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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY LOCALS BOARD
ENVIRONMENTAL APPEALS BOARD

ORIGINAL

-----: :
IN RE: : PSD Appeal No. 09-03
: :
MGP Ingredients of Illinois, : Permit #070300 58
Inc. : :
-----: :

Washington, D.C

Thursday, January 14, 2010

The following pages constitute the proceedings held in the above-captioned matter before the HONORABLE ANNA L. WOLGAST, at the U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue, Washington, D.C., before Natalia Kornilova, of Capital Reporting Company, a Notary Public in and for the District of Columbia, beginning at approximately 10:03 a.m.

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1 A P P E A R A N C E S

2 On behalf of the Plaintiff:

3 DAVID C. BENDER

4 McGillivray Westerberg & Bender, LLC

5 305 South Paterson Street

6 Madison, Wisconsin 53703

7 (608) 310-3566

8 On behalf of the Defendant:

9 LAUREL KROACK (VIA VIDEO)

10 JOHN J. KIM (VIA VIDEO)

11 ROBB H. LAYMAN (VIA VIDEO)

12 IEPA Springfield

13 1021 North Grand Avenue East

14 Springfield, Illinois 19276

15 (217) 782-3397

16

17 MATTHEW J. DUNN (VIA VIDEO)

18 SUSAN HEDMAN (VIA VIDEO)

19 State of Illinois

20 ALSO PRESENT:

21 EURIKA DURR

22 Clerk of the Board

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1 P R O C E E D I N G S

2 CLERK: Now in session for a status
3 conference in re MGP Ingredients of Illinois, Inc.
4 Permit number 070300 58, PSD appeal number 09-03.
5 The Honorable Judge Anna Wolgast presiding. Please
6 turn off cell phones, and any recording devices are
7 not allowed. Please be seated.

8 THE COURT: Good Morning to everyone here and
9 over the phone. We are here today pursuant to the
10 Board's order of January eighth. That order laid
11 out sanctions and a schedule for further proceedings
12 in this case. I'm going to take this opportunity to
13 review where we stand. I also want to discuss
14 (inaudible) the pattern of practice (inaudible)
15 before the board, because it's Board's concern that
16 that practice is becoming increasingly problematic
17 and has played out in a particularly inappropriate
18 way in this case.

19 The order that we issued on January eighth
20 details the deadlines that had been extended both
21 for the administrative record and for filing a
22 response. There has been numerous extensions. Each

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1 of the extensions has come in the day of the
2 deadline, contrary to the Board's practice manual,
3 or in the case -- in one instance there was a
4 request for extension of the administrative record
5 one day after the deadline had passed.

6 I think there are several problems with the
7 history of this case, but some of the problems
8 pretend a more institutional failing, on the part of
9 Illinois prosecution, in defense of these permits.
10 One that has been a problem is representation.
11 Typically, we lose approximately 60 days in any
12 Illinois permit defense as it was quoted in the
13 motions here, to quote, "sort out representation".
14 Something that otherwise would seem fairly straight
15 forward. And again, we typically are losing 60 days
16 just on the matter of representation. As we did in
17 this case.

18 The second thing that occurs in this case, but
19 cuts across a lot of the litigation that we see with
20 Illinois, is a routine failure to timely be able to
21 assemble a file, a certified index, to the
22 administrative record.

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1 Here, the permit was issued on June twenty-
2 second, the petition was filed on July twenty-first,
3 and yet, it wasn't until after numerous extensions
4 on November twelfth that the certified index to the
5 administrative record was filed.

6 Now, there was a decision maker, I assume who's
7 certified, that they made a decision based on the
8 administrative record. And yet five months later --
9 where it took at least five months later before we
10 saw the product of that record. In my mind, those
11 facts don't fit neatly together.

12 As to this case, as I said, Illinois has
13 routinely filed on, or after in one instance, the
14 day it was due, or the day that was set forth in the
15 board order. And I have to say, every responsible
16 litigator knows that when you file on the day of the
17 deadline, seeking relief, you put your clients'
18 interest at risk. And not only the clients'
19 interest, but in this case, because of the nature of
20 the permit, the permittee's interest at risk.

21 Also, obviously, it doesn't matter what the
22 floor is, it doesn't give the decision maker ample

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1 time to adequately consider the remedy that's
2 sought. Also, I want to say that the overall delay
3 in prosecuting these cases is extremely problematic,
4 given the nature of what we are litigating. These
5 are pre-construction permits. Because of the nature
6 of the permit, the board routinely prioritizes pre-
7 construction, PSD, and NPDES permits, we understand
8 that there are entities who have sought a permit and
9 are waiting to move forward in construction.

10 On the other hand, Illinois seems in absolutely
11 no hurry to defend this cases or to conclude an
12 acceptable adjudication of the permit challenge.
13 And frankly, if Illinois isn't prepared to defend
14 this permit, under the terms of which it was issued,
15 Illinois should be asking for a remand. They should
16 not be asking for ceaseless extensions, as they have
17 in this case.

18 Now, I would like -- everyone will have an
19 opportunity to respond. I'd like to start with
20 Illinois, and I would like to -- for you to discuss
21 not just this case, but how the prosecution and
22 defense of these permits could be put on a better

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1 footing in the future. So can we start with
2 Illinois, please?

3 MR. DUNN: Good morning, Judge.

4 THE COURT: Good morning.

5 MR. DUNN: Matthew Dunn, Assistant Attorney
6 General, State of Illinois. With me here in Chicago
7 is Susan Hedman, Environmental and Energy Counsel to
8 the Attorney General, Assistant Attorney General
9 also in the environmental unit here, at this office.

10 We appreciate the Court's time today. Certainly
11 to its patience on the items you have listed here
12 and previously in your January eighth order. We do
13 take them very seriously. Notwithstanding the
14 impression that is apparent from the history in this
15 matter that, Your Honor, had laid out so thoroughly
16 in the January eighth order.

17 The points that have been raised involve the
18 representational issue and the perennial problem, we
19 do believe, this office does believe, that Illinois
20 is getting on track, as far as the relationships
21 that go on in state government. But -- strike that.
22 We have a new governor who has been in office a

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1 little bit less than a year. Mr. Kim, who will be
2 joining us, is the new chief counsel of the Illinois
3 EPA. He's been in place in the eight to nine month
4 time frame. There's been considerable discussion
5 between the senior administration of this office and
6 senior attorneys and policymakers in the new
7 Governor's administration on the types of issues
8 that you have flagged here, especially this first
9 one.

10 So lines of communication, they have been
11 reopened and reestablished. We always communicated,
12 it just obviously wasn't always in the timeframes
13 and all that these things call out for, that these
14 types of proceedings call out for.

15 So I can tell you one, that the concerns of the
16 EAB will be on brief to the senior office of this
17 administration later this morning. And we take the
18 issues and concerns that we mentioned to heart, and
19 we'll work back with -- with the Governor's
20 administration, with their EPA to get a process in
21 place in Illinois to effectively deal with your
22 issues.

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1 Clearly, your 60 day note in all that is an
2 accurate one. There has been a type of lag that
3 really just by having a better process in place, I
4 think we can address and alleviate. If there are
5 questions on that point, however Your Honor wants to
6 deal with them. I can go to number two, or whatever
7 makes sense.

8 THE COURT: Why don't you move onto number two.
9 And can I ask, is anyone from IEPA on this call?

10 MR. DUNN: I don't see them on my screen, Judge.
11 We -- I did speak with ...

12 THE COURT: Is anyone from IEPA on the call?
13 Tim did we call the IEPA?

14 UNIDENTIFIED: They did. I had a phone call a
15 few minutes ago. I missed it. I need to get in
16 touch with them and find out what's going on. If
17 they're having technical problems or what.

18 THE COURT: Okay. Could you do that, please?
19 And just interrupt and let me know where we stand.

20 So, Mr. Dunn, I have no idea what's happening
21 with IEPA and whether that's a problem on our end or
22 not. But -- so I will press you to go ahead and

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1 talk about --

2 MR. DUNN: I know for one that they did submit
3 names to the court and that were fully prepared. I
4 did speak with the chief counsel yesterday around
5 four o'clock, and similarly at that point, and they
6 were all lined up and fully anticipating being here.
7 But I'd offer, Judge, to move along as best I can.

8 Your second item dealt with the certified index
9 and all, and that too, I see a point that Your Honor
10 accurately set forth in the January eighth order.
11 That has been a point of discussion for a number of
12 however months within state government and just what
13 we need to do to be better at that, and have a
14 process in place that allows for the timely
15 submission of the certified index. As the Court
16 knows, that is more a function of the permitting
17 agency and also is one that I am a little less able
18 to speak directly to, other than the involvements
19 that we have had, and those have been to note the
20 need for, you know, for the record to be compiled,
21 preferably in a moving forward fashion throughout
22 the proceeding, so that when you get to a permit

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1 decision date we're not, you know, starting that
2 process there, but rather ultimately finalizing it,
3 and double-checking, and the like. I know there
4 have been, you know, higher-level discussions within
5 state government, between my office and our EPA on
6 the need to be -- to be much more timely in that
7 regard. So again, that too is one that will be, you
8 know, might not be anything to this administration,
9 the concerns of the Board with respect to, you know,
10 (inaudible) practice in front of the board, and
11 we'll look to get a practice and procedure in place
12 that addresses that.

13 THE COURT: Thank you. Two things. One is
14 that, I mean, obviously there is kind of, I mean,
15 administrative best practices in place for compiling
16 the administrative record as the decision
17 progresses. That seems fairly apparent.

18 Two, I completely appreciate your point, that
19 this is something that is, in the first instance, in
20 that agency's -- IEPA's prerogative and role to
21 perform. But I will just say, as a former justice
22 department employee, I know you can be very

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1 persuasive.

2 MR. DUNN: Third off, I think that, with all
3 candor, in the past year, that is true, that we do
4 have people who will listen to us in the Governor's
5 administration. So -- and that has been the focus
6 here in recent months with the personnel changes
7 that I know that you were aware of in this
8 discussion. That is a point well taken.

9 THE COURT: I just received information that
10 IEPA is having some technical problems connecting on
11 their end (inaudible).

12 MS. KROACK: (inaudible).

13 THE COURT: I apologize. I didn't hear that.
14 I'm sorry. Could you -- who is this, please?

15 MS. KROACK: This is Laurel Kroack, from the
16 Illinois EPA. With me I have Robb Layman. We
17 cannot connect by video for some reason, but we are
18 on the phone.

19 THE COURT: And have you been on the phone
20 throughout this meeting?

21 MS. KROACK: No, we just joined. We apologize.

22 MR. LAYMAN: They've been attempting since about

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1 8:30 -- well, 9:30 your time, Judge, to try to get
2 us hooked up. And for some reason, technical
3 glitch, or what have you, we were not able to get on
4 until now. We decided it would be best to try the
5 audio call rather than the video conferencing. We
6 apologize.

7 THE COURT: Okay. Well, thank you for making
8 that effort. Actually, that's fine. We're just up
9 to your issue. We were talking about the
10 administrative record and the numerous delays that
11 we've seen in having a certified index filed, not
12 just in this case, where it was filed four months --
13 after numerous extensions. Filed four months after
14 the petition was filed, some five months after the
15 record had concluded, where presumably a decision
16 maker had certified a decision on the basis of that
17 record.

18 And I want to talk about that, because it's not
19 that it's been very problematic in this case, it's
20 that we've seen this on a regular basis on
21 litigation-based permits from Illinois, and
22 specifically from Illinois. And as you are aware,

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1 of course, IEPA just requested and received a sixty-
2 day extension in Powers Holdings. So it's hardly
3 isolated to this case, and there seems to be some
4 systemic problem in not being able to timely comply
5 with administrative record and certified index to
6 let a litigation on a pre-construction permit move
7 forward. And I want you to speak to that.

8 MR. LAYMAN: Well, Judge, this is Robb Layman,
9 and I'm probably the best person to speak, at least
10 initially at this issue. If you are referring
11 specifically to the administrative record in
12 relation to past cases, my involvement with Indeck,
13 for instance, and Prairie State. I know we have a
14 practice of what we do on an EAB appeal. We have a
15 practice of requesting representation from the
16 Attorney General's office.

17 Historically, in both the Prairie State matter
18 and the Indeck matter, I guess the last matter we
19 had was Christian County Generation. Historically,
20 we have been able to be fairly responsive, I
21 thought, in terms of assembling the record,
22 preparing the index and having it file along with

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1 our formal response.

2 I will be the first to admit that there, in
3 those cases, Indeck and Prairie State, they have an
4 enormous number of issues that were both complex and
5 difficult to deal with, right off the bat. So I
6 know in those cases, we had filed extensions with it
7 at the time, with a responsiveness brief.

8 I'm not aware in those cases, that there have
9 been difficulties. Perhaps there was on Prairie
10 State, but I do not recall any specific difficulties
11 and someone requesting a record before we actually
12 filed it, through our APR response briefs, and I
13 guess going back in time, I guess, historically, I
14 don't know, we had been under the impression here,
15 the attorneys for the IEPA, that it was acceptable
16 to file an index and have it verified -- certified,
17 if you will, in conjunction with our brief. In
18 other words, the response brief was the mechanism by
19 which we would submit both our response and the
20 index. So I guess our, I don't know, as to whether
21 there was a historical problem. If there was, I
22 guess I'd like your take on that as it regards to

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1 this particular case.

2 I don't know what our attorneys of record have
3 represented to you in this matter, or in the Powers
4 Holdings matter. But I can tell you, we -- as soon
5 as we receive the appeal, as is our normal course, a
6 request for our Special Assistant Attorney General
7 appointment from the Attorney General's office to
8 handle the case at our administrative level. That
9 has been the practice for some time.

10 It has only been since Christian County, and in
11 particular on this case and on the Power Holdings
12 matter, that there have been problems arise with
13 respect to the process. Specifically, in this
14 particular case, we waited until, I think it was
15 sometime -- I believe we waited approximately two
16 months. It was 62 days before we heard from the
17 Attorney General's office whether or not we were
18 going to be handling the appeal.

19 Consequently, we were not sure who was going to
20 be responsible for handling the assembly of the
21 records, sitting down with our permit section to
22 compile and go over any documents that might be of

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1 question, for the record, as well as preparing the
2 index and getting that verified -- certified, if you
3 will, and then sending it off to the Board.

4 So that is like a three month period between the
5 time of initial appeal and when we knew who was
6 actually going to be responsible for it.

7 THE COURT: Well, why don't we talk about --

8 MR. DUNN: I'm sorry, Judge. I'm sorry, Judge.
9 The -- the dealings that this office put out, with
10 respect to my long-time colleague, Mr. Laylan
11 (phonetic) --

12 THE COURT: This is Mr. Dunn?

13 MR. DUNN: Yes, it is.

14 THE COURT: Okay. Thank you.

15 MR. DUNN: Correct. So, we had been clear for
16 many, many months that at AAG, getting a letter
17 saying that we worked on a matter for however many
18 months or years, we've issued a permit, and outside
19 AAG come down and put together our records. So we
20 gather that in writing at the agency, you know, for
21 over a year and the like. So I need to address that
22 that I'm not aware of that uncertainty and the like,

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1 regarding it with this matter. But certainly, if
2 there is any uncertainty at the operational level at
3 IEPA, we can address that in a very short order. We
4 certainly want to work with IEPA and the assembly of
5 the record, but they say that would be, in the first
6 instance, the individuals who had spent the many
7 months on the record and the like. So, yeah, the
8 source is unclear to me, given the discussions I've
9 had, again, like at levels of chief counsel and
10 others.

11 But certainly on a moving forward basis, which I
12 assume everybody is committed to with the Court
13 today. Make sure there are no uncertainties as to
14 who's going to look to do what and the like, would
15 be undertaken.

16 MR. KIM: Judge, if I may, this is John Kim, I'm
17 chief legal counsel for the Illinois EPA.

18 THE COURT: Yes, please.

19 MR. KIM: I just wanted to follow up on what Mr.
20 Dunn said. I think it's probably fair to say that
21 in the past, and I don't know the -- I understand
22 your question about wanting to bring up, you know,

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1 any kind of potential, or perceived problems that
2 were there in the past, and what I can tell you is
3 this, what we're trying to do from this point
4 forward, and I think with Powers Holdings, which is
5 a separate case obviously, going forward is trying
6 to have more of a dialogue before the actual request
7 for representation gets sent over. Which we did
8 with Powers Holdings.

9 In that case, I had at least one conversation
10 with Mr. Dunn. I think at that point I conveyed to
11 him that in that case we would not be seeking a
12 special appointment. Which we didn't. I think that
13 sped up the process.

14 They turned around their request letter and, at
15 least in this case, except for what is not, I think,
16 an internal delay. We have been working internally
17 as quickly as possible to get all our documents
18 together, and we have been trying to work as closely
19 as possible with the Attorney General's office, to
20 make sure that their attorneys had opportunity to
21 review the record before it was filed.

22 So I understand what you are saying, and maybe

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1 the final word I'd like to put on it is, you know,
2 we recognize that, you know, we don't want to be
3 delayed and we don't want to ask for extensions when
4 we don't have to. So we're certainly going to try
5 and continue to work towards getting quicker and so
6 forth. But it is a situation, in this case where
7 the steps we're taking and the time periods in
8 between each milestone, I don't think we're entirely
9 unreasonable.

10 THE COURT: I'm sorry, I didn't hear the last
11 point.

12 MR. KIM: I don't think, if you sort of
13 timeline, not what was presented to the EAB, but
14 just the interaction between the Attorney General's
15 office and our office. The timeline and how things
16 went, I don't think it was entirely unreasonable, in
17 terms of what went on at either end and when we
18 eventually got the certified index to you.

19 MR. LAYMAN: Judge, this is Robb Layman again.
20 Can I add just a little bit more to this discussion?
21 I know you may be prepared to move on beyond this,
22 but I would just note this, that first extension

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1 that we sought, it was filed, I think on an
2 appearance, on a motion for an extension, by Matt
3 Dunn of the Attorney General's office. That
4 indicated there that we still had this
5 representation issue that we were dealing with.

6 Shortly after that, Sierra Club submitted a
7 letter to the Board that indicated that they, along
8 with the Attorney General, would gladly propose a
9 schedule for providing a response and then a reply.
10 I don't think that was ever done. I think that is
11 what precipitated your order of October twentieth.

12 One of the problems -- you want to deal
13 specifically on the record issue, was that during
14 that period of time, which was about 40 days,
15 roughly a month and a half. We had no indication as
16 to what was going to transpire, what was going to go
17 forward. There were no communications with us. I
18 think we did receive a proposed schedule, but our
19 response to the schedule that, I think had been sent
20 down here from the AG's office, was that we really
21 couldn't comment on it -- on the date until we knew
22 for sure who was actually going to be handling the

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1 case.

2 So we were still waiting on the representational
3 issue to be resolved. But the kind new order came
4 down then on October twenty-first, I believe it was.
5 We learned then that, in fact, we needed to prepare
6 the record -- copies of the record and get that to
7 the Attorney General's office as quickly as
8 possible. Then it was incumbent on them then to
9 prepare the index and at least to have an
10 opportunity to come down, meet with them at section
11 and review any record issue that might be presented.

12 Consequently, I think an extension request was
13 made at that timeframe, in part, because of the
14 volume of documents we were having to have copied
15 and sent over to the AG's office.

16 That extension was granted. I think it went out
17 until November twelfth. I think it was Monday of
18 that week, the twelfth was a Thursday, Monday of
19 that week, I think the AAP, who was going to handle
20 the case, Mr. Carr. I believe, he came down and met
21 with them at section. They walked through various
22 documents, and then he prepared the index up and got

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1 it filed.

2 I guess that is the factual resurtation of the -
3 - of what happened regarding this case.

4 THE COURT: Well, let's just follow along that
5 for a second. As you alluded to earlier, Ms.
6 Kroack, the board sends out a letter, in this case
7 IEPA, as well as the AAG's office, as well as MGP
8 and others, that we received a letter that said --
9 I'm sorry, Illinois, (inaudible) stating that you
10 should file -- that a petition can be filed on July
11 twenty-first, and that both the certified index of
12 administrative record and known portions of that
13 record, as well as your response, is due August
14 nineteenth -- August nineteenth. We then received a
15 motion for extension. We granted that extension to
16 October twenty-eighth to file the record. We're
17 just talking about the record right now.

18 On October twenty-ninth, the day after the
19 record was due, we received a request for a further
20 extension. We granted the extension until November
21 twelfth, and that's the date that a certified index
22 was filed with this board. That is approximately

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1 five months after the permit was decided, and five
2 months, presumably -- well, not presumably, five
3 months after a decision maker had made a decision on
4 this permit on the basis of the record.

5 And I'm really, fairly unimpressed with who
6 represents who at what time. The compilation of a
7 record is, and it's basis for an important
8 administrative decision, is solely in IEPA's court.
9 And I understand you all consult with your lawyers,
10 but the practice of how you compile the record and
11 make it available, in the instance of an
12 adjudication, in this court or any other court, is
13 obviously lacking.

14 Does anyone from IEPA or Illinois AAG have
15 anything else to add on the issues that we've raised
16 so far?

17 MR. DUNN: Yes, Your Honor. I guess, we
18 understand where the Judge's -- the Board's concerns
19 on this, and as, I think I did mention, perhaps
20 before IEPA joined us as a call, we've had
21 discussions to start working on that. Mr. Kim
22 alluded to, you know, in earlier discussions and

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1 all, that hopefully will have a positive benefit to
2 Illinois being able to be closer to and ultimately
3 meet the Board's needs and the likes. So we get it
4 now, and just know that all of the issues that have
5 been raised will be -- will be fully briefed and
6 reviewed between our -- between the two
7 administrations.

8 THE COURT: Thank you. Mr. Bender, do you have
9 anything to add?

10 MR. BENDER: No, Your Honor.

11 THE COURT: I trust we will be seeing IEPA's
12 response on November twenty-second. And I
13 appreciate all of your taking the time to
14 participate in the status today. It has been
15 helpful to me. Thank you very much.

16 UNIDENTIFIED: The session of Environmental
17 Appeals Board now stands adjourned.

18 (Proceedings concluded.)

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1 CERTIFICATE OF COURT REPORTER

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3 I, NATALIA KORNILOVA, the officer before whom the
4 foregoing deposition was taken, do hereby certify
5 that the witness whose testimony appears in the
6 foregoing deposition was duly sworn; that the
7 testimony of said witness was taken by me in
8 stenotypy and thereafter reduced to typewriting by
9 me; that said deposition is a true record of the
10 testimony given by said witness; that I am neither
11 counsel for, related to, nor employed by any of the
12 parties to the action in which this deposition was
13 taken; and, further, that I am not a relative or
14 employee of any counsel or attorney employed by the
15 parties hereto, nor financially or otherwise
16 interested in the outcome of this action.

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Natalia Kornilova

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NATALIA KORNILOVA

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NOTARY/COURT REPORTER

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<p>whom 26:3 who's 5:6 18:14 whose 26:5 Wisconsin 2:6 witness 26:5,7,10 Wolgast 1:13 3:5 work 8:19 18:4 19:18 20:5 worked 17:17 working 19:16 24:21 writing 17:20</p> <hr/> <p style="text-align: center;">Y</p> <hr/> <p>yesterday 10:4 yet 5:3,8</p>			
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