

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Creative Liquid Coatings, Inc.)
(formerly d/b/a Creative Coatings, Inc.))
2701 S. Coliseum Blvd., Suite 1284)
Fort Wayne, IN 46803)
)
U.S. EPA ID No. INR 000 109 322)
)
Elite Enterprises, Inc.)
)
AND)
)
Randall Geist)
)
)
Respondents.)

Docket No. RCRA-05-2009-0012

RECEIVED
APR 14 2010
REGIONAL HEARING CLERK
USEPA
REGION 5

IN THE MATTER OF:)
)
Elite Enterprises, Inc.)
2701 S. Coliseum Blvd., Suite 1158)
Fort Wayne, IN 46803)
)
U.S. EPA ID No. IND 985 102 607)
)
Creative Liquid Coatings, Inc.)
(formerly d/b/a Creative Coatings, Inc.))
)
AND)
)
Randall Geist)
)
)
Respondents.)


Docket No. RCRA-05-2009-0013

**COMPLAINANT'S MOTION FOR ISSUANCE OF
SUBPOENAS FOR MARK ESPICH AND JAN JACKSON**

Comes now the United States Environmental Protection Agency, Region 5 ("U.S. EPA" or "Complainant"), through its undersigned attorneys, pursuant to Sections

22.16(a) and 22.21(b) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits* (“Consolidated Rules”), codified at 40 C.F.R. §§ 22.16(a) and 22.21(b), and respectfully requests that the Presiding Officer issue subpoenas ordering Mark Espich and Jan Jackson to appear and testify at the specified date, time, and location for the administrative hearing in these matters. In support of this Motion, Complainant relies on the Consolidated Rules, the pleadings and records on file with the Court, and the facts and law set forth in the accompanying Memorandum.

Respectfully submitted,



Richard J. Clarizio
Karen Peaceman
Associate Regional Counsels
Gary E. Steinbauer
Assistant Regional Counsel
United States EPA – ORC Region 5
77 W. Jackson Blvd. (C14-J)
Chicago, IL 60604
(312) 886-0559
Attorneys for Complainant

DATE: April 14, 2010

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

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Respondents.)

Docket No. RCRA-05-2009-0013

**MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR
ISSUANCE OF SUBPOENAS FOR MARK ESPICH AND JAN JACKSON**

Complainant moves the Presiding Officer to issue subpoenas to compel Mark
Espich and Jan Jackson to appear and testify at the administrative hearing in these

matters, currently scheduled for 9:30 a.m. on May 18, 2010, and continuing as necessary until May 21, 2010, at the Allen County Juvenile Center, Courtroom 3, 2929 Wells Street, Fort Wayne, Indiana 46808. Proposed subpoenas for Mr. Espich and Ms. Jackson are attached hereto as **Exhibit 1**.

I. RELEVANT BACKGROUND

These civil administrative penalty cases are 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. Complainant has named Creative Liquid Coatings, Inc., formerly doing business as Creative Coatings, Inc. (“Creative”); Elite Enterprises, Inc. (“Elite”); and Randall Geist as Respondents (hereinafter, when referred to collectively, Creative, Elite, and Mr. Geist will be referred to as “Respondents”).

The Complaints in these matters involve Respondents’ operations at two separate facilities within an industrial park known as International Park Commerce & Industrial Business Center (“International Park”), which is located at 2701 S. Coliseum Boulevard, Fort Wayne, Indiana 46803. (Compl. 0012, ¶¶42-44¹; Compl. 0013, ¶¶39-41²). Wayne Coliseum Limited Partnership (“Wayne Coliseum”) owns International Park. (Compl. 0012, ¶¶43, 45-46, 49; Compl. 0013, ¶¶40, 42, 44-45). Respondents leased two facilities

¹ “Compl. 0012” refers to the Complaint in the case captioned *In the matter of Creative Liquid Coatings, Inc.*, Docket No. RCRA-05-2009-0012.

² “Compl. 0013” refers to the Complaint in the case captioned *In the matter of Elite Enterprises, Inc.*, Docket No. RCRA-05-2009-0013.

in International Park from Wayne Coliseum. (*Id.*) The facilities Respondents leased are known as Suite 1158 and Suite 1284.³ (Compl. 0012, ¶¶47-52; Compl. 0013, ¶¶46-50).

Respondents conducted painting operations at Suites 1158 and 1284. (*See* Compl. 0012, ¶41; Compl. 0013, ¶38). Respondents' painting operations resulted in the generation of hazardous waste at both of these facilities. (*See* Compl. 0012, ¶41; Compl. 0013, ¶38).

Complainant alleges that Respondents stored hazardous waste at these facilities without a permit or interim status. (*See* Complaints Count I). More specifically, Complainant alleges that Respondents accumulated hazardous waste on-site at their facilities for more than 90 days, mislabeled hazardous waste containers, failed to include the necessary information in and keep on-site a contingency plan, failed to conduct weekly inspections of the hazardous waste storage areas, and failed to provide training for their employees with duties involving hazardous waste management. (*Id.*). In addition, Complainant alleges that Respondents failed to comply with certain manifest requirements, which made it more difficult for EPA and the Indiana Department of Environmental Management ("IDEM") to track the off-site shipment and disposal of their hazardous waste. (*See* Complaints Count II). Complainant proposes penalties of \$313,722 for Respondents' violations at Suite 1158 and \$110,027 for Respondents' violations at Suite 1284. (Complainant's Rebuttal Prehearing Exchanges, p. 4).

³ Respondents also have referred to Suite 1158 as "Plant 1" and Suite 1284 as "Plant 2." (Compl. 0012, ¶¶47-48; Compl. 0013, ¶¶46-47).

II. GOVERNING LEGAL STANDARD⁴

The Consolidated Rule governing the issuance of subpoenas to compel witnesses to attend and testify at an administrative hearing is codified at 40 C.F.R. § 22.21(b).

Pursuant to this Consolidated Rule, the applicable statute must authorize the issuance of subpoenas to compel the attendance and testimony of a witness at an administrative hearing. 40 C.F.R. § 22.21(b). In addition, subpoenas may be granted “upon a showing of the grounds and necessity therefor, and the materiality and relevancy of the evidence to be adduced.” *Id.*; see also *In re Blackinton Common, LLC*, Docket No. RCRA-01-2007-0164, 2008 EPA ALJ LEXIS 43, at *7 (Nov. 13, 2008) (citing cases)

II. DISCUSSION

A. RCRA Authorizes The Issuance Of Administrative Subpoenas

Section 3008(b) of RCRA, 42 U.S.C. § 6928(a)(3)(b), grants the Presiding Officer authority, in connection with a hearing, to “issue subpoenas for the attendance and testimony of witnesses” See also *Chem. Waste Mgmt., Inc. v. U.S. EPA*, 873 F.2d 1477, 1478-79 (D.C. Cir. 1989) (citing RCRA § 3008(b), 42 U.S.C. § 6928(b), as granting the agency authority to issue subpoenas in connection with administrative hearings). Therefore, RCRA, the statute pursuant to which these actions were initiated, authorizes the Presiding Officer to issue subpoenas.

⁴ For a more complete discussion of the background of these cases and a more thorough discussion of Respondents and their operations in International Park, please see the Memoranda in support of Complainant’s Motions To Compel Discovery And To Correct Deficiencies In Respondents’ Prehearing Exchange, which were filed and served on March 31, 2010.

B. The Testimony Of These Witnesses Will Be Relevant And Material

As required by Consolidated Rule 22.21(b), the testimony of Mr. Espich and Ms. Jackson will be both relevant and material to Respondents' liability for the alleged violations and the penalty imposed.

Mark Espich. Mr. Espich was an inspector in IDEM's Office of Solid and Hazardous Waste Management during the relevant time period. Mr. Espich accompanied Mr. Todd Brown of the U.S. EPA on the compliance evaluation inspection on June 22, 2005, during which violations alleged in the Complaints were observed. (*See* CPHX⁵ 37, CX-0000341).

Mr. Espich may be called upon to testify as to his personal knowledge and observations related to the operations at Suites 1158 and 1284 before, during, and after the June 22, 2005, inspection. He may be called upon to testify as to his experience with inspecting painting operations and the generation of hazardous waste at these and similar facilities. He also may be called upon to testify as to his observations and discussions during the June 22, 2005, inspection and IDEM's knowledge of the regulatory status and operations of the facilities. (Complainant's Prehearing Exchange ("PHE"), p. 2). More specifically as to IDEM's knowledge of the notification and regulatory status of Creative and Elite's facilities, Mr. Espich may have knowledge regarding the use of an EPA hazardous waste identification number assigned to Elite for Suite 1158 (IND 985 102 607) for waste generated by Creative at Suite 1284. (*Id.* at p. 2; *see also* CPHX 37, CX-0000341).

⁵ Complainant uses "CPHX" to refer to the exhibits submitted in its prehearing exchanges.

In addition, Mr. Espich may be called upon to explain the operation of the IDEM's Virtual File Cabinet ("VFC"). Mr. Espich may testify that the VFC is a publicly available database and that the VFC is the source of certain documents relied upon by Complainant to establish Respondents' liability. For example, the VFC contains a copy of the September 5, 2007, Air Permit Application submitted by Mr. Randall Geist, as President of Creative Liquid Coatings, Inc., wherein Mr. Geist admits that the name of Creative Liquid Coatings, Inc. was Elite Enterprises, Inc. prior to 2005. (CPHX 107, CX CX-0000711). In sum, Mr. Espich's testimony will be relevant to a wide-range of material issues in these cases.

Jan Jackson. Ms. Jackson is the Property Manager for International Park, which is owned by Wayne Coliseum. (Compl. 0012, ¶43; Compl. 0013, ¶40). As Property Manager for International Park, Ms. Jackson is responsible for, among other things, managing the properties and overseeing and resolving problems with tenants, including Respondents. Ms. Jackson's office is located in International Park and she is there daily. A number of the documents provided in Complainant's prehearing exchange were either generated or reviewed by Ms. Jackson as part of her duties as Property Manager. She may be called upon to authenticate these documents and testify as to events memorialized in these documents that are relevant to resolution of these cases.⁶ For example, Ms. Jackson's email correspondence⁷ and possible testimony will provide information on Mr. Geist's involvement in directing the movement of waste paint and product paint from

⁶ These documents may corroborate and bolster the credibility of Ms. Jackson's testimony because they were contemporaneously written by her after observing or being involved in the underlying events and were recorded as part of her duties as Property Manager.

⁷ See, e.g., CPHX 74-76, 78, and 80.

Suite 1158 in 2006. This is one piece of evidence that may be relevant to the potential liability of Mr. Geist for the violations alleged in the Complaints.

In addition to authenticating certain documents and testifying as to the events memorialized in several documents submitted in Complainant's prehearing exchange, Ms. Jackson will testify to a number of relevant facts that are material to Respondents' liability.⁸ Ms. Jackson's daily presence in International Park during the relevant time period and her responsibilities as Property Manager resulted in her becoming intimately familiar with the daily activities of the Respondents. (PHE, p. 2). In addition, Ms. Jackson corresponded with and spoke directly to Mr. Geist about Creative and Elite's leases of, and environmental conditions at Suites 1158 and 1284. (*Id.* at p. 2; *see also* CPHX 3, 6, 17, 25, 27, 39, 127).

Having served as Property Manager for International Park, Ms. Jackson will also testify as to her knowledge of the locations of Creative and Elite's operations in International Park and the locations of their operations at the time of the RCRA inspection on June 22, 2005. (*Compare* CPHX 125 with CPHX 126). Ms. Jackson also has knowledge of the environmental reports and conditions she personally observed, or became aware of through her role as Property Manager, at Respondents' facilities.⁹ (*Id.* at p. 3; *see* CPHX 90, 101, 117). Ms. Jackson's testimony may demonstrate that, during the course of Elite's and Creative's tenancies, environmental concerns were serious

⁸ Ms. Jackson's testimony may also be relevant to this Court's assessment of the appropriate penalty under the RCRA Civil Penalty Policy because that policy allows the Court to consider "other matters as justice may require" and "history of non-compliance."

⁹ The leases between Wayne Coliseum and Respondents required Respondents to comply with all applicable environmental laws. (CPHX 3, CX-0000059; CPHX 6, CX-0000093; CPHX 17, CX-0000253).

enough for Wayne Coliseum to employ an environmental consultant to audit environmental compliance and meet with Mr. Geist to correct the problems. (*Id.*; *see also* CPHX 64, 65, 110 and 135). Ms. Jackson may also testify as to facts related to whether Respondents continued to store hazardous wastes greater than 90 days after the inspection (*Id.*; CPHX 64); the fact that there was leaking or disposal of oil, other liquids, or paint ash material onto the ground or in or near storm and sanitary sewers (*Id.*; *see also* CPHX 78, 102, 103,142); and the unannounced shut-off of the fire protection systems at Suite 1158 (CPHX 83).

Given her unique personal observations and the knowledge she gained during her daily presence at International Park and frequent interactions with Creative and Elite personnel, including Mr. Geist, Ms. Jackson's testimony will be offered to establish Respondents' liability for the alleged violations. Ms. Jackson's testimony is an important component of Complainant's ability to convince this Court that the actions of Respondents Mr. Geist and Creative are sufficient to hold them liable as operators at both Suites 1158 and 1284 or to pierce the corporate veil and hold them derivatively liable under the appropriate corporate law.

C. The Requested Subpoenas Are Necessary To Compel The Attendance Of Mr. Espich and Ms. Jackson At The Administrative Hearing

Counsel for Complainant has contacted counsel for both Mr. Espich and Ms. Jackson, both of whom have indicated that subpoenas will be required for their clients' attendance and testimony at the administrative hearing. Therefore, the issuance of the requested subpoenas is necessary to ensure that Mr. Espich and Ms. Jackson will attend and testify at the hearing. *In re Strong Steel Prods., LLC*, Docket No. CAA-5-2003-0009, 2005 EPA ALJ LEXIS 6, at *22-23 (Feb. 17, 2005) (requiring the party requesting

a subpoena to make a showing that the witness is unable or would refuse to testify unless compelled by subpoena) (citing cases).

III. CONCLUSION

For all of the foregoing reasons, Complainant respectfully requests that this Court enter an order granting Complainant's Motion For Issuance of Subpoenas for Mark Espich and Jan Jackson and that the Court return the issued subpoenas to Complainant, at which time they will be served on Mr. Espich and Ms. Jackson. Proposed subpoenas for Mr. Espich and Ms. Jackson are attached hereto as **Exhibit 1**.

Respectfully submitted,



Richard J. Clarizio
Karen Peaceman
Associate Regional Counsels
Gary E. Steinbauer
Assistant Regional Counsel
United States EPA – ORC Region 5
77 W. Jackson Blvd. (C14-J)
Chicago, IL 60604
(312) 886-0559
Attorneys for Complainant

DATE: April 14, 2010

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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Motion for the Issuance of Subpoenas for Mark Espich and Jan Jackson and the Memorandum in Support of Complainant's Motion for the Issuance of Subpoenas for Mark Espich and Jan Jackson, dated April 14, 2010, were sent this day in the following manner to the addresses listed below:

Original and One-Copy
by Hand-Delivery to:

La Dawn Whitehead
Regional Hearing Clerk
United States EPA – ORC Region 5
77 W. Jackson Blvd. (E-19J)
Chicago, IL 60604-3590

Copy by Pouch Mail to:

The Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460-2001

Copy by UPS to:

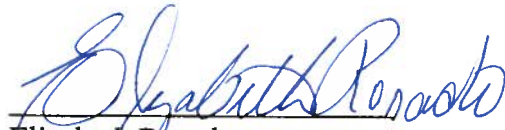
David L. Hatchett, Esq.
Hatchett & Hauck LLP
111 Monument Circle, Suite 301
Indianapolis, IN 46204-5124
*Attorney for Respondents Creative Liquid
Coatings, Inc. and Mr. Randall Geist*

Mr. Randall Geist
Registered Agent
Elite Enterprises, Inc.
2701 S. Coliseum Blvd, Suite 1158
Fort Wayne, IN 46803

Ms. Denise A. Walker
Office of Attorney General
Environmental Litigation Division
302 West Washington Street
IGCS – Fifth Floor
Indianapolis, IN 46204
Attorney for Mr. Mark Espich

Mr. David R. Steiner
Barrett & McNagny LLP
215 East Berry Street
Fort Wayne, IN 46802
Attorney for Ms. Jan Jackson

DATE: April 14, 2010



Elizabeth Rosado
United States EPA – ORC Region 5
77 W. Jackson Blvd. (C14-J)
Chicago, IL 60604

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Exhibit 1

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5
BEFORE THE ADMINISTATOR**

IN THE MATTER OF:)
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(formerly d/b/a Creative Coatings, Inc.))
2701 S. Coliseum Blvd., Suite 1284)
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Creative Liquid Coatings, Inc.)
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)
AND)
)
Randall Geist)
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Respondents.)

SUBPOENA

TO: Mark Espich
c/o Denise Walker, Esq.
Indiana Department of Environmental Management
100 N. Senate Avenue Room IGCN 1307
Indianapolis, IN 46204

YOU ARE HEREBY COMMANDED, pursuant to Section 3008(b) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)(3)(b), and Section 22.21(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.21(b), TO APPEAR IN PERSON at the following place and times:

DATE AND TIMES: May 18, 2010 at 9:30 am., and continuing as necessary until May 21, 2010

PLACE: Allen County Juvenile Center
Courtroom 3
2929 Wells Street
Fort Wayne, Indiana 46808

YOU ARE FURTHER COMMANDED:

TO APPEAR IN PERSON before the Administrative Law Judge at the above dates, time and place;

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

TO REMAIN IN ATTENDANCE until expressly excused by the Administrative Law Judge.

PURSUANT TO THE AUTHORITY OF SECTION 3008(b) OF THE RESOURCE CONSERVATION AND RECOVERY ACT, 42 U.S.C. § 6928(a)(3)(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 COURT AS CONTEMPT THEREOF.

WITNESS FEES AND EXPENSES IN THE SAME AMOUNTS AS ARE PAID TO WITNESSES IN THE COURTS OF THE UNITED STATES SHALL BE PAID BY THE PARTY UPON WHOSE REQUEST THE SUBPOENA IS ISSUED.

ISSUED in Washington, D.C., this ____ day of _____, ____.

Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900L
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

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).

Person at whose request this Subpoena was issued:

Richard J. Clarizio
Karen Peaceman
Associate Regional Counsels
Gary E. Steinbauer
Assistant Regional Counsel
United States EPA – ORC Region 5
77 W. Jackson Blvd. (C14-J)
Chicago, IL 60604
(312) 886-0559

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 5
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Creative Liquid Coatings, Inc.)
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AND)
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Randall Geist)
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Respondents.)

SUBPOENA

TO: Jan Jackson
c/o David R. Steiner, Esq.
Barrett & McNagny LLP
215 East Berry Street
Fort Wayne, IN 46802

YOU ARE HEREBY COMMANDED, pursuant to Section 3008(b) of the Resource Conservation and Recovery Act, 42 U.S.C. § 6928(a)(3)(b), and Section 22.21(b) of the Consolidated Rules of Practice, 40 C.F.R. § 22.21(b), **TO APPEAR IN PERSON** at the following place and times:

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WITNESS FEES AND EXPENSES IN THE SAME AMOUNTS AS ARE PAID TO WITNESSES IN THE COURTS OF THE UNITED STATES SHALL BE PAID BY THE PARTY UPON WHOSE REQUEST THE SUBPOENA IS ISSUED.

ISSUED in Washington, D.C., this ____ day of _____, ____.

Barbara A. Gunning
Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900L
U.S. Environmental Protection Agency
1200 Pennsylvania Ave. N.W.
Washington, D.C. 20460

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).

Person at whose request this Subpoena was issued:

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Associate Regional Counsels
Gary E. Steinbauer
Assistant Regional Counsel
United States EPA – ORC Region 5
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