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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of:

Carbon Injection Systems LLC,
Scott Forster,
and Eric Lofquist,

Respondents.

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Docket No. RCRA-05-2011-0009

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RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER AND
ERIC LOFQUIST'S RESPONSE TO COMPLAINANT'S MOTION FOR AN
ADMINISTRATIVE SUBPOENA TO ISSUE FOR THE DEPOSITION OF A THIRD-
PARTY WITNESS AND FOR A REVISED RESPONSE DATE FOR THE MOTION,

and

REQUEST TO RE-ISSUE RESPONDENT'S SUBPOENA
TO THIRD PARTY WITNESS DONALD DURIVAGE

Respondents Carbon Injection Systems LLC ("CIS"), Scott Forster and Eric Lofquist ("Respondents"), through counsel, hereby respond to Complainant's Motion for an Administrative Subpoena to Issue for the Deposition of a Third-Party Witness and for a Revised Response Date for the Motion ("Motion").

Complainant's Motion is, at best, perplexing and unnecessary, and at worst, disingenuous and a waste of the resources of the parties and the Court. As explained below, the only real disagreement between the parties is not whether third-party witness Donald DuRivage should be deposed, but which counsel, Complainant's or Respondents', *gets to ask questions first*.

The thrust of Complainant's Motion is that because Respondents "chose not to depose" Mr. DuRivage and, because Complainant itself *now* wishes to depose him (having vigorously

resisted Respondents' request to do so only weeks before), a new subpoena should be issued by the Court. (Motion, at 3). This is incorrect. The record is clear that Respondents, with the acquiescence and acknowledgment of Complainant, only delayed asking for reissuance of the DuRivage subpoena until the depositions of the other IFF witnesses could be completed, and the need for DuRivage's deposition could be reassessed at that time (and, as explained below, even before those depositions were completed earlier this week, both Complainant and Respondent specifically discussed and agreed with each other that DuRivage would have to be deposed after all).

Simply put, under the Court's January 17, 2012 Order, the DuRivage Subpoena, having already been issued by the Court previously, was allowed to be held in abeyance pending Respondent's further request to revise and reissue the subpoena. Respondents have acted timely, in reliance on the Order, and the good faith agreements between the parties. For those reasons, and the other reasons set forth below, Respondents respectfully request that the Presiding Administrative Law Judge deny Complainant's Motion and further request their *Subpoena Duces Tecum* to Third Party Witness Donald DuRivage be re-issued as contemplated by the Court's January 17, 2012 Order, with the revised date, time and venue set forth herein.

I. Background

As the Court is well aware, Respondents originally moved the Court to issue administrative *subpoenas duces tecum* to four third-party witnesses, all of whom were employees or (in one case) a former employee of non-party International Flavors and Fragrances, Inc. ("IFF"). Complainants strenuously objected to Respondent's request, arguing, among other things, that:

- The information sought by Respondents via the IFF subpoenas was duplicative and immaterial;

- Covering the depositions would be burdensome to Complainant;
- The information sought was available from other sources; and
- Such depositions were unjustified since there was no showing that the witnesses would be unavailable at hearing.

(See Complainant's Response to Respondents' Motion for a Revised Case Schedule and Renewed Motion for Third-Party Discovery, dated 12/13/11, at 8-11). Complainants further insisted that both parties should be able to adequately prepare for hearing (which, at that time, was scheduled for the end of February 2012). Essentially, Complainant stated that its case was complete, third-party discovery was completely unnecessary, and it was ready to go.

Recognizing the significance of the requested IFF testimony and information to the case, and the difficulty of obtaining this information by other means, this Court granted Respondents' motion over Complainant's vociferous objections, and issued the subpoenas to the four IFF witnesses. (Order, dated 11/27/11). Subsequently, counsel for Respondents conferred with both counsel for Complainants and counsel for IFF to agree to more mutually convenient times and places for the depositions than had originally been set forth in Respondent's original motion with proposed subpoenas. In the course of these discussions, Counsel for Respondents, Lawrence Falbe, suggested to Complainant and IFF that in the interests of economy, the deposition of the fourth witness, Donald DuRivage, might wisely be deferred until the completion of the other three IFF witnesses, each a current IFF employees. It was easier to arrange the depositions of these persons through IFF's counsel and to complete them expeditiously. It was hoped that Mr. DuRivage's testimony might not be needed in light of information expected to be gleaned from the other witnesses. Falbe conferred with attorney Steven Sarno to advise him of this proposal, and was informed that while such a proposal seemed reasonable, due to the Court's hearing schedule on other matters, any request for a revised subpoena to issue to Mr. DuRivage should

be made as soon as possible, and really no later than immediately after the depositions of the other three IFF witnesses were completed.

Subsequently, by letter dated January 12, 2012, Falbe wrote to Mr. Sarno and stated the following, in pertinent part:

As you are aware, Judge Biro issued the subpoenas of third-party witnesses of current and former employees of International Flavors and Fragrances, Inc. (IFF) as requested by the Respondents pursuant to the Motion. As we have discussed in relation to the Motion, Respondents anticipated that the proposed dates, times and venues for the requested depositions might need to be amended from those set forth on the proposed subpoenas which were included with Respondents' motion. We discussed that as long as all parties (including IFF) agreed with respect to any future amendments, the subpoenas could be amended without leave of court with respect to the specifics of any such amendments; however, as a matter of procedure, it seemed most proper to provide amended subpoenas for reissuance by the Court.

Accordingly, I have provided with this letter, revised subpoenas for three of the four witnesses for which subpoenas were issued: Theresa Barry, Thomas Guido and David Shepard. The dates, time and venues have been revised as reflected on the subpoenas, by agreement of all parties. With the agreement of all parties, we have decided to forgo requesting reissuance of the subpoena for the fourth witness, Donald DuRivage, anticipating that Respondents will be able to obtain the information sought from the other three witnesses. *Should Respondents determine that they wish to proceed with Mr. DuRivage's deposition, we will ask the Court to reissue the DuRivage subpoena immediately after the conclusion of the depositions of the three IFF witnesses.*

(See January 12, 2012 Letter from Falbe to Sarno (attached as Exhibit A), emphasis added).

The January 12, 2012 letter included proposed revised subpoenas for IFF witnesses Thomas Guido, David Shepard, and Theresa Barry, but not, for the reasons explained in the letter, Donald DuRivage. The letter was sent to Mr. Sarno and copied to counsel for both Complainants and IFF by e-mail that same afternoon. Soon thereafter, on January 17, 2012, the Court issued an Order reissuing the requested subpoenas, stating, in pertinent part:

On January 12, 2012, Respondents submitted a letter requesting the reissuance of three of those subpoenas. In that letter, Respondents state that all parties, including the deponents, have agreed to hold the depositions at later dates,

mutually agreeable to all participants. The letter also states that the parties have agreed not to request a new subpoena at this time for one witness, Donald DuRivage, anticipating that all necessary information can be gathered from the remaining three deponents. Respondents note that should a deposition for Mr. DuRivage become necessary, they will address this need with all haste. The parties are reminded that all discovery in this matter must be completed by February 24, 2012.

(Order, 1/17/12).

As set forth in the January 12, 2012 Falbe letter, and the Court's subsequent January 17, 2012, Order, the agreement of the parties and the instructions of the Court could not have been clearer: the three currently-employed IFF witnesses would be deposed pursuant to the terms of the revised subpoenas, and the fourth subpoena for Mr. DuRivage would be held in abeyance until such time as the Respondents requested that such subpoena be reissued. Complainant, having been fully advised of and in agreement with Respondents' proposal to hold off on deposing Mr. DuRivage for the time being, never objected to or expressed any concern with the statements in the Falbe letter or the Court's Order.

II. Complainant's Attempts to Obtain Discovery of DuRivage from IFF

Notwithstanding the parties' agreement and the Court's Order, as noted above, and despite Complainant's assertion of the lack of probative value in pursuing information from IFF before the hearing, it appears now that counsel for Complainant unilaterally contacted IFF's counsel, Mara Levin, almost immediately after the issuance of the Order and requested that IFF agree to provide access to Mr. DuRivage for informal questioning, presumably outside the presence or knowledge of Respondents. (See Exhibit B to Complainant's Motion, e-mail dated January 25, 2012, between USEPA counsel Catherine Garypie and IFF Counsel Mara Levin). As noted in the e-mails attached to Complainant's Motion, counsel for IFF expressed reservations about proceeding in such a fashion, in light of the Court's Order, and suggested that written questions

would be a more appropriate means of responding to USEPA's desire for information from Mr. DuRivage. Complainant refused to agree to submit written questions to Ms. Levin, and as evidenced by the e-mails, grew more insistent, once again demanding that Ms. Levin arrange a meeting. IFF's counsel again refused, once again citing the Court's January 17, Order, and made it clear that she would not comply absent a subpoena from the Court.

At no time prior to the depositions of the three current IFF employees (which occurred as scheduled on Tuesday, January 31 and Wednesday, February 1, 2012), did any counsel for Complainant contact counsel for Respondents and indicate their desire to obtain information from Mr. DuRivage in any fashion. Nor did counsel for Complainant contact Respondents to tell them that USEPA had changed its mind and wanted to depose Mr. DuRivage irrespective of what information might be obtained from the other IFF witnesses in the upcoming depositions.

III. The IFF Depositions

In fact, the issue of Mr. DuRivage's subpoena was not discussed or raised again in the collective presence of Complainant, Respondent and IFF's counsel, until the afternoon of January 31, 2012, at the IFF witness depositions that were held at IFF's counsel's office in Newark, NJ, at some point in the afternoon after Thomas Guido's deposition had ended and David Shepard's deposition had begun. Both deponents had identified Mr. DuRivage as the person with the best knowledge regarding several issues and several particular documents. At that point, Falbe and Complainant's counsel Garypie discussed briefly the idea that it looked like DuRivage was going to have to be deposed after all, despite Respondents' good faith attempt to avoid having to undertake a fourth deposition unless clearly necessary.

The subject was not brought up again until the afternoon of the next day, during the deposition of Theresa Barry. At that time, counsel for Complainant, Respondent and IFF all

conferred extensively regarding the logistics of a DuRivage deposition, which were complicated by the fact that Ms. Levin informed Falbe and Garypie that DuRivage's wife was in poor health, which might make travel to Newark or any other destination far from DuRivage's home near Columbia, SC, difficult and burdensome on the witness. Counsels collectively discussed possible dates and times for the deposition, with Ms. Levin noting that she would not be available to present Mr. DuRivage for deposition the second two weeks of February, and she had only obtained some level of general assurance that the witness would be available the week of February 20th. During this discussion, Garypie stated to Falbe her intention to motion the Court for the subpoena of DuRivage to issue. Taking her to mean that Complainant intended to move to have the previous subpoena initially requested by Respondent reissued, Falbe expressed no objection, again presuming that it would be in the nature of an agreed motion, with Complainant simply taking care of the filing. Garypie even requested that Falbe arrange for the court reporter, since unspecified funding/requisition issues always seemed to be a bit problematic for the government. Falbe agreed to all of the above, but expressly stated, however, his desire to question the witness first (as had been the protocol used in the other IFF depositions), to which Garypie agreed in the presence of IFF counsel and the others in the room at the time. Finally, Garypie and Falbe agreed to join in a conference call at 10:00 am the next morning (Thursday, February 2, 2012), to finalize the details of the deposition, and invited Ms. Levin to join the call in hope that she would have obtained confirmation of the witnesses' availability by then.

On Thursday, February 2, 2012, as agreed at 10:00 am CST, Levin and Falbe joined a conference call to discuss the plans for the DuRivage deposition, but Garypie did not join the call (Falbe received a voice mail from Garypie's co-counsel Matthew Moore that Garypie had been delayed, and later, Falbe received an e-mail from Garypie suggesting a rescheduled call later that

day). Because Falbe and Levin had discussed fairly extensive plans for the DuRivage deposition on the phone, Falbe drafted an e-mail summarizing those points and sent it to Garypie. (See Exhibit B, Falbe e-mail to Garypie dated 2/2/12). In brief, those main points were that:

- 1) DuRivage would be presented by IFF for deposition in Columbia SC;
- 2) Since DuRivage was on both parties' witness lists, Falbe offered to split the costs of the witness's mileage and the cost of a hotel conference room for the deposition; and
- 3) The deposition would be held on Wednesday, February 22nd, at 9:00 am, to allow the deposition to be completed in time for the witness to return home to his ailing wife.

Surprisingly, a long electronic exchange then occurred among counsel, with counsel for Complainant first insisting on an earlier date for the deposition given the short timeframe before dispositive motions are due on March 16, 2012, and then also refusing to honor her agreement to allow counsel for Respondent to question the witness first. (See Exhibit C, e-mail chain between Falbe and Garypie, 2/2/12). Garypie, at the end of the exchange, acquiesced to the proposed date of February 22, 2012, but refused to give on the issue of which party's lawyers would be afforded the first opportunity to ask questions of the witness. While Respondents' counsel was agreeable to the notion of deposing the witness, and agreeable to the date and time of the deposition, Respondent's counsel refused to agree to the proposed order of questioning.

IV. Complainant's Motion Should Be Denied and the Original Subpoena Reissued with the Revised Date, Time and Venue Proposed by Counsel for Respondents and IFF

Complainant's Motion should be denied for numerous reasons. First, the Motion completely misstates and misrepresents that Respondents chose not to depose Mr. DuRivage. Complainant offers no evidence or support for this brazen misstatement. As set forth in detail above, and as completely acknowledged and agreed to by the Complainant, the original DuRivage deposition was set in abeyance by the Court, pending a potential renewed request to re-issue the subpoena, in exactly the same fashion as the other three IFF witness subpoenas were

revised and reissued. Moreover, per the original plan, the parties conferred even before the IFF depositions were completed and had mutually agreed that the information that other witnesses indicated Mr. DuRivage was likely to possess (in many instances, Mr. DuRivage is probably the exclusive source of relevant information). Counsel for Respondents assumed that the motion that Complainant contemplated was the revision and re-issuance of the prior subpoena, and when the discussion among the parties ended, there seemed to be no points of disagreement. The fact that Complainant was eager to file the motion did not concern counsel for Respondent, as long as the date, time and place were mutually agreed-to, and he was provided the first opportunity to question the witness, to which counsel for Complainant had clearly agreed. Significantly, none of the above dialogue between the parties is mentioned in Complainant's Motion, nor is the Thursday, February 2, e-mail exchange between counsel.

Respondents regret taking the Court's time on an issue that should have been agreed to (and Respondents' counsel thought, was) between the parties. But, Complainant's Motion stating that Respondents had chosen not to depose Mr. DuRivage, misstates facts, ignores the agreements of the parties, and apparently seeks to take advantage of winning a race to the courthouse to get its own subpoena issued by the Court before Respondents understood the apparent need to ask for their own subpoena to be reissued.

For the reasons set forth above, Respondents respectfully request Complainant's Motion for an Administrative Subpoena to Issue for the Deposition of a Third-Party Witness and for a Revised Response Date for the Motion¹ be denied, and that the revised Respondents' subpoena for Donald DuRivage be issued by the Court as set forth in the attached proposed subpoena

¹ Given the importance of this issue and the Court's schedule, Respondents have filed their response to Complainant's Motion within 24 hours of receiving it and, thus, that part of

(Exhibit D), with express instructions that Respondents' counsel be afforded the first opportunity to ask questions of the witness, per the previous IFF depositions.

Respectfully submitted,

Keven Drummond Eiber
Meagan L. Moore
BROUSE MCDOWELL
600 Superior Avenue East
Suite 1600
Cleveland, OH 44114
Tel: (216) 830-6816
Fax: (216) 830-6807
keiber@brouse.com
mmoore@brouse.com



Lawrence W. Falbe
QUARLES & BRADY LLP
300 N. LaSalle Street, Suite 4000
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*Attorneys for Respondents Carbon Injection
Systems LLC, Eric Lofquist and Scott Forster*

Complainant's Motion seeking a truncated response time for Respondents to respond to the Motion is mooted.

**In the Matter of: Carbon Injection Systems LLC, Scott Forster, and Eric Lofquist,
Respondents, Docket No. RCRA-05-2011-0009**

CERTIFICATE OF SERVICE

I, Lawrence W. Falbe, an attorney, hereby certify that the foregoing **RESPONDENTS CARBON INJECTION SYSTEMS LLC, SCOTT FORSTER AND ERIC LOFQUIST'S RESPONSE TO COMPLAINANT'S MOTION FOR AN ADMINISTRATIVE SUBPOENA TO ISSUE FOR THE DEPOSITION OF A THIRD-PARTY WITNESS AND FOR A REVISED RESPONSE DATE FOR THE MOTION and REQUEST TO RE-ISSUE RESPONDENT'S SUBPOENA TO THIRD PARTY WITNESS DONALD DURIVAGE** was sent on February 3, 2012, in the manner indicated, to the following:

Original and One Copy by hand delivery to:

LaDawn Whitehead
Regional Hearing Clerk
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

Copy by Overnight Delivery to:

The Honorable Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, DC 20005

Copy by hand delivery to:

Catherine Garypie, Esq. (garypie.catherine@epamail.epa.gov)
Matthew Moore, Esq. (moore.matthew@epamail.epa.gov)
Office of Regional Counsel
U.S. EPA Region 5
77 West Jackson Blvd.
Chicago, IL 60622

Copy by E-mail and Regular Mail to:

Steven Sarno (sarno.steven@epamail.epa.gov)
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW

Mail Code 1900L
Washington, DC 20460

Keven Eiber, Esq. (keiber@brouse.com)
Meagan Moore, Esq. (mmoore@brouse.com)
Brouse McDowell
600 Superior Avenue East
Suite 1600
Cleveland, OH 44114

February 3, 2012

A handwritten signature in cursive script that reads "Lawrence W. Falbe". The signature is written in dark ink and has a long, sweeping horizontal line extending to the right.

Lawrence W. Falbe

EXHIBIT A



300 N. LaSalle Street
Suite 4000
Chicago, Illinois 60654-3406
312.715.5000
Fax 312.715.5155
www.quarles.com

Attorneys at Law in
Milwaukee and Madison, Wisconsin
Naples and Tampa, Florida
Phoenix and Tucson, Arizona
Chicago, Illinois
Shanghai, China

Writer's Direct Dial: 312.715.5223
E-Mail: lawrence.falbe@quarles.com

January 12, 2012

Via e-mail

Steven Sarno, Esq.
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Mail Code 1900L
Washington, DC 20460

RE: In the Matter of Carbon Injection Systems, Inc., et al.; RCRA-05-2011-0009

Dear Mr. Sarno:

I am writing in regard to the issuance of certain third-party subpoenas in this matter pursuant to Judge Biro's Order dated December 27, 2011, ruling on Respondents' Motion for Administrative Subpoena to issue for the Deposition of International Flavors and Fragrances, LLC (the "Motion").

As you are aware, Judge Biro issued the subpoenas of third-party witnesses of current and former employees of International Flavors and Fragrances, Inc. (IFF) as requested by the Respondents pursuant to the Motion. As we have discussed in relation to the Motion, Respondents anticipated that the proposed dates, times and venues for the requested depositions might need to be amended from those set forth on the proposed subpoenas which were included with Respondents' motion. We discussed that as long as all parties (including IFF) agreed with respect to any future amendments, the subpoenas could be amended without leave of court with respect to the specifics of any such amendments; however, as a matter of procedure, it seemed to most proper to provide amended subpoenas for reissuance by the Court.

Accordingly, I have provided with this letter, revised subpoenas for three of the four witnesses for which subpoenas were issued: Theresa Barry, Thomas Guido and David Shepard. The dates, time and venues have been revised as reflected on the subpoenas, by agreement of all parties. With the agreement of all parties, we have decided to forgo requesting reissuance of the subpoena for the fourth witness, Donald DuRivage, anticipating that Respondents will be able to obtain the information sought from the other three witnesses. Should Respondents determine that they wish to proceed with Mr. DuRivage's deposition, we

January 12, 2012
Page 2

will ask the Court to reissue the DuRivage subpoena immediately after the conclusion of the depositions of the three IFF witnesses.¹

As we have also discussed, counsel for IFF has agreed to accept service of the subpoenas for the three above-referenced witnesses. Upon reissuance of the subpoenas by the Court, please once again forward them to me, and I will provide for service as noted.

Thank you for your assistance, and please do not hesitate to contact me with any questions.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Lawrence W. Falbe". The signature is written in black ink and is positioned to the right of the typed name.

Lawrence W. Falbe

cc: Counsel of Record (via e-mail)
Mara Levin, Esq. (via e-mail)

¹ Based on our discussion this afternoon, Respondents are cognizant of the Court's schedule concerning its hearing in Milwaukee beginning February 3, 2012, so in the event that we determine that we wish to proceed with the deposition of Mr. DuRivage, we will act with alacrity in that regard.

EXHIBIT B

Falbe, Lawrence W.

From: Falbe, Lawrence W.
Sent: Thursday, February 02, 2012 10:37 AM
To: 'Garypie.Catherine@epamail.epa.gov'; 'Matthew Moore'
Cc: 'maralevin@mac.com'; 'Levin, Mara'; 'Keven Drummond Eiber (keiber@brouse.com)'
Subject: Subpoena for Donald DuRivage/Logistics

Hi Catherine and Matt - Per Matt's voice mail to me of this morning, I understand Catherine was not able to call in at 10:00 after all. While I invited Matt to join and forwarded the call-in info, Mara Levin and I did not hear from him, so we went ahead and discussed some possible deposition logistics. Here is what we have so far:

- 1) As you know, Mara Levin has agreed to accept service on behalf of DuRivage, and she will be representing him as a former IFF employee. Thus, as soon as the subpoena is re-issued by the ALJ, all we need to do is e-mail it to Mara as I did with the other subpoenas.
- 2) Mr. DuRivage's wife is in poor health, as Mara indicated yesterday. That means we all have to go to the witness. The venue that makes the most sense seems to be Columbia SC. That's about 60 miles from DuRivage's home, so he will incur some travel costs that I anticipate he will ask to be reimbursed for. Given that DuRivage is on both Complainant's and Respondent's witness lists, I have no problem splitting the costs with EPA. Similarly, we will need a venue for the deposition; it makes most sense to me to arrange for a conference room in a local hotel, but this will again be another expense (but one which Respondents are willing to split with EPA). That is, unless EPA happens to have a regional office in town or has a better idea.
- 3) Per my discussion with Catherine yesterday, I am willing to handle setting up the court reporter and taking care of all the logistics, presuming I can go first in questioning the witness. We'd have to discuss how we can handle payment arrangements for the government's share of the witness expenses, hotel conference room, etc.
- 4) The witness is available the week of Feb. 20th. Mara suggests that we fly into Columbia on the 21st and start the deposition early on the 22nd (10:00 local time) to give us plenty of time to finish and get the witness home to see to his wife.
- 5) Mara scouted out hotel locations in Columbia and recommended the following:
http://www.starwoodhotels.com/sheraton/property/overview/index.html?propertyID=1783&language=en_US
- 6) If that works for everyone, I would propose that EPA ask the court to reissue the DuRivage subpoena with the above date/time/venue. (I think that Steve Sarno might even be willing to do it with a simple e-mail from EPA rather than a motion (given that the original subpoena already issued and we telegraphed to the court that this might well be happening), but I leave that up to Catherine and Matt).

If Catherine and I need to talk further, I am available any time today up until 2:00 pm CST but I'm tied up after that. If we need to bring in Mara, we will have to find a mutually agreeable time to talk.

Thoughts?

Larry

EXHIBIT C

Falbe, Lawrence W.

From: Catherine Garypie [Garypie.Catherine@epamail.epa.gov]
Sent: Thursday, February 02, 2012 4:14 PM
To: Falbe, Lawrence W.
Cc: Jeff Cahn; 'KEiber@brouse.com'; 'maralevin@mac.com'; Matthew Moore; 'mlevin@herrick.com'
Subject: RE: Donald DuRivage Deposition

Based on your message below, we plan to state in our motion that Respondents agree with the date, time and place for the deposition, but do not agree with EPA's request for a DuRivage subpoena.

Catherine Garypie, Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (C-14J)
Chicago, Illinois 60604
PH 312-886-5825
FAX 312-692-2513
email: garypie.catherine@epa.gov

CONFIDENTIAL: This message may contain information that is privileged or otherwise exempt from disclosure under applicable law. Do not disclose without consulting the Office of Regional Counsel. If you think you received this email in error, please notify the sender immediately.

From: "Falbe, Lawrence W." <larry.falbe@quarles.com>
To: Catherine Garypie/R5/USEPA/US@EPA
Cc: Jeff Cahn/R5/USEPA/US@EPA, "'KEiber@brouse.com'"
<KEiber@brouse.com>, "'maralevin@mac.com'"
<maralevin@mac.com>, Matthew Moore/R5/USEPA/US@EPA,
'mlevin@herrick.com' <mlevin@herrick.com>
Date: 02/02/2012 03:16 PM
Subject: RE: Donald DuRivage Deposition

Why not? When I brought this up specifically yesterday in Newark, I thought you agreed. I'm pretty sure those in the room heard our discussion.

In any event, the original subpoena request was Respondents', which we won over EPA's strong objections. We made it clear that we did not ask to have the subpoena re-issued when we agreed to revise the dates only because both sides hoped that it might not be necessary in light of the other depositions. Since both sides now feel that Mr. DuRivage should be deposed, there is no reason why EPA should get to go first, simply because EPA is 'racing to the courthouse.' I thought we had agreed to all of these terms yesterday, but if EPA has changed its mind, we can agree on time and date, and let the judge decide who gets to go first, if necessary.

Larry

-----Original Message-----

From: Catherine Garypie [mailto:Garypie.Catherine@epamail.epa.gov]
Sent: Thursday, February 02, 2012 3:12 PM
To: Falbe, Lawrence W.
Cc: Jeff Cahn; 'KEiber@brouse.com'; 'maralevin@mac.com'; Matthew Moore;
'mlevin@herrick.com'
Subject: RE: Donald DuRivage Deposition

EPA will not agree to Respondents taking the first opportunity to question the witness on the record. Given this, will the Respondents agree to a request for a DuRivage subpoena requiring his attendance in Columbia SC on February 22 at 9am?

Catherine Garypie, Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Blvd. (C-14J)
Chicago, Illinois 60604
PH 312-886-5825
FAX 312-692-2513
email: garypie.catherine@epa.gov

CONFIDENTIAL: This message may contain information that is privileged or otherwise exempt from disclosure under applicable law. Do not disclose without consulting the Office of Regional Counsel. If you think you received this email in error, please notify the sender immediately.

From: "Falbe, Lawrence W." <larry.falbe@quarles.com>
To: Catherine Garypie/R5/USEPA/US@EPA
Cc: Jeff Cahn/R5/USEPA/US@EPA, "'KEiber@brouse.com'"
<KEiber@brouse.com>, "'maralevin@mac.com'"
<maralevin@mac.com>, Matthew Moore/R5/USEPA/US@EPA,
'mlevin@herrick.com'" <mlevin@herrick.com>
Date: 02/02/2012 02:59 PM
Subject: RE: Donald DuRivage Deposition

Yes, that is correct - we are agreeable to a dep on the 22nd. Note that it is my understanding from my discussion with Ms. Levin this morning, that she understood from the witness that he was available the week of the 20th, but she had not, as of this morning, specifically confirmed that specific time and date (22nd, 9:00 am) with the witness.

I understand from your e-mail that EPA is willing to assume responsibility for all costs of the deposition. Our offer to split costs remains open, if you should reconsider. In any event, Respondents have no objection if EPA wishes to assume the costs, as long as EPA is okay with Respondents taking the first opportunity to question the witness on the record, given that it was Respondents who initially moved for and were allowed to have the subpoena issued, and we indicated yesterday our intention to ask to have the subpoena re-issue regardless

of whether EPA was interested in doing so.

Larry

-----Original Message-----

From: Catherine Garypie [mailto:Garypie.Catherine@epamail.epa.gov]
Sent: Thursday, February 02, 2012 2:54 PM
To: Falbe, Lawrence W.
Cc: Jeff Cahn; 'KEiber@brouse.com'; 'maralevin@mac.com'; Matthew Moore;
'mlevin@herrick.com'
Subject: Re: Donald DuRivage Deposition

I understand your email to mean that you will not agree to a request for a DuRivage subpoena requiring his attendance in Columbia SC on February 13 at 9am, but you will agree to a request for a DuRivage subpoena requiring his attendance in Columbia SC on February 22 at 9am. Is this correct?

Catherine Garypie, Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
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From: "Falbe, Lawrence W." <larry.falbe@quarles.com>
To: Catherine Garypie/R5/USEPA/US@EPA,
'maralevin@mac.com'
<maralevin@mac.com>
Cc: Jeff Cahn/R5/USEPA/US@EPA, Matthew
Moore/R5/USEPA/US@EPA,
'mlevin@herrick.com' <mlevin@herrick.com>,
'KEiber@brouse.com' <KEiber@brouse.com>
Date: 02/02/2012 02:37 PM
Subject: Re: Donald DuRivage Deposition

Sorry, not sure why I wrote "suggested" date of the close of fact discovery. It's clearly set in stone by the ALJ unless she changes it.

LWF

----- Original Message -----

From: Falbe, Lawrence W.
Sent: Thursday, February 02, 2012 02:32 PM

To: 'Garypie.Catherine@epamail.epa.gov'
<Garypie.Catherine@epamail.epa.gov>; 'maralevin@mac.com'
<maralevin@mac.com>
Cc: 'Cahn.Jeff@epamail.epa.gov' <Cahn.Jeff@epamail.epa.gov>;
'Moore.Matthew@epamail.epa.gov' <Moore.Matthew@epamail.epa.gov>;
'mlevin@herrick.com' <mlevin@herrick.com>; 'KEiber@brouse.com'
<KEiber@brouse.com>
Subject: Re: Donald DuRivage Deposition

Catherine - given that Ms. Levin has stated she cannot comply with EPA's requested timeframe, and she is the only attorney for IFF that is in a position to be able to adequately represent IFF's witness, we will agree only to a date that is satisfactory to Ms. Levin. The 22nd seems to be reasonable and is within the schedule established by the ALJ.

The suggested date of close of fact discovery is Feb. 24th and cannot be unilaterally truncated by EPA because it thinks it needs more time to prepare dispositive motions. If EPA needs more time, I would suggest that EPA motion the court for additional time for the dispositive motion deadline.

I would remind EPA that it was only at the insistence of Respondents (over EPA's strenuous objections) that we even went forward with the depositions of the IFF witnesses in the first place. I find it somewhat ironic that EPA is now so insistent on completing the last deposition, on ITS schedule, to the possible prejudice of CIS and IFF.

Best, Larry

----- Original Message -----

From: Catherine Garypie [mailto:Garypie.Catherine@epamail.epa.gov]
Sent: Thursday, February 02, 2012 01:48 PM
To: Falbe, Lawrence W.; maralevin@mac.com <maralevin@mac.com>
Cc: Jeff Cahn <Cahn.Jeff@epamail.epa.gov>; Matthew Moore
<Moore.Matthew@epamail.epa.gov>
Subject: Donald DuRivage Deposition

Mara & Larry - Upon further reflection, we have determined that is appropriate for EPA to request the issuance of the subpoena. EPA plans to cover the costs of the location, court reporter, and any witness fees which are necessary.

Due to the tight schedule we are on (close of discovery is on February 25, and Motions for Accelerated Decision are due March 16), it is important for EPA to conduct the deposition sooner than February 22. Therefore, we plan to request a subpoena requiring the appearance of Mr. DuRivage on Monday, February 13 at 9am. Although Mara stated yesterday that she is unavailable during the weeks of February 6 and February 13, we are hopeful that another attorney in her firm will be able to cover the deposition or in-house counsel for IFF will be available. We are mindful of the witness' travel concerns which Mara has communicated, and we are planning a location in Columbia, SC.

Larry, please let me know as soon as possible if CIS agrees with our planned request for the DuRivage subpoena (Columbia SC, February 13,

9am). We plan to file the Motion by 4:30pmCT today.

Thank you.

Catherine Garypie, Associate Regional Counsel
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U.S. Environmental Protection Agency, Region 5
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Chicago, Illinois 60604
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EXHIBIT D

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:)	
)	Docket No. RCRA-05-2011-0009
Carbon Injection Systems LLC;)	
Scott Forster, President;)	
Eric Lofquist, Vice President)	Under Section 3008(a) of the Resource
Gate #4 Blast Furnace Main Ave)	Conservation and Recovery Act,
Warren Township, OH 44483)	42 U.S.C. § 6928(a)
)	
EPA ID No. OHR000127910)	
)	
Respondents.)	
)	
)	
)	

SUBPOENA DUCES TECUM

To: Donald DuRivage
c/o International Flavors & Fragrances, Inc.
World Headquarters
521 West 57th 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: February 22, 2012, at 9:00 am, and continuing as needed

PLACE: Sheraton Columbia Downtown Hotel
1400 Main Street
Columbia, SC 29201
(803) 988-1400

The deposition will be taken pursuant to Rule 30 of the Federal Rules of Civil Procedure, as applicable and may be continued from day to day until completed. The deposition will be recorded by stenographic means and may be recorded by sound and visual means.

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 COUTY AS COMTEMPT THEREOF.

ISSUED in Chicago, Illinois, this ____ date of _____, 2012.

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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Brouse McDowell, L.P.A.
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