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July 26, 2011

United States EPA, Region 5  
Office of Regional Hearing Clerk  
Attn: La Dawn Whitehead  
77 W. Jackson Blvd.  
Mailcode: E-19J  
Chicago, IL 60604-3590



**Re: Carbon Injection Systems LLC, et al. Motion for Administrative Subpoena to Compel Discovery Deposition of International Flavors & Fragrances, LLC Docket No. RCRA 05-2011-0009**

Dear Ms. Whitehead:

Enclosed please find an original and two copies of Carbon Injection Systems LLC, Scott Forster and Eric Lofquist's Motion for Administrative Subpoena to Compel Discovery Deposition of International Flavors & Fragrances, LLC. Please contact me if you have any questions or concerns.

Sincerely,

Meagan L. DeJohn

Enclosure

cc: Keven Eiber, Esq.  
Larry Falbe, Esq.

812823.1

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5**

**In the Matter of:**

**Carbon Injection Systems LLC;  
Scott Forster, President;  
Eric Lofquist, Vice President  
Gate #4 Blast Furnace Main Ave  
Warren Township, OH 44483**

**EPA ID No. OHR000127910**

**Respondents.**

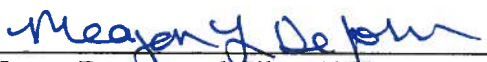
**Docket No. RCRA-05-2011-0009**

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**MOTION FOR ADMINISTRATIVE SUBPOENA  
TO ISSUE FOR THE DEPOSITION  
OF INTERNATIONAL FLAVORS & FRAGRANCES, LLC**

Respondents Carbon Injection Systems LLC, Scott Forster and Eric Lofquist, by and through their undersigned counsel, pursuant to Rule 22.19(e) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (40 C.F.R. 22.19(e)), respectfully request the Presiding Officer issue a subpoena for a corporate representative of International Flavors & Fragrances, Inc. (IFF) to appear and testify for a deposition. In support of this Motion, Respondents rely on the Consolidated Rules and the facts and law set forth in the accompanying Memorandum.

Respectfully submitted,

  
\_\_\_\_\_  
Keven Drummond Eiber (OH 0043746)  
Meagan L. DeJohn (OH 0079429)  
Brouse McDowell, L.P.A.  
1001 Lakeside Ave., Suite 1600  
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*Attorneys for Respondents Carbon Injection  
Systems LLC, Scott Forster, and Eric  
Lofquist*

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

In the Matter of: )

Carbon Injection Systems LLC; )  
Scott Forster, President; )  
Eric Lofquist, Vice President )  
Gate #4 Blast Furnace Main Ave )  
Warren Township, OH 44483 )

EPA ID No. OHR000127910 )

Respondents. )

) Docket No. RCRA-05-2011-0009

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MEMORANDUM IN SUPPORT OF RESPONDENTS' MOTION FOR  
ADMINISTRATIVE SUBPOENA  
TO ISSUE FOR THE DEPOSITION  
OF INTERNATIONAL FLAVORS & FRAGRANCES, LLC

Respondents Carbon Injection Systems LLC ("CIS"), Scott Forster and Eric Lofquist request the issuance of a subpoena for non-party International Flavors & Fragrances, Inc. ("IFF") to appear and testify for a deposition at the specified date, time and location noted in the attached subpoena. Respondents request the deposition be taken pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure which governs depositions of corporations through their corporate representatives. Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, IFF would be directed to designate one or more of its proper employees, officers, agents, or other persons duly authorized to testify on its behalf. The deposition is intended for discovery and also for use at the hearing. The proposed subpoena for IFF is attached hereto as Exhibit 1.

I. Relevant Background

This civil administrative penalty case is brought pursuant to Section 3008(a) of

the Resource Conservation and Recovery Act, as amended (“RCRA”), 42 U.S.C. § 6928(a), and its implementing state and federal regulations. The Complaint involves CIS’s former operations at its facility in Warren Township, Ohio. (Compl. ¶ 11). CIS’s operations at the facility included blending used oil with virgin products and marketing on-specification used oil to its customer, a steel mill. The steel mill uses the oil supplied by CIS as a source of carbon, an essential ingredient for the production of iron in its blast furnace. (Comp. ¶¶ 17 and 28).

Complainant, the United States Environmental Protection Agency (“U.S. EPA”) alleges that CIS stored and treated hazardous waste at its facility without a permit or interim status. Specifically, U.S. EPA alleges that Respondents accepted hazardous waste at the facility on one hundred and eighty-nine (180) occasions between August 9, 2006 and February 27, 2009, without a permit. (Compl. ¶¶ 73-75). The Complaint against Respondents includes nine additional allegations related to the storage and treatment of this same alleged hazardous waste. (See Complaint Count II-X). U.S. EPA proposes a penalty of \$1,915,148 against Respondents. (Compl. ¶ 97).

This alleged hazardous waste that is the subject of the complaint consists of UNITENE AGR and UNITENE LE, two terpene<sup>1</sup>-based products manufactured by IFF in Augusta, Georgia. IFF marketed these products to CIS through a broker, and the products were shipped to CIS’s facility by IFF without any indication that the products were waste materials. Information received from IFF since the Complaint was filed confirms that the UNITENE products it sold to CIS were not hazardous wastes. (See, e.g., Letter from Joseph Leightner, Assistant General Counsel of IFF to U.S. EPA dated

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<sup>1</sup> Terpenes are a natural product derived from the essential oils of plants.

June 6, 2011, attached hereto as Exhibit 2). Respondents have answered the Complaint and have asserted in good faith that the material purchased from IFF was not a hazardous waste. It follows that if the IFF products sold to CIS were not hazardous wastes, CIS did not violate RCRA as alleged in the Complaint.

Respondents submitted their Answer to the Administrative Complaint on July 15, 2011. As of this date, the Presiding Officer has not yet been assigned, nor has a hearing been scheduled. The parties have agreed to engage in non-binding mediation of this matter through U.S. EPA's Conflict Prevention and Resolution Center. The parties have already interviewed several potential mediators and are in the process of selecting a mediator.

In order to prepare for mediation and, if necessary, for an eventual hearing, Respondents need to obtain admissible evidence regarding whether the UNITENE products it purchased from IFF were hazardous waste, as U.S. EPA claims and as IFF disputes. Such evidence likely would consist of testimony and documents regarding IFF's products, its manufacturing process, and its marketing of its products. Evidence regarding whether the material purchased by CIS from IFF was a hazardous waste lies within the exclusive possession and control of IFF. Because IFF is not a party to this proceeding, CIS cannot obtain the information through the usual prehearing exchange process. To effectively prepare for mediation, and ultimately to defend against the allegations in the Complaint, Respondents require information from IFF. Respondents are bringing this motion early in this proceeding in order to have time to schedule the necessary depositions without undue inconvenience to IFF and without unnecessary delay in these proceedings.

## **II. Legal Standard**

Consolidated Rule 22.19 authorizes the taking of additional discovery outside of the prehearing exchange. Discovery other than the prehearing exchange may be ordered by the Presiding Officer if it:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e)(1).

For the Presiding Officer to order a deposition the moving party must also meet either of two additional criteria: 1) the information sought cannot be reasonably obtained by alternative methods of discovery, or 2) there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing. 40 C.F.R. § 22.19(e)(3). Although the standard for discovery under the Consolidated Rules is more restrictive than under the Federal Rules of Civil Procedure, courts applying the Consolidated Rules have recognized that discovery will be granted if “a refusal to do so would so prejudice a party as to deny him due process.” *McClelland v. Andrus*, 606 F.2d 1278, 1286 (D.C. Cir. 1979).

## **III. Discussion**

The deposition of IFF—which is not a party to this matter—is authorized by Section 22.19 (e) of the Consolidated Rules. The information sought from IFF is probative of the central issue in this proceeding - whether the products purchased from IFF were hazardous wastes. The information sought cannot be obtained from U.S. EPA.

Although U.S. EPA has twice requested information from IFF, the information supplied by IFF in response is insufficient to resolve the issue of whether the products it sold to CIS were hazardous wastes. (See, e.g., Letter from Joseph Leightner, Assistant General Counsel of IFF to U.S. EPA dated June 6, 2011, attached hereto as Exhibit 2). Because IFF is not a party to this proceeding, Respondents have no other means of obtaining the information from it. IFF's outside counsel has represented to CIS's counsel that IFF will require a subpoena before it will provide either testimony or documents. Without the deposition of IFF, Respondents will be prejudiced in their ability to prepare for mediation and to present their defense at any hearing.

The requested deposition will not unreasonably delay the proceeding. At this point in time, the parties are in the process of selecting a mediator, and neither mediation or a hearing have been scheduled.


Further, the requested deposition will not pose an unreasonable burden on U.S. EPA. The information is sought from a third-party. U.S. EPA would, of course, have the right to attend and participate in the deposition, but it is not required to do so. Likely, it would be able to attend any deposition by telephone or video conference, as such arrangements are common.

### **III. Conclusion**

For the foregoing reasons, Respondents respectfully request that the Presiding Officer enter an order granting Respondents' Motion for Administrative Subpoena to Issue for the Deposition of International Flavors & Fragrances, LLC and that the subpoena be returned to Respondents for service on IFF. The proposed subpoena for IFF is attached hereto as Exhibit 1.



Respectfully submitted,

  
\_\_\_\_\_  
Keven Drummond Eiber (0043746)  
Meagan L. DeJohn (0079429)  
Brouse McDowell, L.P.A.  
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Lawrence W. Falbe (IL State Bar 06224888)  
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*Attorneys for Respondents Carbon Injection  
Systems LLC, Scott Forster, and Eric  
Lofquist*

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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and accurate copy of the foregoing Respondents' Motion for Administrative Subpoena to Compel Discovery Deposition of International Flavors & Fragrances, LLC was mailed by U.S. Mail, postage prepaid, to the following counsel on this 26<sup>th</sup> day of July, 2011.

U.S. EPA Office of Regional Hearing Clerk  
Attn: La Dawn Whitehead  
77 W. Jackson Blvd. (E-19J)  
Chicago, Illinois 60604

Catherine Garypie, Associate Regional Counsel  
U.S. Environmental Protection Agency, Region 5  
77 West Jackson Blvd. (C-14J)  
Chicago, Illinois 60604

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\_\_\_\_\_  
Meagan L. DeJohn

# **EXHIBIT A**

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 5

In the Matter of: )

Carbon Injection Systems LLC; )  
Scott Forster, President; )  
Eric Lofquist, Vice President )  
Gate #4 Blast Furnace Main Ave )  
Warren Township, OH 44483 )

EPA ID No. OHR000127910 )

Respondents. )  
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Docket No. RCRA-05-2011-0009

Under Section 3008(a) of the Resource  
Conservation and Recovery Act,  
42 U.S.C. § 6928(a)

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REGION 5

SUBPOENA DUCES TECUM

To: International Flavors & Fragrances, Inc.  
World Headquarters  
521 West 57<sup>th</sup> Street  
New York, New York 10019

YOU ARE HEREBY COMMANDED, pursuant to Section 3008(b) of the  
Resources Conservation and Recovery Act, 42 U.S.C. § 6928(b), and Section 22.19(e) of  
the Consolidated Rules of Practice, 40 C.F.R. Part 22, TO APPEAR IN PERSON at the  
following place and times:

DATES AND TIMES: August 15, 2011 at 9:30 am, and continuing as needed

PLACE: International Flavors & Fragrances, Inc.,  
World Headquarters  
521 West 57<sup>th</sup> Street  
New York, New York 10019

The deposition will be taken pursuant to Rule 30(b)(6) of the Federal Rules of  
Civil Procedure, as applicable and may be continued from day to day until completed.  
Pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, International Flavors  
& Fragrances, Inc. is directed to designate one or more of its proper employees, officers,  
agents, or other persons duly authorized to testify on its behalf regarding all information  
known or available to International Flavors & Fragrances, Inc. concerning the matters  
listed below. The deposition will be recorded by stenographic means and may be  
recorded by sound and visual means.

Subjects of Inquiry for International Flavors & Fragrances

1. The manufacturing process at IFF's Augusta, Georgia facility, including specifically the production of products containing various fractions or streams of terpene derivatives, including Unitene AGR and Unitene LE, from 2005 to the present.
2. All process changes in the manufacture and storage of UNITENE AGR and UNITENE LE in 2006 and thereafter.
3. The generation, storage, transportation and disposal of hazardous waste from IFF's Augusta, Georgia facility.
4. IFF's marketing and sale of Unitene AGR and Unitene LE beginning in 2006 and continuing to the present, generally, and to CIS specifically.
5. IFF's undertaking to obtain trademarks related to UNITENE, UNITENE AGR and UNITENE LE.
6. To the extent not included in the above topics, clarification and elaboration regarding IFF's responses to U.S. EPA's 2007 and 2009 information requests, particularly Response No. 3 in IFF's response dated March 30, 2010.

YOU ARE FURTHER COMMANDED:

TO APPEAR IN PERSON at the above dates, time and place;

TO TESTIFY then and there under oath, make truthful response to all lawful inquiries and questions put to you by the Parties; and

TO REMAIN IN ATTENDANCE until excused.

YOU ARE FURTHER COMMANDED TO BRING WITH YOU AND PRODUCE at the earliest time and place identified above the following books, papers, letters or other documentary evidence related to the matters listed above:

1. Process diagrams that describe the manufacturing process at IFF's Augusta, GA, plant for Unitene AGR from 2005 to the present.
2. Process diagrams that describe the manufacturing process at IFF's Augusta, GA, plant for Unitene LE from 2005 to the present.
3. Documents sufficient to describe any process changes in the manufacture of Unitene AGR at IFF's Augusta, GA, plant from 2005 to the present.
4. Documents sufficient to describe any process changes in the manufacture

of Unitene LE at IFF's Augusta, GA, plant from 2005 to the present.

5. All documents regarding the RCRA closure of any tank at IFF's Augusta, GA, plant used to store Unitene AGR and/or Unitene LE from 2005 to the present.

6. All documents consisting of or reflecting communications, whether written, oral or electronic, between IFF and any state or federal governmental agency, including U.S. EPA, regarding Unitene AGR and/or Unitene LE.

7. All documents that refer or relate to IFF's marketing and sale of Unitene AGR and/or Unitene LE.

8. All documents that refer or relate to IFF's undertaking to obtain trademark protection for its Unitene products.

PURSUANT TO THE AUTHORITY OF SECTION 3008(b) OF THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6928(b), FAILURE TO COMPLY WITH THIS SUBPOENA MAY RESULT IN INITIATION OF COURT PROCEEDINGS IN A UNITED STATES DISTRICT COURT AGAINST THE RECIPIENT OF THE SUBPOENA TO COMPEL COMPLIANCE WITH THE SUBPOENA AND ANY FAILURE TO OBEY SUCH ORDER OF THE COURT MAY BE PUNISHED BY SUCH COURTY AS COMTEMPT THEREOF.

ISSUED in Chicago, Illinois, this \_\_\_\_ date of \_\_\_\_\_, 2011.

\_\_\_\_\_  
NAME

Administrative Law Judge

**This subpoena is to be served in accordance with Section 22.05(B)(1)(i) of the Consolidated Rules of Practice, 40 C.F.R. § 22.05(b)(1)(i).**

**Persons at whose request this Subpoena was issued:**

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Meagan L. DeJohn  
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# **EXHIBIT B**





June 6, 2011

Catherine Garypie, Esq.  
Associate Regional Counsel  
United States Environmental Protection Agency  
Region 5  
77 West Jackson Blvd.  
Chicago, IL 60604-3590

Re: *In the Matter of Carbon Injection Systems LLC*  
Docket Number RCRA-05-2011-0009

Dear Ms. Garypie:

I am Assistant General Counsel with International Flavors & Fragrances Inc. ("IFF") and, in that capacity, I write regarding the above referenced administrative proceeding. It is IFF's understanding that the Complaint in that proceeding is based in part on UNITENE AGR that the Respondent, Carbon Injection Systems LLC ("CIS"), received from IFF. We understand from recent correspondence between the United States Environmental Protection Agency ("USEPA") and CIS that this product is considered by the USEPA to be hazardous waste. The purpose of this letter is to clarify IFF's position to USEPA and to correct what appears to be a misunderstanding on the part of USEPA about certain UNITENE products that were sold by IFF to CIS.

As you know, IFF received two Requests for Information from USEPA regarding certain aspects of its waste management practices in 2007 and 2009 and IFF submitted responsive documents thereto. It now appears that the USEPA may not have had the benefit of a fully comprehensive analysis of the way in which various fractions of terpene derivatives were treated over time and, as a result, we believe that USEPA has reached certain conclusions that IFF respectfully submits are erroneous.

The source of the materials sold to CIS was IFF's manufacturing facility in Augusta, Georgia. Manufacturing processes at Augusta result in the creation of certain by-products containing various fractions or streams of terpene derivatives. Prior to mid-2006, IFF was not aware of any commercial uses for these terpene by-products. As a result, the terpene by-products were sent to a central collection tank and accumulated with various other by-products. Once collected, the materials, now viewed as waste because there was no commercial use for them, were reviewed and disposed of as hazardous waste due to their characteristics, or because the collected material contained

listed hazardous wastes pursuant to 40 CFR Part 261. Accordingly, the hazardous waste was transported by a licensed hazardous waste transporter to a licensed treatment, storage and disposal facility.

As earlier noted, we have had an opportunity to review correspondence between you and counsel for CIS regarding the referenced matter. In that correspondence, USEPA has asserted that materials identified as UNITENE-LE and UNITENE-AGR were sent by IFF to CIS on approximately 149 occasions between 2006 and 2009. Although there is no mention of these materials in USEPA's Complaint against CIS and its principals, we believe it is clear from the correspondence that USEPA erroneously believes that these products were once classified as hazardous waste. IFF respectfully disagrees with USEPA's position for the reasons set forth below.

In or around 2006, as part of a larger corporate initiative toward waste reduction and minimization, IFF began to seek out commercial applications for some of these terpene fractions. In doing so, IFF learned that there were commercial applications, and a market for certain terpene streams. Accordingly, IFF segregated certain streams from other terpene by-products and discontinued its practice of commingling and managing all terpene streams as wastes. IFF identified these segregated products under the label "UNITENE" (which is trademarked).

The UNITENE products included specific formulations such as UNITENE-AGR and UNITENE-LE. Since being segregated from the collection tank and labeled as UNITENE products, IFF has consistently sold these as products (which would include all sales to CIS). At no time has any product labeled "UNITENE", "UNITENE AGR" or "UNITENE LE" ever been managed as a waste, let alone a hazardous waste.

As I previously noted, IFF received a Request for Information from USEPA regarding certain waste management practices in 2007 and 2009. In particular, IFF was asked to provide written waste determinations for UNITENE AGR and UNITENE LE. IFF submitted its responses on June 15, 2009 and further supplemented on March 30, 2010. In your letter to Lawrence Falbe, Esq., counsel for CIS, dated May 5, 2011, you referred specifically to IFF's Response No.3 in the March 30<sup>th</sup> letter as a basis for USEPA's assertion that UNITENE AGR is a hazardous waste.

Response No.3 says, in pertinent part, "[a]s of 6/27/2007, none of this material [referring to UNITENE AGR] has been sent offsite as hazardous waste. Prior to that date, during the time frame for this request, some of the material had been sent offsite as hazardous waste with waste numbers D001, D035, F003 (Ethyl Benzene) & F005 (Methyl Ethyl Ketone)."

Upon review, it is clear that Response No.3 is incomplete and, as a result, is inadvertently misleading. In fact, UNITENE AGR, as a separate terpene derivative stream, has always been a product and never been managed as a waste. It has been segregated from other terpene derivative streams (with which it was previously combined prior to being identified by any nomenclature as a separate product), and sold as a

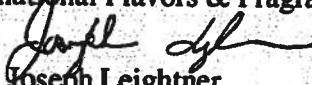
product for commercial use, generally as a solvent or degreaser. In the past, prior to any time period relevant to the referenced matter, the stream now known as UNITENE AGR was commingled with other terpene streams to be disposed of as waste and *only the commingled material was managed as hazardous waste*. UNITENE AGR, as a separate stream, has never been managed as nor considered in any way pursuant to statute to be hazardous waste. Unfortunately, this critical clarification was not included in Response No.3 and therefore was not brought to USEPA's attention at that time. I wanted to take this opportunity to do so now.

Similarly, IFF also responded, in Response No.6, to the equivalent inquiry about UNITENE LE. Response No.6 clearly and consistently states IFF's position that UNITENE LE is not a waste, and therefore cannot be a hazardous waste, because it can be used or reused as an effective substitute for commercial products, pursuant to 40 CFR §261.2(e)(1)(ii). Response No.6 included a description of those uses and explicitly stated that "[t]his material does not get sent off site as a waste and thus does not have a waste determination."

Based on the foregoing, IFF respectfully submits that USEPA's conclusion that the material sent from IFF to CIS was hazardous waste is incorrect. We would welcome a further dialogue on this subject as IFF continues to transport this product.

Thank you very much for your courtesy and consideration. Please feel free to contact me if you would like to discuss these issues further.

Very truly yours,  
International Flavors & Fragrances Inc.

  
Joseph Leightner  
Assistant General Counsel