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**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 8**

IN THE MATTER OF:

Guy Zwahlen
45 W. Louise Avenue
Salt Lake City, UT 84115,

Respondent.

Docket No. CAA 08-2007-0004

**INITIAL PREHEARING EXCHANGE &
HEARING LOCATION REQUEST**

Respondent Guy Zwahlen ("**Zwahlen**"), by and through his legal counsel, Clay W. Stucki of Bennett Tueller Johnson & Deere, hereby **REQUESTS THAT THE HEARING IN THIS MATTER BE CONDUCTED IN SALT LAKE COUNTY, UTAH**, as discussed more fully below in section 5, and exchanges the information required pursuant to 40 C.F.R. § 22.19(a) and the Prehearing Order in this matter dated November 21, 2007.

1. **Expected Witnesses:** Respondent expects to call the following persons as witnesses: (a) himself, Zwahlen, (b) Kay C. Jolley, an employee of TID, Inc., located at 45 W. Louise Ave., Salt Lake City, Utah 84115, (c) one or more officers, employees or

representatives of New Concepts Construction, Inc., located at 31 West Gregson Ave., Salt Lake City, Utah, including without limitation Kevin J. Hunt, (d) one or more officers, employees or representatives of Cameron Construction, located at 573 West, 3560 South # 1, South Salt Lake, Utah 84115, (e) Duane R. Bailey of Air Systems Incorporated, located at 596 West 3560 South, Salt Lake City, Utah 84115, (f) one or more officers, employees or representatives of the Utah Division of Air Quality, located at 150 North 1950 West, Salt Lake City, Utah 84114, and (g) one or more officers, employees or representatives of Temperature Technologies, located at 4843 S. Murray Blvd., # B, Murray, Utah 84123. In addition, Respondent reserves the right to call any witnesses necessary to rebut any testimony of the witnesses disclosed in Complainant's initial exchange.

2. **Expected Testimony:** The witnesses identified above will testify as follows: TID, Inc. ("TID") first entered into a contract to demolish a substantial portion of a building that formerly was used as a Fred Meyer store (the "Building"). Only part of the old Building ("Phase I") was to be demolished because the Building had already been subdivided and was now owned by two separate car dealerships. New Concepts Construction, Inc. ("NCC") was the general contractor in Phase I for Henry Day Ford, and TID submitted a bid to NCC dated October 25, 2005 (the "Phase I Bid") for the demolition of Phase I.

The Phase I Bid specifically excluded all permits and other governmental requirements, including any removal of hazardous materials and waste, which environmental matters remained the responsibility of NCC. Pursuant to this Phase I Bid,

NCC appropriately contracted and paid for the removal of any refrigerant from the roof-top units (“RTUs”) located in Phase I, clearly demonstrating that the Phase I Bid required the general contractor, not TID, to perform such environmental work prior to the demolition of the Building. At the direction of NCC, Temperature Technologies removed any refrigerant from the twenty (20) RTUs located in Phase I and billed NCC \$1,624.00 for such work. TID was not involved in negotiating or performing this environmental work in any way. TID knew that such work was not included in the Phase I Bid and that the general contractor, NCC, was going to make sure any such work, if necessary, was performed before the demolition of Phase I by TID. NCC did make sure this refrigerant removal work was performed appropriately on Phase I. Moreover, NCC provided TID with a Pre-Demolition Hazardous Materials Survey Report dated November 3, 2005 (the “Environmental Report”) which stated that no CFCs existed in the Building. TID therefore demolished Phase I in early 2006 in full compliance with 42 U.S.C. section 7671g(c).

Later, on June 8, 2006, TID submitted another bid (the “Phase II Bid”) to another contractor, Cameron Construction (“Cameron”), for the demolition of the remaining portion of the old Building (“Phase II”) to make way for a West Valley Dodge dealership being constructed by Cameron. Similar to the Phase I Bid, the Phase II Bid also excluded all permits and other governmental requirements, including any removal of hazardous materials and waste, which environmental matters remained the responsibility of the general contractor, Cameron. Again, TID also relied on the Environmental Report stating that there were no CFCs anywhere in the building. TID commenced demolition on Phase II believing in good faith that the general contractor had again already removed any CFCs

to the extent necessary. However, for reasons unknown to TID, it appears that some of the RTUs in Phase II had not been properly evacuated and still contained CFCs. As soon as TID was informed that one or more of the RTUs in Phase II still contained CFCs, TID stopped further demolition, and the general contractor, Cameron, immediately had Air Systems Incorporated remove any CFCs from the RTUs at the cost and expense of Cameron. During Phase II, no more than six (6) RTUs were removed by TID, and four (4) were properly evacuated. Thus, even if TID was somehow liable for a knowing violation of 42 U.S.C. section 7671g(c), the maximum number of RTUs removed without proper evacuation was two (2), not the 19 alleged in the Complaint in this matter.

However, there was no knowing violation of 42 U.S.C. section 7671g(c). TID reasonably and in good faith believed that there was no refrigerant remaining in any appliance because (i) both bids related to the old Fred Meyer building provided that the general contractor was responsible for any environmental matters and permits in the demolition, (ii) the first contractor had interpreted the Phase I Bid in the same manner as TID and had appropriately removed all of the refrigerant from any RTU before it was removed by TID, and (iii) the Environmental Report provided to TID stated that no CFC containing materials were present in the Building.

In addition to the foregoing testimony, Respondent hereby incorporates by this reference the affirmative allegations already set forth in his Answer to the Complaint. Moreover, Respondent will testify that he is an individual who owns a small business and has a gross annual income of approximately \$112,000.00.

3. **Documents:** The documents that Respondent expects to introduce into evidence and use at the hearing in this matter are submitted with this pleading.

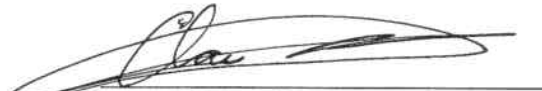
4. **Errors in Penalty Calculations:** Based on the facts set forth above in section 2, the penalty calculation included with the Complaint is incorrect because the calculation (i) is based on false allegations and incorrect assumptions, such as the allegation that 19 RTUs contained CFCs when the maximum number is 2, (ii) wrongfully includes an economic benefit component when there was absolutely no economic benefit to Zwahlen or TID because the Phase II Bid, like the Phase I Bid, excluded any CFC removal service and allocated that responsibility and cost to the general contractor, and (iii) uses a multiplier of 2 for the size component, the highest possible multiplier allowed for economic giants, when the Respondent is a humble individual who owns a small business and has a gross annual income of approximately \$112,000.00. Thus, even if Respondent is responsible for a violation, (i) the additional amounts for any additional violations is \$3,000 for one additional violation, not \$54,000 for eighteen, (ii) the economic component is \$0, not \$3,287, and (iii) and the penalty should then be reduced based on the small economic size of Respondent, not doubled as if Respondent was Chevron or General Electric.

5. **Location of Hearing:** Because Respondent, all of the witnesses, and the site at which the violations occurred are *all* located in Salt Lake County, Utah, the hearing should be held in Salt Lake County, Utah pursuant to 40 C.F.R. § 22.19(d). Any

other location would seriously prejudice the rights of Respondent and prevent respondent from presenting its evidence through witnesses.

6. **Time for Hearing:** As long as it is scheduled sufficiently in advance (at least three months notice), it is believed that almost any dates will work for the hearing except for the period of July 3 through July 10, 2008. Respondent's legal counsel currently has no matters after March that could not be moved to accommodate the hearing, but of course such dates will fill up with depositions, hearings, and trials for clients in other matters as time moves forward. It is believed that it will take Respondent at least 2 days to present its evidence with cross examination by opposing counsel and redirect of witnesses.

DATED this 21st day of January, 2008.

A handwritten signature in black ink, appearing to read 'Clay W. Stucki', is written over a horizontal line.

Clay W. Stucki
Attorney for Respondent


Certificate of Service

I hereby certify that on this 21st day of January, 2008, I caused to be sent by U.S. Postal Service First Class Mail delivery the foregoing **INITIAL PREHEARING EXCHANGE & HEARING LOCATION REQUEST** to:

Jessie Goldfarb (8ENF-L), Senior Enforcement Attorney
U.S. EPA-Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Regional Hearing Clerk (8RC)
U.S. EPA-Region 8
1595 Wynkoop Street
Denver, CO 80202-1129

Judge William B. Moran
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1200 Pennsylvania Ave., N.W.
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Washington, DC 20005



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