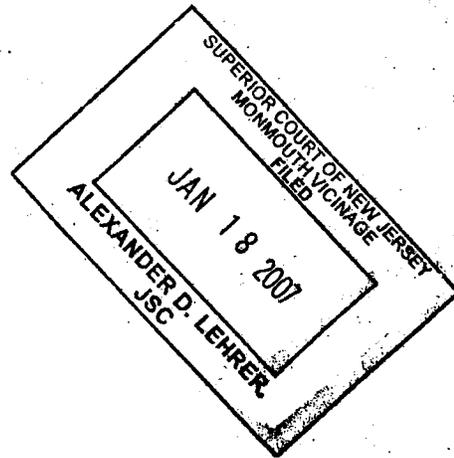


STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY  
Division of Law  
124 Halsey Street  
P.O. Box 45029  
Newark, New Jersey 07102  
Attorney for Plaintiff

By: Christopher W. Gerold  
Deputy Attorney General  
(973) 648-2893



SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - COUNTY OF  
MONMOUTH  
Docket No. C-316-06

STUART RABNER,  
Attorney General of New  
Jersey, on behalf of  
FRANKLIN L. WIDMANN, Chief of  
the New Jersey Bureau of  
Securities,

Plaintiffs,

v.

DIGITAL GAS INC.,  
a Michigan Corporation;  
BRIAN SMITH, individually;  
LYNN SMITH, individually; and  
WILLIAM BROWN, individually,

Defendants.

Civil Action

NOTICE OF MOTION TO COMPEL THE  
DEPOSITION OF BRIAN SMITH AND  
RECOVERY OF REASONABLE  
EXPENSES PURSUANT TO R. 4:23-4

2/16

TO: ALL COUNSEL AND PARTIES ON ATTACHED SERVICE LIST

PLEASE TAKE NOTICE that on February 9, 2007, at 9:00 a.m.  
or as soon thereafter as counsel may be heard, the undersigned,

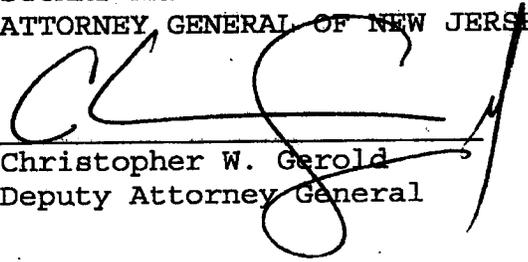
Stuart Rabner, Attorney General of New Jersey, on behalf of Franklin Widmann, Chief of the New Jersey Bureau of Securities, shall apply to the Honorable Alexander Lehrer, P.J.Ch., Superior Court, Chancery Division, Monmouth County, sitting at the Hall of Records, 1 East Main Street, Freehold, New Jersey, for an Order pursuant to R. 4:23-4 compelling the deposition of Defendant Brian Smith and reasonable expenses for failing to appear at the January 3, 2007 deposition.

PLEASE TAKE FURTHER NOTICE that Plaintiff shall rely on the enclosed Letter Brief and the Certification of Deputy Attorney General Christopher W. Gerold in Support of Plaintiff's Motion to Compel the Deposition of Brian Smith and Recovery of Reasonable Expenses Pursuant to R. 4:23-4 of the within application.

PLEASE TAKE FURTHER NOTICE that a proposed form of Order is submitted herewith.

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY

By:

  
Christopher W. Gerold  
Deputy Attorney General

Dated: January 17, 2007

**SERVICE LIST**

Rabner v. Digital Gas, et al.

Docket No. C-316-06

Robert Stevens, Esq.  
Attorney for Defendant Lynn Smith  
947 State Road, Suite 202  
Princeton, New Jersey 08540  
Fax: (609) 430-2822

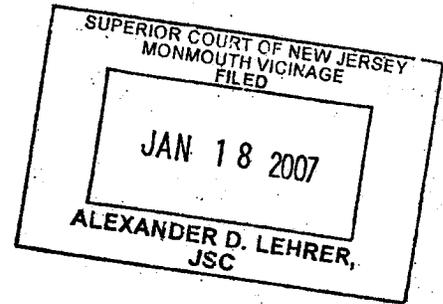
Brian Smith, pro se  
409 St. Clair Avenue  
Spring Lake, New Jersey

Digital Gas Inc.  
c/o Austin Marshall  
433 South Ashley Street  
Ann Arbor, Michigan 48103-4903

William Brown, pro se  
55 Harbour Square, Unit 1317  
Toronto, Ontario, Canada M5J 1A6

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY  
Division of Law  
124 Halsey Street  
P.O. Box 45029  
Newark, New Jersey 07102  
Attorney for Plaintiff

By: Christopher W. Gerold  
Deputy Attorney General  
(973) 648-2893



SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - COUNTY OF  
MONMOUTH  
Docket No. C-316-06

STUART RABNER,  
Attorney General of New  
Jersey, on behalf of  
FRANKLIN L. WIDMANN, Chief of  
the New Jersey Bureau of  
Securities,

Plaintiffs,

v.

DIGITAL GAS INC.,  
a Michigan Corporation;  
BRIAN SMITH, individually;  
LYNN SMITH, individually; and  
WILLIAM BROWN, individually,

Defendants.

Civil Action

**CERTIFICATION OF DEPUTY  
ATTORNEY GENERAL CHRISTOPHER  
W. GEROLD IN SUPPORT OF  
PLAINTIFF'S MOTION TO COMPEL  
THE DEPOSITION OF BRIAN SMITH  
AND RECOVERY OF REASONABLE  
EXPENSES PURSUANT TO R. 4:23-4**

I, Christopher W. Gerold, Deputy Attorney General, of full  
age, certify that:

1. I am an attorney admitted to practice law in the State of New Jersey and employed as a Deputy Attorney General by the State of New Jersey, the Office of Stuart Rabner, Attorney General of New Jersey, Department of Law and Public Safety, Division of Law, 124 Halsey Street, Fifth Floor, Newark, New Jersey. I am appearing in this case on behalf of plaintiff Stuart Rabner, Attorney General of New Jersey, on behalf of Franklin L. Widmann, Chief of the New Jersey Bureau of Securities ("Plaintiff").

2. I submit this Certification in support of Plaintiff's Motion to Compel the Deposition of Brian Smith and Recovery of Reasonable Expenses Pursuant to R. 4:23-4.

3. This Certification is based on facts that are within my knowledge.

4. On December 8, 2006, Plaintiff sent a cover letter and "Notice of Deposition" via overnight mail to Defendant Brian Smith. The "Notice of Deposition" required Defendant Brian Smith to appear for deposition on Wednesday, December 20, 2006 at the Division of Law, 124 Halsey Street, Newark, New Jersey. A copy of the cover letter and "Notice of Deposition" dated December 8, 2006 are attached as Exhibit 1.

5. On December 19, 2006, New Jersey Bureau of Securities Chief Investigator Richard Barry, Supervising Investigator James Lane, and I called Defendant Brian Smith to confirm his

appearance on December 20, 2006. Defendant Brian Smith informed us that he was still in the process of retaining counsel, specifically William Fox, Esq. of the law firm of Graham Curtin, P.A. Immediately after speaking with Defendant Brian Smith, we contacted Mr. Fox. Mr. Fox informed us that he had not been retained as counsel for Defendant Brian Smith.

6. In light of the information received from Defendant Brian Smith regarding his retention of counsel, Plaintiff agreed to reschedule the deposition of Defendant Brian Smith until January 3, 2007.

7. On December 20, 2006, a letter was sent to Defendant Brian Smith noticing him that the deposition scheduled for December 20, 2006 was rescheduled to January 3, 2007. The letter also stated that "no further requests for postponement will be granted. Please make all arrangements regarding counsel in advance of this date." A copy of the letter sent to Defendant Brian Smith, dated December 20, 2006, is attached as Exhibit 2.

8. On December 21, 2006, Chief Investigator Richard Barry personally served the December 20, 2006 letter on Defendant Brian Smith at his residence, 409 St. Clair Avenue, Spring Lake, New Jersey.

9. On January 2, 2007, Supervising Investigator James Lane and I contacted Defendant Brian Smith to confirm his appearance for deposition on January 3, 2007. Defendant Brian

Smith informed us that he had spoken to counsel and an attorney would be calling our offices at 2:00 p.m. Supervising Investigator James Lane and I inquired as to the identity of the attorney who would be calling. Defendant Brian Smith responded that it would be William Fox, Esq., of Graham, Curtin, P.A. or one of his associates.

10. Neither I, nor any person at the New Jersey Bureau of Securities, received any communication from an attorney representing Defendant Brian Smith on January 2, 2007.

11. On January 3, 2007, upon arriving at my office at approximately 8:30 a.m., I received facsimile from Defendant Brian Smith regarding the deposition scheduled for 10:00 a.m. the same morning. The facsimile was sent numerous times between approximately 11:20 p.m. and 2:24 a.m., as indicated by the time at the top of the document. Copies of the letters sent by Defendant Brian Smith, dated January 2, 2007, are attached as Exhibit 3.

12. Although it may be inferred, the January 3, 2007 letters do not expressly state that Defendant Brian Smith will not be attending the January 3, 2007 deposition.

13. At approximately 10:00 a.m. on January 3, 2007, Deputy Attorney General Victoria Manning and I left a message for Defendant Brian Smith informing him that the deposition had not been cancelled and his appearance was still required.

14. At approximately 10:20 a.m. on January 3, 2007, Chief Investigator Richard Barry, Supervising Investigator James Lane, and I again attempted to contact Defendant Brian Smith to no avail.

15. At approximately 11:00 a.m. on January 3, 2007, I made a record with the stenographer, who had arrived at my office at approximately 9:45 a.m., that Defendant Brian Smith had failed to appear as required by the "Notice of Deposition" and subsequent correspondence. A copy of the transcript from the January 3, 2007 deposition is attached as Exhibit 4.

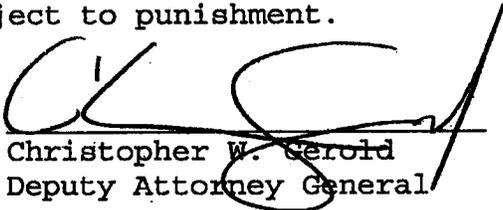
16. On January 3, 2007, at 11:40 p.m., more than twelve (12) hours after the scheduled start of the deposition, a facsimile was sent to my office from Defendant Brian Smith, where he offers "to let us undertake the payment of the stenographer ...." I received this facsimile on January 4, 2007. A copy of the letter from Defendant Brian Smith dated December 3, 2007 is attached as Exhibit 5.

17. The cost for the stenographer on January 3, 2007 was \$238.00. Of that amount, \$180.00 was for "Reporter Attendance" and \$58.00 was for the eight (8) pages of transcript, setting forth Defendant Brian Smith's failure to appear. A copy of the invoice from Rosenberg & Associates for work performed on January 3, 2007 is attached as Exhibit 6.

18. My attorney fees relating to the time spent waiting for Defendant Brian Smith on January 3, 2007 and the time spent in drafting the Motion to Compel the Deposition of Brian Smith and the Recovery of Reasonable Expenses Pursuant to R. 4:23-4, including the supporting documents and this Certification, are approximately 10.1 hours @ \$135.00 per hour, totaling \$1363.50. A copy of the relevant Division of Law Timekeeping System Timesheet Report and State of New Jersey, Department of Law and Public Safety, Division of Law, Memorandum, regarding Uniform Rate of Compensation are attached as Exhibit 7.

I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

By:

  
Christopher W. Gerold  
Deputy Attorney General

Dated: January 17, 2007

**EXHIBIT 1**



JON S. CORZINE  
Governor

*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
PO Box 45029  
NEWARK, NJ 07101

STUART RABNER  
Attorney General

December 8, 2006

VIA OVERNIGHT MAIL

Brian Smith, pro se  
409 St. Clair Avenue  
Spring Lake, New Jersey 07762

Re: Rabner v. Digital Gas, et al.  
Docket Number Mon-C-316-06  
Notice of Deposition of Brian Smith

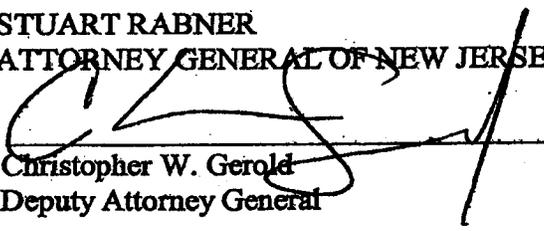
Dear Mr. Smith:

Enclosed is the "Notice of Deposition of Brian Smith." Pursuant to that notice, you are required to appear on at 10:00 a.m. on December 20, 2006 at the Division of Law, 124 Halsey Street, 5<sup>th</sup> Floor, Newark, New Jersey for a deposition in the above matter.

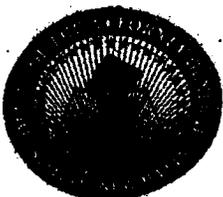
If you have any questions, please contact me at (973) 648-2893.

Very truly yours,

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY

By:   
Christopher W. Gerold  
Deputy Attorney General

cc: *See attached service list (via regular mail)*  
Franklin L. Widmann, Chief of the Bureau of Securities (via email)  
Amy Kopleton, Deputy Bureau Chief (via email)  
James Lane, Supervising Investigator (via email)  
Michael LaChapelle, Investigator (via email)



Anna Lascrain, Deputy Attorney General, Section Chief (via email)  
Victoria Manning, Deputy Attorney General, Assistant Section Chief (via email)

**Service List**

**Rabner v. Digital Gas Inc., et al.**  
**Docket Number Mon-C-316-06**

Robert Stevens, Esq.  
Attorney for Defendant Lynn Smith  
947 State Road, Suite 202  
Princeton, New Jersey 08540  
Fax: (609) 430-2822

Digital Gas Inc.  
C/O Business Filings Inc.  
30600 Telegraph Road  
Bingham Farms, Michigan 48025

Digital Gas Inc.  
433 South Ashley Street  
Ann Arbor, Michigan 48103-4903

William Brown, pro se  
55 Harbour Square, Unit 1317  
Toronto, Ontario, Canada M5J 1A6

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY  
Division of Law  
124 Halsey Street  
P.O. Box 45029  
Newark, New Jersey 07102  
Attorney for Plaintiff

By: Christopher W. Gerold  
Deputy Attorney General  
(973) 648-2893

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - COUNTY OF  
MONMOUTH  
Docket No. C-316-06

STUART RABNER,  
Attorney General of New  
Jersey, on behalf of  
FRANKLIN L. WIDMANN, Chief of  
the New Jersey Bureau of  
Securities,

Plaintiffs,

v.

DIGITAL GAS INC.,  
a Michigan Corporation;  
BRIAN SMITH, individually;  
LYNN SMITH, individually; and  
WILLIAM BROWN, individually,

Defendants.

Civil Action

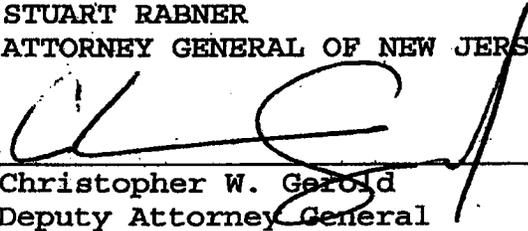
NOTICE OF DEPOSITION OF BRIAN  
SMITH

To: Brian Smith, pro se  
409 St. Clair Avenue  
Spring Lake, New Jersey 07762

PLEASE TAKE NOTICE that in accordance with the Current New Jersey Court Rules, testimony will be taken by deposition upon oral examination before a person authorized by the laws of the State of New Jersey to administer oaths on Wednesday, December 20, 2006 at 10:00 a.m., at the Division of Law, 124 Halsey Street, 5<sup>th</sup> Floor Newark, New Jersey, with respect to all matters relevant to the subject matter involved in this action, at which time and place you, BRIAN SMITH, will appear and testimony will be taken.

Dated: December 8, 2006

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY

By: 

Christopher W. Gerold  
Deputy Attorney General

\*\*\* Transmit Conf. Report \*\*\*

P.1

Dec 13 2006 16:26

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State of New Jersey

DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW

FAX TRANSMITTAL SHEET

SECURITIES FRAUD PROSECUTION SECTION

FAX NUMBER: 973-648-3956

DATE: December 13, 2006

\*\*\*\*\*

TO: Robert Stevens, Esq.  
FAX (609) 430-2822

FROM: Christopher W. Gerold, DAG

FAX NUMBER: 973-648-3956

NUMBER OF PAGES INCLUDING COVER SHEET: 5

MESSAGE: Rabner v. Digital Gas Inc., et al.  
Docket Number Mon-C-316-06

\*\*\*\*\*

PLEASE NOTIFY SENDER IMMEDIATELY  
IF ANY PAGES ARE RECEIVED IMPROPERLY

\*\*\*\*\*

The information contained in this facsimile transmission may be privileged and confidential information from the New Jersey Attorney General's Office intended for the sole use of the persons or entities named on this transmittal cover sheet. If you are not an intended recipient of this transmission, the dissemination, distribution, copying or use of the information it contains is strictly prohibited. If you have received this



**EXHIBIT 2**



JON S. CORZINE  
Governor

*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
PO Box 45029  
NEWARK, NJ 07101

STUART RABNER  
Attorney General

December 20, 2006

VIA HAND DELIVERY AND REGULAR MAIL

Brian Smith, *pro se*  
409 St. Clair Avenue  
Spring Lake, New Jersey 07762

Re: Rabner v. Digital Gas, et al.  
Docket Number Mon-C-316-06  
Rescheduling of Deposition of Brian Smith

Dear Mr. Smith:

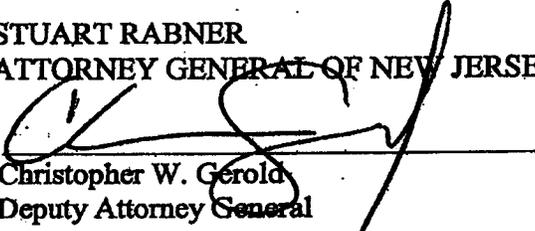
On December 19, 2006, you informed Supervising Investigators James Lane and Richard Barry, as well as myself, that you are not currently represented by counsel and are still in the process of retaining counsel, specifically William Fox, Esq. In light of that information, I agreed to postpone your deposition, scheduled for December 20, 2006, until January 3, 2007.

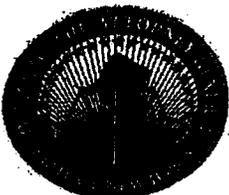
Please be advised that at 10:00 a.m. on January 3, 2007 at the Division of Law, 124 Halsey Street, 5<sup>th</sup> Floor, Newark, New Jersey, your appearance is required. Also be advised that no further requests for postponement will be granted. Please make all arrangements regarding counsel in advance of this date.

If you have any questions, please contact me at (973) 648-2893.

Very truly yours,

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY

By:   
Christopher W. Gerold  
Deputy Attorney General



December 20, 2006

Page 2

cc: *See attached service list (via regular mail and facsimile)*  
Franklin L. Widmann, Chief of the Bureau of Securities (via email)  
Amy Kopleton, Deputy Bureau Chief (via email)  
James Lane, Supervising Investigator (via email)  
Michael LaChapelle, Investigator (via email)  
Anna Lascrain, Deputy Attorney General, Section Chief (via email)  
Victoria Manning, Deputy Attorney General, Assistant Section Chief (via email)

**Service List**

**Rabner v. Digital Gas Inc., et al.**

**Docket Number Mon-C-316-06**

Robert Stevens, Esq.  
Attorney for Defendant Lynn Smith  
947 State Road, Suite 202  
Princeton, New Jersey 08540  
Fax: (609) 430-2822

Digital Gas Inc.  
C/O Business Filings Inc.  
30600 Telegraph Road  
Bingham Farms, Michigan 48025

Digital Gas Inc.  
433 South Ashley Street  
Ann Arbor, Michigan 48103-4903

William Brown, pro se  
55 Harbour Square, Unit 1317  
Toronto, Ontario, Canada M5J 1A6

**EXHIBIT 3**

**Brian Smith**  
409 St. Clair Avenue  
Spring Lake, New Jersey 07762  
(732) 927-0185

January 2, 2007

Mr. Christopher W. Gerold  
Deputy Attorney General  
State of New Jersey  
Newark, New Jersey 07101

Re: Docket No. MON-C-316-06

Dear Mr. Gerold:

I respectfully and in good faith ask you to abide by the sequence of events and timing laid out in The Honorable Alexander D. Lehrer's court on December 1, 2006.

His honor originally scheduled the next hearing for January 5, 2007, but changed it to January 19, 2007 after you made your request for an accounting. That was because he knew that we would need that added time just to fulfill that one request. To expect me to prepare for a deposition in addition to that request was unreasonable.

There are several additional good reasons not to seek a deposition prior to January 19<sup>th</sup> and without a discussion between yourself, my attorney, representing me on that date, and His Honor. However, unless you specifically request additional reasons, I would prefer to cite solely the above reason at this time.

I will be represented on January 19<sup>th</sup> and there will be a substantive answer and other facts and information for you to consider at or by that time.

I ask this in the best interest of our investors, shareholders, interested third parties and the public good.

I could not get back to you before this time today. I apologize for any inconvenience.

As a matter of fact, in 2005 and early 2006 the Prosecutor and Bureau of Securities were advised of conditions and circumstances at variance to those contained in the Complaint they advised you to file. I requested of each that they contact me to clarify all matters. They ignored this plea or request.

As a result, third parties acting against our company have cut a huge swath of damage against us and a variety of institutions, including courts and a bank to the tune of \$800,000. They did this because I placed what was in the best interest of shareholders and investors in front of their greed and denied them the rape or circumvention of our company that they desired.

In light of what has happened, in light of the wild press reporting and other events and actions leveled against the company and me, in light of the gun toting visit to my home, which I am sure you did in complete unawareness of my prior ignored requests for meetings, discussions and disclosures, please excuse me for acting a little damaged in light of what I have had to bear, a little gun-shy of this process.

I am trying to protect all good interested parties. If that is your aim, please withdraw the request for a deposition until the appropriate time. Have more empathy for the company than the reports and information given to your office to date have permitted you to demonstrate. Unless I am wrong, your office has also been victimized.

I will have my attorney contact you well before the court date.

Original signed copies of this letter will be fedexed to you.

Sincerely,

*Brian Smith*

**Brian Smith**  
409 St. Clair Avenue  
Spring Lake, New Jersey 07762  
(732) 927-0185

January 2, 2007

Mr. Christopher W. Gerold  
Deputy Attorney General  
State of New Jersey  
Newark, New Jersey 07101

Re: Docket No. MON-C-316-06

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Sincerely,

*Brian Smith*

**Brian Smith**  
409 St Clair Avenue  
Spring Lake, New Jersey 07762  
(732) 927-0185

January 2, 2007

Mr. Christopher W. Gerold  
Deputy Attorney General  
State of New Jersey  
P.O. Box 45029  
Newark, New Jersey 07101

Re: Docket No. MON-C-316-06

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Sincerely,

Brian Smith

**Brian Smith**  
409 St. Clair Avenue  
Spring Lake, New Jersey 07762  
(732) 927-0185

January 2, 2007

Mr. Christopher W. Gerold  
Deputy Attorney General  
State of New Jersey  
P.O. Box 45029  
Newark, New Jersey 07101

Re: Docket No. MON-C-316-06

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Sincerely,

Brian Smith

## FAX COVER SHEET

<b>TO</b>	Christopher Gerold
<b>COMPANY</b>	Deputy Attorney General
<b>FAX NUMBER</b>	19736483956
<b>FROM</b>	Brian Smith
<b>DATE</b>	2007-01-03 00:01:58 GMT
<b>RE</b>	Letter

### COVER MESSAGE

I rushed to get it to you after I got back.

In printing out the final and signing I edited some typos.

No substantive changes.

Thanks.

## **FAX COVER SHEET**

<b>TO</b>	Christopher Gerold
<b>COMPANY</b>	Deputy Attorney General
<b>FAX NUMBER</b>	19736483956
<b>FROM</b>	Brian Smith
<b>DATE</b>	2007-01-02 23:11:34 GMT
<b>RE</b>	

### **COVER MESSAGE**

**EXHIBIT 4**

1 SUPERIOR COURT OF NEW JERSEY  
2 CHANCERY DIVISION:MONMOUTH COUNTY  
3 DOCKET NO. MON-C-316-06

4  
5 STUART RABNER, Attorney General of New :  
6 Jersey, on behalf of FRANKLIN L. WIDMANN, :  
7 Chief of the New Jersey Bureau of Securities, :  
8 Plaintiffs, :

9 vs. :

10 DIGITAL GAS INC., a Michigan corporation; :  
11 BRIAN SMITH, individually; LYNN SMITH, :  
12 individually; and WILLIAM BROWN, :  
13 individually, :  
14 Defendants. :

15 -----

16 TRANSCRIPT OF PROCEEDINGS  
17 WEDNESDAY, JANUARY 3, 2007

18  
19  
20 ROSENBERG & ASSOCIATES, INC.  
21 Certified Shorthand Reporters & Videographers  
22 425 Eagle Rock Avenue, Suite 201  
23 Roseland, New Jersey 07028  
24 (973) 228-9100  
25 www.rosenbergandassociates.com

1            Transcript of Proceedings, taken in the  
2 above-entitled matter before WINIFRED A. HANDEL, a  
3 Certified Shorthand Reporter (License No. XI00421)  
4 and Notary Public of the State of New Jersey, taken  
5 at the offices the ATTORNEY GENERAL OF NEW JERSEY,  
6 Division of Law, 124 Halsey Street, Newark, New  
7 Jersey, on Wednesday, January 3, 2007, commencing  
8 at 10:56 a.m.

9

## 10    A P P E A R A N C E S:

11

12    STUART RABNER, Attorney General  
13    124 Halsey Street, Second Floor  
14    Newark, New Jersey 07101

15    BY: CHRISTOPHER W. GEROLD, DAG.

16    Attorney for the Plaintiffs

17

18

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	E X H I B I T S		
	NUMBER	DESCRIPTION	PAGE
1			
2			
3	P-1	letter, January 2, 2007	4
4	P-2	letter, with attached	
5		deposition notice	5
6	P-3	letter, December 20, 2006	5
7			
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1 (P-1, P-2, and P-3 were marked for  
2 identification.)

3 MR. GEROLD: It is now 10:56, and Mr.  
4 Brian Smith has not appeared. Defendant Brian  
5 Smith was scheduled to be deposed at 10 a.m. at  
6 this office in the case of the Bureau Chief, Frank  
7 Widmann, versus Brian Smith, Lynn Smith, William  
8 Brown, and Digital Gas, Docket No. C-316-06.

9 I called Mr. Smith at 10 a.m. with  
10 Deputy Attorney General Victoria Manning and left a  
11 voice message at the number he provided to my office  
12 in previous correspondence. That number is  
13 (732) 927-0185. The message that I left stated  
14 that the deposition was still scheduled for this  
15 morning at 10 a.m.

16 I also called Mr. Smith at 10:15 a.m.  
17 with Investigators James Lane and Richard Barry.  
18 There was no answer. I did not leave a second  
19 message. I received a letter from Mr. Smith this  
20 morning that did not expressly state that he would  
21 not be appearing. From the time on the fax, the  
22 letter was sent to my office late last night,  
23 January 2, 2007. I have marked this letter as  
24 Exhibit P-1 for identification purposes.

25 This deposition was originally

1 scheduled for December 19, 2006 via notice of  
2 deposition which was sent to Mr. Smith on December  
3 8, 2006 via overnight mail. I'm going to mark the  
4 notice of deposition of Brian Smith as Exhibit P-2  
5 for identification purposes.

6                   On December 19, 2006, Mr. Smith  
7 informed myself, Investigators James Lane and  
8 Richard Barry that he was still in the process of  
9 retaining counsel. Based on that information, the  
10 New Jersey Bureau of Securities agreed to adjourn  
11 the deposition to today, January 3, 2007. That  
12 letter to Mr. Smith has been marked as Exhibit P-3 for  
13 identification purposes.

14                   Yesterday Investigators James Lane  
15 and Richard Barry and myself called Mr. Smith to  
16 confirm that he would be appearing today. He  
17 stated he was still retaining counsel, specifically  
18 Mr. Bill Fox or one of his associates, and that an  
19 attorney would be calling my office at or about 2  
20 p.m. to speak with me. No phone call was ever received.

21                   It is now 10:59 a.m. I have not  
22 received a response to my voice mail or heard any  
23 other information from Mr. Brian Smith with the  
24 exception of his letter late last night, and I'll  
25 presume that Mr. Smith will not be appearing today.

## **FAX COVER SHEET**

<b>TO</b>	Christopher Gerold
<b>COMPANY</b>	Deputy Attorney General
<b>FAX NUMBER</b>	19736483956
<b>FROM</b>	Brian Smith
<b>DATE</b>	2007-01-03 23:37:49 GMT
<b>RE</b>	Letter January 3rd

### **COVER MESSAGE**

See attached.

**EXHIBIT 6**

**Rosenberg & Associates** *Since 1965*  
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TOLL FREE 800-86COURT (862-6878)      ONLINE www.RosenbergandAssociates.com

# INVOICE

INVOICE NO.	DATE	JOB NUMBER
85277	01/09/2007	01-93751
JOB DATE	ASSIGNED TO	CASE NUMBER
01/03/2007	HANDWI	MON-C-316-06
CASE CAPTION		
Rabner vs. Digital Gas Inc.		
TERMS		
Net 30, After 30, Int. at 1.5% per Month		

Christopher W. Gerold, DAG  
 Christopher W. Gerold, DAG  
 124 Halsey Street  
 2nd floor  
 Newark, NJ 07101

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 Transcript of Proceedings  
 REPORTER ATTENDANCE

8 Pages

58.00  
 180.00

TOTAL DUE >>>>

238.00

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df

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Please detach bottom portion and return with payment.

Christopher W. Gerold, DAG  
 Christopher W. Gerold, DAG  
 124 Halsey Street  
 2nd floor  
 Newark, NJ 07101

Job No. : 01-93751  
 Case No. : MON-C-316-06  
 Rabner vs. Digital Gas Inc.  
 Invoice No.: 85277  
 Date : 01/09/2007  
 TOTAL DUE : 238.00

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STATE OF NEW JERSEY

DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
MEMORANDUM

DATE: January 17, 2007

TO: All Division of Law Staff  
FROM: Nancy Kaplen  
Acting Director  
SUBJECT: Uniform Rate of Compensation

Effective May 1, 2005, the uniform rate of compensation in cases where the State is entitled to recovery of fees is hereby amended as follows:

PARALEGAL .....\$55 per hour  
LAW ASSISTANT .....\$100 per hour  
DEPUTY ATTORNEY GENERAL .....\$135 per hour  
(0-5 years of legal experience)  
DEPUTY ATTORNEY GENERAL .....\$155 per hour  
(5-10 years of experience)  
DEPUTY ATTORNEY GENERAL .....\$175 per hour  
(more than ten years of experience)  
ASSISTANT ATTORNEY GENERAL .....\$200 per hour

These rates are generally consistent with the rates paid by the State of New Jersey for the services of outside counsel. Although application of the lodestar rate for New Jersey might result in higher hourly fees, it is reasonable to utilize the fees the State pays to private attorneys when seeking reimbursement of fees for services by this office. Accordingly, these hourly rates should be utilized by Division of Law attorneys when making application for the recovery of fees.

N.K.



*State of New Jersey*  
OFFICE OF THE ATTORNEY GENERAL  
DEPARTMENT OF LAW AND PUBLIC SAFETY  
DIVISION OF LAW  
PO Box 45029  
NEWARK, NJ 07101

JON S. CORZINE  
*Governor*

STUART RABNER  
*Attorney General*

January 17, 2007

VIA OVERNIGHT MAIL

Honorable Alexander D. Lehrer, P.J.Ch.  
Hall of Records  
1 East Main Street  
Freehold, New Jersey 07728

Re: Rabner v. Digital Gas, et al.  
Docket Number Mon-C-316-06  
Motion to Compel the Deposition of Brian Smith and  
Recovery of Reasonable Expenses Pursuant to R. 4:23-4

Dear Judge Lehrer:

Plaintiff, Stuart Rabner, Attorney General of New Jersey, on behalf of Franklin Widmann, Chief of the New Jersey Bureau of Securities, ("Plaintiff") respectfully submits this letter brief in support of Plaintiff's Motion to Compel the Deposition of Brian Smith and Recovery of Reasonable Expenses Pursuant to R. 4:23-4.

Statement of Facts

On December 8, 2006, Plaintiff sent a cover letter and "Notice of Deposition" to Defendant Brian Smith ("Smith") via overnight mail. The "Notice of Deposition" noticed Smith that he was to appear for deposition on Wednesday, December 20, 2006 at 10:00 a.m.



at 124 Halsey Street, Newark, New Jersey. (See Certification of Deputy Attorney General Christopher W. Gerold in Support of Plaintiff's Motion to Compel the Deposition of Brian Smith and Recovery of Reasonable Expenses Pursuant to R. 4:23-4 ("Gerold Cert."), ¶4.) On December 19, 2006, New Jersey Chief Investigator Richard Barry, Supervising Investigator and I called Smith to confirm his appearance the following day. Smith informed us that he was still in the process of retaining counsel, specifically William Fox, Esq. of the law firm of Graham Curtin, P.A. (Gerold Cert., ¶5.) In light of the information received from Smith, Plaintiff agreed to adjourn the deposition until January 3, 2007. (Gerold Cert., ¶6.)

On December 20, 2006, a letter was sent to Smith confirming the January 3, 2007 deposition. (Gerold Cert., ¶7.) That same letter was personally served on Smith by Chief Investigator Richard Barry on December 21, 2006 at Smith's residence, 409 St. Clair Avenue, Spring Lake, New Jersey. (Gerold Cert., ¶8.) The letter specifically stated, "no further requests for postponement will be granted. Please make all arrangements regarding counsel in advance of the this date [January 3, 2007]." (Gerold Cert., ¶7.)

On January 2, 2007, Supervising Investigator James Lane and I contacted Smith to confirm his appearance for deposition on the following day. Smith again informed us he was still in the process of retaining counsel and an attorney would be contacting us at 2:00

p.m. (Gerold Cert., ¶9.) No communication from an attorney was ever received. (Gerold Cert., ¶10.)

On January 3, 2007, Plaintiff received a facsimile from Smith, which did not expressly state he would not be appearing. (Gerold Cert., ¶12.) Deputy Attorney General Victoria Manning and I called Defendant Brian Smith and left a message stating that the deposition was not cancelled and his appearance was required. (Gerold Cert., ¶13 .) Further attempts were made to contact Smith with no avail. (Gerold Cert., ¶14.) At 11:00 a.m., one hour past the scheduled start of the deposition, I went on the record with the stenographer, who had arrived at 9:45 a.m., and stated that Defendant Brian Smith failed to appear. (Gerold Cert., ¶15.) The total cost of Defendant Brian Smith's failure to appear for deposition on January 3, 2007 and Plaintiff's Motion to Compel the Deposition of Brian Smith and Recovery of Reasonable Expenses Pursuant to R. 4:23-4 are \$1606.50, representing \$1368.50 in attorney's fees and \$238.00 for the stenographer on January 3, 2007. (Gerold Cert., ¶¶17, 18.)

On January 4, 2007, Plaintiff received a facsimile from Smith that had been sent more than twelve (12) hours after the scheduled start of his deposition, at approximately 11:40 p.m. on January 3, 2007, where he offered "to let us [Defendant Brian Smith] undertake payment of the stenographer...." (Gerold Cert., ¶16.) This letter was not received until twenty four (24) hours after Smith's

scheduled deposition. Furthermore, to date no effort has been made by Smith to reschedule his deposition or reimburse Plaintiff for expenses relating to his failure to appear on January 3, 2007.

**The Court Should Compel Defendant Brian Smith's Deposition and Grant Reasonable Expenses Pursuant to R. 4:23-4.**

Pursuant to R. 4:23-4, the Court may enter an Order compelling a party to appear when that party has failed to appear for a properly noticed deposition. See, e.g. Ruiz-Aquirr v. Torres, 2006 WL 2193822, at \*1 (N.J. Super. Jul. 21, 2006); Walters v. Mays Landing Village Condominiums Ass'n, 2005 WL 1244685, at \*1 (N.J. Super. Apr. 15, 2005). Here, Smith's deposition was properly noticed by the December 8, 2006 "Notice of Deposition" and the December 20, 2006 letter, yet he failed to appear. There is no question that this Court has the power to compel Smith, the main defendant to this action, to appear for his deposition. In addition, Plaintiff believes that it would be a waste of time and State resources to continue to attempt to reschedule the deposition when it appears Smith will not appear unless ordered to do so by the Court.

Furthermore, Smith should be ordered to pay for the reasonable expenses of the properly noticed January 3, 2007 deposition. Pursuant to R. 4:23-4, "[i]n lieu of any order or in addition thereto the court shall require the party failing to act to pay the

reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust." Smith failed to properly notify Plaintiff in a timely manner that he would not be appearing at the January 3, 2007 deposition. In addition, Smith volunteered to pay the expenses in his January 3, 2007 letter, where he states "let us [Defendant Brian Smith] undertake payment of the stenographer...."

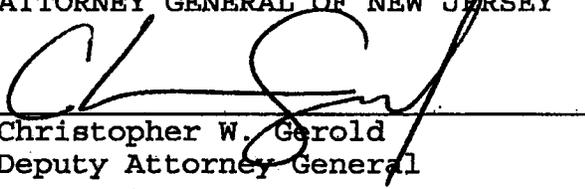
Since the initial return date of Plaintiff's Order to Show Cause on October 13, 2006, Smith has stated to this Court and Plaintiff that he is in the process of retaining counsel. Plaintiff has acted reasonably in light of those circumstances, however Smith's reliance on his attempts to retain counsel should not permit him to cause unreasonable delay and expense in this litigation.

Conclusion

For the reasons set forth above, Plaintiff respectfully requests that the Court enter an Order compelling Smith to appear for his deposition to be taken by Plaintiff within twenty (20) days of the Court's Order and Smith be ordered to pay reasonable expenses for the January 3, 2007 deposition.

Respectfully submitted,

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY

By: 

Christopher W. Gerold  
Deputy Attorney General

cc: *See attached service list* (via overnight mail)  
Franklin L. Widmann, Chief of the Bureau of Securities (via email)  
Amy Kopleton, Deputy Bureau Chief (via email)  
James Lane, Supervising Investigator (via email)  
Richard Barry, Chief Investigator (via email)  
Anna Lascurain, Deputy Attorney General, Section Chief (via email)  
Victoria Manning, Deputy Attorney General, Assistant Section Chief (via email)

**Service List**  
**Rabner v. Digital Gas Inc., et al.**  
Docket Number Mon-C-316-06

Robert Stevens, Esq.  
Attorney for Defendant Lynn Smith  
947 State Road, Suite 202  
Princeton, New Jersey 08540  
Fax: (609) 430-2822

Digital Gas Inc.  
c/o Austin Marshall  
433 South Ashley Street  
Ann Arbor, Michigan 48103-4903

William Brown, pro se  
55 Harbour Square, Unit 1317  
Toronto, Ontario, Canada M5J 1A6

Brian Smith, pro se  
409 St. Clair Avenue  
Spring Lake, New Jersey 07762

STUART RABNER  
ATTORNEY GENERAL OF NEW JERSEY  
Division of Law  
124 Halsey Street  
P.O. Box 45029  
Newark, New Jersey 07102  
Attorney for Plaintiff

By: Christopher W. Gerold  
Deputy Attorney General  
(973) 648-2893

SUPERIOR COURT OF NEW JERSEY  
CHANCERY DIVISION - COUNTY OF  
MONMOUTH  
Docket No. C-316-06

STUART RABNER,  
Attorney General of New  
Jersey, on behalf of  
FRANKLIN L. WIDMANN, Chief of  
the New Jersey Bureau of  
Securities,

Plaintiffs,

v.

DIGITAL GAS INC.,  
a Michigan Corporation;  
BRIAN SMITH, individually;  
LYNN SMITH, individually; and  
WILLIAM BROWN, individually,

Defendants.

Civil Action

**CERTIFICATION OF SERVICE**

I, Christopher W. Gerold, Deputy Attorney General, of full  
age, certify that:

1. I am an attorney admitted to practice law in the State of New Jersey and employed as a Deputy Attorney General by the State of New Jersey, the Office of Stuart Rabner, Attorney General of New Jersey, Department of Law and Public Safety, Division of Law, 124 Halsey Street, Fifth Floor, Newark, New Jersey. I am appearing in this case on behalf of Stuart Rabner, Attorney General of New Jersey, on behalf of Franklin L. Widmann, Chief of the New Jersey Bureau of Securities ("Plaintiff").

2. I hereby certify that on January 17, 2007, I caused the (1) Notice of Motion to Compel the Deposition of Brian Smith and Recovery of Reasonable Expenses Pursuant to R. 4:23-4; (2) Certification of Deputy Attorney General Christopher W. Gerold in Support of Plaintiff's Motion to Compel the Deposition of Brian Smith and for Reasonable Expenses Pursuant to R.4:23-4; (3) Letter Brief; (4) Proposed Form of Order, and (5) this Certification of Service to be served via overnight mail upon the counsel of record and the pro se defendants on the attached service list.

I certify that the forgoing statements made by me are true. I am aware that if any of the foregoing statements made by me

are willfully false, I am subject to punishment.

Dated: January 17, 2007

  
Christopher W. Gerold  
Deputy Attorney General

**SERVICE LIST**

Rabner v. Digital Gas, et al.

Docket No. C-316-06

Robert Stevens, Esq.  
Attorney for Defendant Lynn Smith  
947 State Road, Suite 202  
Princeton, New Jersey 08540  
Fax: (609) 430-2822

Brian Smith, pro se  
409 St. Clair Avenue  
Spring Lake, New Jersey

Digital Gas Inc.  
c/o Austin Marshall  
433 South Ashley Street  
Ann Arbor, Michigan 48103-4903

William Brown, pro se  
55 Harbour Square, Unit 1317  
Toronto, Ontario, Canada M5J 1A6

Widmann, Chief of the New Jersey Bureau of Securities (the "Bureau"), for an Order compelling the deposition of Defendant Brian Smith and recovery of reasonable expenses pursuant to R. 4:23-4, on notice to counsel and all other parties to this action, and the Court having considered all moving and opposing papers, and for good cause having been shown,

IT IS ON THIS \_\_\_\_\_ DAY OF FEBRUARY 2007 ORDERED as follows:

1. Pursuant to R. 4:23-4, Defendant Brian Smith is hereby ordered to appear for a deposition to be taken by Plaintiff within twenty (20) days of entry of this Order. The deposition shall continue day-to-day until complete and shall occur at the offices of Plaintiff, 124 Halsey Street, 5<sup>th</sup> Floor, Newark, New Jersey.
2. Pursuant to R. 4:23-4, Defendant Brian Smith shall pay reasonable expenses for his failure to appear for deposition on January 3, 2007. Payment shall be made within twenty (20) days of entry of this Order in the amount of \_\_\_\_\_, payable by certified funds to the "State of New Jersey, Bureau of Securities" and sent to the New Jersey Bureau of Securities, P.O. Box 47029, Newark, New Jersey, 07101.