on
the method for building the system to produce the images as required to use the software in
the Draeger 9510.
3. A labeled, loadable, executable copy of the software as provided to the State of Washington
or any sub-entity thereof in the form and on the medium used to load or install it into a
Draeger 9510 device (e.g., USB stick, flash drive, etc.), along with instructions on the
methods of use, analysis, verification, upgrading, and installation as well as the system
requirements to use that software outside the Draeger 9510 device.
4. The brand and model of the device used to create, build, compile, and assemble the source
code into machine language deployable images and the brand, title and revision level of the
software used to create, compile, and assemble the source code into a machine executable
binaries.
5. The functional specifications of the software program (to include but not limited to, the
architecture, diagrams, user interface, specifications, error identification, handling
specifications and hardware requirements).

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aforementioned radiation types. Said documentation to be delivered in either computer readable (e.g., PDF) or human readable (e.g., hard copy printout) format.

- d. Documented and certified results of independent testing of the following, but not limited to:
 - i. Effects, measurement and content of sample contaminants taken from tests with both positive and negative internal standards-type samples
 - ii. Effects, measurement and type of RF interference on the individual sensors and the 9510 device as a whole
 - iii. Test results as but not limited to those required by other State and/or Government agencies, e.g. Department of Transportation Testing Guidelines.

13. A list of the specific design issues and work-product related to the Draeger Alcotest 9510 which Draeger considers to be trade-secret.

And to remain in attendance at said Court until discharged.

FAILURE TO RESPOND AS REQUIRED TO THIS SUBPOENA SHALL BE CONSIDERED A CONTEMPT OF COURT AS PROVIDED IN CHAPTER 7.21 RCW.

THIS SUBPOENA MAY BE COMPLIED WITH BY SUPPLYING ALL OF THE ABOVE ITEMS TO DEFENSE COUNSEL PRIOR TO THE ABOVE-NOTED COURT DATE.

HEREIN FAIL NOT AT YOUR PERIL.

GIVEN UNDER MY HAND this 7 day of Aug, 2015.

Jessie Ness

The Honorable Judge *Proten*