

CAVITCH

FAMILO DURKIN & FRUTKIN
Legal Professional Association

Max E. Dehn
Attorney at Law
mdehn@cfd.com

August 9, 2008

Fourteenth Floor
1717 East Ninth Street
Cleveland, OH 44114-2876
T 216.621.7860
F 216.621.3415
www.cfd.com

Ms. Sonja Brooks – Woodard
Regional Hearing Clerk (E-13J)
U.S. EPA , Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3511

RE: Docket No. EPCRA-05-2008-0005

Dear Ms. Woodard:

Please find enclosed Respondent's Reply to Complainant's Response to Respondent's Motion to File Answer Instantly in the above-captioned matter.

Very truly yours,



Max E. Dehn

Enclosure

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:) Docket No. EPCRA-05-2008-0005
)
LIBRA INDUSTRIES, INC.) RESPONDENT'S REPLY TO
MENTOR, OHIO,) COMPLAINANT'S RESPONSE
) TO RESPONDENT'S MOTION TO
Respondent) FILE ANSWER INSTANTER

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In its Response to Respondent's Motion to File Answer Instanter, the Complainant (the "EPA") argued that Respondent, Libra Industries, Inc. ("Libra"), should be denied the opportunity to file its Answer in this matter, and should suffer default judgment. The EPA bases its position largely upon Libra's technical failure to timely file its Answer. The EPA's position is improper, and Libra should not be denied the opportunity to present its case as a result of technical error that did not benefit or prejudice any party.

In its Brief in Opposition to Claimant's Motion for Default Order, incorporated by reference herein, Libra explained that its conduct in this matter has been in good faith, and that the EPA's demand for default judgment appears contrary to controlling federal law. For the sake of economy, those arguments will not be restated here. But several points raised by the EPA's Response merit addressing.

First, undersigned counsel has a different recollection of the events of June 23, 2008, than that recounted by the EPA. On June 23, Associate Regional Counsel Coyle phoned and stated that no Answer appeared to have been filed in this matter. In previous conversations, both attorneys had expressed surprise that no hearing date had been established, and the lack of a docketed Answer appeared to solve the mystery.

But undersigned counsel did not know at the time of the June 23 conversation what had actually happened, as Federal Express delivery records initially appeared to confirm the Answer had been properly delivered for filing.

Further, Libra did not miss a “deadline” when it sent its Answer on June 27 rather than June 25.¹ Amidst the press of other matters, undersigned counsel ascertained what had happened with the initial filing, drafted a Motion to File Instantly, and filed the Answer without undue delay.

Second, the EPA points to the initial delivery date of February 8, 2008, as itself being out of time for filing an Answer. The EPA asserts that the Answer was to have been filed by February 6. But the EPA did not assert that the February filing of the Answer was untimely before issuing its present Response. Even if the EPA is correct in its calculation of dates, the failure to raise this issue earlier either effects a waiver or, at the very least, demonstrates that the matter was of little import.

Third, the EPA points to “insufficient certificates of service” as being the root of the delay in this matter.² The EPA asserts that because the certificate of service only identified Complainant, that the EPA was prevented from earlier determining that the Answer was not properly filed. As an initial matter, it is surprising that the EPA Associate Regional Counsel is unable to review a docket, or lacks alternate means of reviewing the status of pending matters. But even assuming that to be the case, the EPA’s assertion highlights the overreaching nature of its position. The EPA seeks to

¹ Complainant’s Response to Respondent’s Motion to File Answer Instantly, pgs. 1-2.

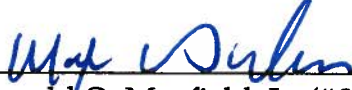
² Id. at pg. 2.

deny Libra the opportunity to be heard based upon alleged procedural errors that are individually minor, and collectively have no impact on the merits of the matter.

Libra has gained no advantage as a result of the inadvertent misfiling, and the EPA's position has not been prejudiced. When Libra learned of the improper filing, it immediately took steps to correct the mistake. Also, Libra cooperated fully with the pre-Complaint investigatory process, and Libra has no history of violations of any state or federal law, environmental or otherwise. Accordingly, Libra should be permitted to file its Answer, and should not be denied its right to be heard in this matter.

Respectfully submitted,

CAVITCH, FAMILO, DURKIN & FRUTKIN CO., L.P.A.

By: 
Harold O. Maxfield, Jr. (#36858)
Max E. Dehn (#007600)
1717 East Ninth Street, 14th Floor
Cleveland, Ohio 44114
Telephone: (216) 621-7860
Fax: (216) 621-3415
Email: mdehn@cfd.com
hmaxfield@cfd.com

Attorneys for Libra Industries, Inc.

CERTIFICATE OF SERVICE

On this 9th day of August, 2008, a copy of Respondent Libra Industries, Inc.'s Reply to Complaint's Response to Respondent's Motion to File Answer Instantly, was sent by ordinary U.S. mail to:

Ms. Ann L. Coyle (C-14J)
Associate Regional Counsel
U.S. EPA, Region 5
77 West Jackson Boulevard
Chicago, Illinois 60604

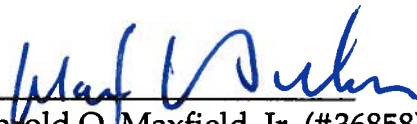
Attorney for U.S. EPA

Ms. Marcy A. Toney
Presiding Officer
U.S. EPA, Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3511

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CAVITCH, FAMIO, DURKIN & FRUTKIN CO., L.P.A.

By:


Harold O. Maxfield, Jr. (#36858)
Max E. Dehn (#0079600)
1717 E. 9th Street, 14th Floor
Cleveland, Ohio 44114
(216) 621-7860

Attorneys for Libra Industries, Inc.