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TRANSMITTAL MEMORANDUM

TO: Marcy Leavitt, Bureau Chief
Ground Water Protection & Remediation Bureau

FROM: Ana Marie Ortiz, Assistant General Counsel
Office of General Counsel

DATE: April 11, 1997

Enclosed please find the latest copies of the pleadings and correspondence for your information. Please share with Rob and Dennis or provide them with a copy. Thank you

PLEASE:

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Thank you very much,

Casilda N. Baca

Casilda N. Baca
Secretary to
Ana Marie Ortiz

Enclosure(s)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
ALBUQUERQUE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 97-0210-M/DJS
	)	
SPARTON TECHNOLOGY, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO STAY, DISMISS OR TRANSFER VENUE

Sparton Technology, Inc. ("Sparton") requests that this case be stayed, dismissed or transferred to the United States District Court for the Northern District of Texas, Dallas Division for the following reasons:

I.
INTRODUCTORY STATEMENT

There has been pending in federal court in Dallas, since August 1996, a lawsuit brought by Sparton that involves the same issue presented by this action -- how should impacts to the environment associated with a Sparton manufacturing plant be addressed? Since October of 1996 there has been an administrative proceeding before the United States Environmental Protection Agency ("EPA," Region VI) in Dallas -- that also seeks to identify how the same impacts to soil and groundwater should be addressed.

In February 1997, the United States initiated a third proceeding, this action, to identify a remedy for addressing these same impacts to soil and groundwater associated with a Sparton manufacturing plant. The United States was required to bring this action as a compulsory counterclaim in the Dallas Litigation. Therefore, this action must be dismissed or stayed.

Even if the claims of the United States in this lawsuit are not compulsory counterclaims in the Dallas Litigation, they could have been brought in Dallas as permissive counterclaims. Doing so would have been more convenient for the parties who are already litigating both judicially and administratively in Dallas. The United States chose instead to expand the proceeding both numerically and geographically by bringing suit in Albuquerque. This case should be heard in Dallas.

II.
FACTUAL BACKGROUND

The facts relevant to this Motion to Stay, Dismiss or Transfer Venue are largely undisputed:[1]

Sparton operated a manufacturing plant at 9621 Coors Road N.W. in Albuquerque, New Mexico from 1961 to 1997. At this plant, Sparton used various solvents in the course of its defense-related manufacturing operation. In the 1980s, Sparton became aware that the method by which it handled and disposed of spent solvents had caused unintended releases to groundwater at the plant. Sparton notified appropriate authorities of this discovery and

[1] The information in this section is taken from the complaint in this lawsuit, the complaint in the Dallas litigation, attached as Exhibit "A," to the affidavit of A. Jan Appel, which is attached as Exhibit "A," to this pleading.

entered into extended discussions with various regulatory agencies. These discussions culminated in an administrative order on consent ("AOC") between Sparton and the EPA office in Dallas. The AOC described how the extent of the soil and groundwater impacts would be determined and specified a process for developing a plan to deal with those impacts. The AOC called the report detailing how the impacts would be addressed the "Corrective Measure Study" ("CMS"). Under the terms of the AOC, if the EPA approved Sparton's CMS, it was required to accept the remedy Sparton recommended in the CMS.

But the EPA did not live up to its promise: In November 1992, Sparton submitted its initial draft CMS. Almost four years later, in March 1996, the EPA submitted final comments in which it requested the draft CMS be revised. Sparton timely submitted a final draft CMS to the EPA in May 1996. In the CMS, Sparton identified a recommended remedy to prevent an increase in the amount of impacted groundwater and to reduce over time the concentration of solvents in the groundwater. In June 1996, the EPA approved the CMS, with concerns, but, in violation of the AOC, refused to accept Sparton's recommended remedy. Instead, the agency made a final decision selecting a remedy other than the one Sparton recommended.

In August 1996, Sparton sued EPA in federal court in Dallas because the agency had violated its obligations under the AOC, in selecting a remedy. EPA made no objection to venue in the Dallas Litigation.

In September of 1996, and apparently in response to the August lawsuit, EPA issued an initial administrative order ("IAO") to Sparton. Under the terms of that order, Sparton was required to implement a remedy other than what it recommended in the CMS. EPA

directed Sparton to proceed with the remedy EPA chose in its "final decision." Sparton objected to the IAO, and the resolution of that objection is the subject of a current administrative proceeding before EPA Region VI in Dallas.

Despite the existence of these two pending actions, the United States, on behalf of EPA, filed this lawsuit on February 19, 1997. That action occurred more than eight years after the AOC was entered and more than 13 years after EPA first had notice of impacts to soil and groundwater. Through this lawsuit, EPA suggests that conditions that have remained relatively unchanged for several years, somehow only now present an "imminent and substantial endangerment" to human health or the environment.

III.
ARGUMENT AND AUTHORITIES

A. The present lawsuit should have been brought as a compulsory counterclaim in the Dallas Litigation.

The claims the EPA asserts against Sparton in the present action should properly be brought as counterclaims in the pending Dallas Litigation. A counterclaim is compulsory "if it arises out of a transaction or occurrence that is the subject matter of the opposing party's claim."[2] Courts have given the terms "transaction" and "occurrence" flexible and realistic constructions in order to promote judicial economy.[3] The controlling test for whether a

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[2] Fed. R. Civ. P. 13(a).

[3] *Pipeliners Local Union No. 798 v. Ellerd*, 503 F.2d 1193, 1198 (10th Cir. 1974).

claim arises out of the same transaction or occurrence is whether there is any logical relation between the claim and the proposed counterclaim.[4]

> "Transaction" is a word of flexible meaning. It may comprehend a series of many occurrences, depending not so much upon the immediateness of their connection as upon their logical relationship. . . . Essential facts alleged by appellant enter into and constitute in part the cause of action set forth in the counterclaim. That they are not precisely identical, or that the counterclaim embraces additional allegations . . . does not matter. To hold otherwise would be to rob this branch of the rule of all serviceable meaning, since the facts relied upon by the plaintiff rarely, if ever, are, in all particulars, the same as those constituting the defendant's counterclaim.[5]

The goal of both the Dallas Litigation and the present lawsuit is to determine the proper remedy for Sparton to undertake at the Coors Road plant. Clearly there is a logical relationship between the Dallas Litigation, in which Sparton challenges the EPA's authority to enforce its IAO and seeks clarification of how a remedy is to be selected, and the present lawsuit, in which the EPA requests this court enter a remedy. Consequently, the present lawsuit should have been filed as a compulsory counterclaim in the Dallas Litigation.

Because the present lawsuit should have been filed as a compulsory counterclaim in the Dallas Litigation, this Court may dismiss, enjoin, or transfer the present lawsuit.[6] Absent special circumstances, the first filed of two competing lawsuits should have priority.[7] Although nothing in Rule 13 prevents the filing of a duplicative action instead of a

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[4] *Id.*, at 1198-99.

[5] *Moore v. New York Cotton Exch.*, 270 U.S. 593, 610, 46 S. Ct. 367, 371 (1926).

[6] *See Kerotest Mfg. Co. v. C-O-Two Fire Equip. Co.*, 342 U.S. 180, 183-84, 72 S. Ct. 219, 221 (1952) (holding that district court has discretion over whether to stay or dismiss a proceeding); *Texas Eastern Transmission Corp. v. Marine Office - Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978) (holding that district court has discretion to transfer a proceeding).

[7] *Adam v. Jacobs*, 950 F.2d 89, 92 (2d Cir. 1991).

compulsory counterclaim, the filing of the second action contravenes the purpose of Rule 13.[8] "Ideally, once a court becomes aware that an action on its docket involved a claim that should be compulsory counterclaim in another pending federal suit, it will stay its own proceeding."[9] Consequently, when two actions are logically interdependent such that the second filed action could have been brought as a compulsory counterclaim in the first, the second filed action should be enjoined "to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters."[10]

In general, when an action before a court involves a claim that should be a compulsory counterclaim in another pending federal suit, the court should stay its own proceedings or dismiss the claim.[11] The general rule exists because the determination of form should be left to the federal court having prior jurisdiction, where questions of venue may be resolved pursuant to a motion to transfer under 28 U.S.C. § 1404(a).[12] Consequently, when it appears that claims in the present suit would be a compulsory counterclaim in the first filed action, the second filed action should be stayed.[13]

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[8] *Id.* at 93 (citing 6 Charles A. Wright & Arthur R. Miller ("Wright & Miller"), *Federal Practice and Procedure* § 1418, at 142-43 (2nd ed. 1990 & Supp. 1991).

[9] Wright & Miller, at 143.

[10] *See Southern Const. Co. v. Pickard*, 371 U.S. 57, 60, 83 S. Ct. 108, 110 (1962) (stating the purpose of Federal Rule of Civil Procedure 13(a)); *see, e.g., Chicago Pneumatic Tool Co. v. Hughes Tool Co.*, 180 F.2d 97, 98 (10th Cir.) (enjoining second filed action for declaratory judgment where action for alleged patent infringement had already been commenced in federal district court in Oklahoma), *cert. denied*, 340 U.S. 816, 71 S. Ct. 46 (1950).

[11] *Republic Telcom Corp. v. Telemetrics Communications, Inc.*, 634 F. Supp. 767, 768 (D. Minn. 1986).

[12] *Id.*

[13] *See, e.g., Id.* (enjoining breach of contract action when related breach of contract action was already pending in the Northern District of Texas).

To prevent multiple litigation between the same parties concerning the same issues, this Court may also dismiss the present action.[14] In the alternative, this Court may transfer the present litigation to the Northern District of Texas so that it may be joined with the Dallas Litigation.[15]

B. This court has the authority to transfer venue in the interest of justice.

1. Section 1404 of the Judicial Code allows this Court to transfer the present case to any district where the action might have been brought.

Under section 1404 of the Judicial Code, this Court may, in the interest of justice, transfer the present lawsuit to any other district or division where the lawsuit might have been brought.[16] The purpose of section 1404 is to prevent waste of time, energy and money, and to protect litigants, witnesses and the public against unnecessary inconvenience and expense.[17] The section reflects a desire to have federal civil suits tried in the federal system at the place called for in the particular case by considerations of convenience and justice.[18] Transfer is appropriate under section 1404 when the moving party

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[14] *See, e.g., Donaldson, Lufkin & Jenrette v. Los Angeles County*, 542 F. Supp. 1317, 1320-21 (S.D.N.Y. 1982) (applying first filed rule to dismiss second filed lawsuit involving essentially the same parties and the same issues).

[15] *See, e.g., Laughlin v. Edwards Business Machines, Inc.*, 155 F.R.D. 543, 545-46 (W. D. Va. 1994) (holding that transfer and consolidation would serve the interest of justice when claims asserted by plaintiffs in three suits arose out of the same transaction); *Spencer, White & Prentis, Inc. v. Jacot Const. Corp.*, 258 F. Supp. 473, 474 (S.D.N.Y. 1966) (transferring, instead of dismissing, when defendant represented that it would assert compulsory counterclaim in first filed action).

[16] *See* 28 U.S.C.A. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.")

[17] *Van Dusen v. Barrack*, 376 U.S. 612, 616, 84 S. Ct. 805, 809 (1964).

[18] *Id.*

demonstrates that: (1) venue is proper in the transferor district; (2) venue and jurisdiction are proper in the transferee district; and (3) the transfer will serve the convenience of the parties, the convenience of the witnesses, and the interest of justice.[19] In passing on a motion for transfer, the district judge must consider the statutory factors in light of all the circumstances of the case.[20] Because the task of weighing these factors necessarily involves "a large degree of subtlety and latitude," the decision to transfer is committed to the sound discretion of the district judge.[21]

2. **The present action "might have been brought" in the Northern District of Texas.**

The statutory factors set out in section 1404 are met in the present case. First, venue is proper in this Court. The Resource Conservation and Recovery Act (RCRA) provides that the EPA may institute a judicial proceeding in "the appropriate district court."[22] This Court is an appropriate forum under section 1391(b)(2) of the Judicial Code, which provides that "a civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as provided by law, be brought only in . . . (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of the

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[19] *Vandeveld v. Christoph*, 877 F. Supp. 1160, 1167 (N.D. Ill. 1995).

[20] *Coffey v. Van Dorn Iron Works*, 796 F.2d 217, 219 (7th Cir. 1986).

[21] *Texas Eastern Transmission Corp. v. Marine Office-Appleton & Cox Corp.*, 579 F.2d 561, 567 (10th Cir. 1978); *see also Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 236, 102 S. Ct. 252, 256 (1981) (explaining that section 1404 gives courts greater discretion than did doctrine of *forum non conveniens*).

[22] 42 U.S.C.A. § 6973.

property that is the subject of the action is situated . . . ."[23] Because the impacted ground water is located within this judicial district, venue is proper in this Court.

But this action "might have been brought" in the Northern District of Texas as well. A federal court's power to transfer an action to another district under section 1404(a) is dependent upon whether the action "might have been brought" by the plaintiff in the transferee district.[24] Whether the action sought to be transferred could have been brought in the transferee district is evaluated as of the time the suit to be transferred was filed.[25] If the action might have been brought as a counterclaim in a pre-existing suit, the plaintiff's ability to raise the action by counterclaim in the transferee district will satisfy the "might have been brought" requirement of section 1404(a).[26] Therefore, in the rare case when both parties are already litigating against one another in the transferee district, the plaintiff's ability to bring its claim as a counterclaim in the transferee district qualifies the transferee district as one where the action "might have been brought."[27]

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[23] 28 U.S.C.A. § 1391(b)(2).

[24] *Hoffman v. Blaski*, 363 U.S. 335, 343-44, 80 S. Ct. 1084, 1089-90 (1960); *Cessna Aircraft Co. v. Brown*, 348 F.2d 689, 691 (10th Cir. 1965).

[25] *Liaw Su Teng v. Skaarup Shipping Corp.*, 743 F.2d 1140, 1148 (5th Cir. 1984).

[26] *A.J. Industries, Inc. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 503 F.2d 384, 387 (9th Cir. 1974); *see also Am. Telephone and Telegraph Co. v. Milgo Electronic Corp.*, 428 F. Supp. 50, 54-55 (S.D.N.Y. 1977) (following *A.J. Industries* in holding that a plaintiff's ability to bring an action as a counterclaim in an action pending in the transferee district qualifies the transferee district as one in which suit "might have been brought"); *Lessona Corp. v. Duplan Corp.*, 317 F. Supp. 290, 293-94 (D.R.I. 1970) (preceding *A.J. Industries* in holding that a plaintiff's ability to bring an action as a counterclaim in an action pending in the transferee district qualifies the transferee district as one in which suit "might have been brought").

[27] *See Phillips Petroleum Co. v. Fed. Energy Admin.*, 435 F. Supp. 1234, 1238 (D. Del. 1977) ("First, *A.J. Industries* involved the unique condition of having both parties already litigating against one another in the transferee district. There only certain claims, and not parties in any real sense, were transferred.").

The ability to raise the subject matter of the transferred suit by counterclaim in a pending action in the transferee district is "significant because it ensures that a plaintiff will not be transferred to a forum where it has not already appeared and is not already engaged in litigation with the defendant."[28] If the plaintiff had brought its claim as a counterclaim in the pending action, the other party could not have objected to the counterclaim on the basis of venue or jurisdiction.[29] Accordingly, when the subject matter of the present suit could have been raised as a counterclaim in a pending suit in the transferee district, both venue and jurisdiction are proper in the transferee district as well.

The EPA could have filed the present action as a counterclaim in the Dallas Litigation. The Dallas Litigation involves Sparton's challenge to the EPA's authority to issue and proceed to enforce the IAO; both because RCRA and the separation of powers doctrine do not permit the EPA to maintain simultaneous administrative and judicial actions, and because the EPA's actions in issuing the IAO conflicts with its obligations under the AOC.

Under Rule 13 of the Federal Rules of Civil Procedure, any claim a defendant has against a plaintiff may be filed in a pending action, whether or not it arises out of the same transaction or occurrence that is the subject matter of the plaintiff's claim. Therefore, there is no question that EPA could have filed this action in Dallas. But, more importantly, the

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[28] *A.J. Industries*, 503 F.2d at 388.

[29] *See Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 451, 52 S. Ct. 238, 239-40 (1932) (holding that when plaintiff brings suit in federal district court, it submits itself to jurisdiction of the court with respect to all issues embraced in the suit, including those pertaining to defendant's counterclaim); *Mayer v. Devel. Corp. of Am.*, 396 F. Supp. 917, 932-33 (D. Del. 1975) (holding that plaintiffs waived all objections to venue and process as to compulsory counterclaims); *Lesnik v. Public Industrials Corp.*, 144 F.2d 968, 977 (2nd Cir. 1944) (holding that plaintiff had waived venue objection to permissive counterclaim), *cited in United States v. Acord*, 209 F.2d 709, 712 (10th Cir.) (holding that no independent jurisdictional basis was necessary for third-party plaintiff's claim), *cert denied*, 347 U.S. 975, 74 S. Ct. 786 (1954).

claims in this lawsuit arise out of the transaction or occurrence that is the subject matter of the Dallas Litigation, namely an appropriate response to environmental impacts associated with the Sparton manufacturing plant. Therefore, EPA was required to file this lawsuit in Dallas.

At the time the EPA filed the present lawsuit, the EPA had the right to file a counterclaim in the Dallas Litigation because it had not yet filed an answer in that case.[30] Because the EPA should have brought the present action as a counterclaim in the Dallas Litigation, the Northern District of Texas is a district where suit might have been brought for purposes of section 1404.

C. The present lawsuit should be transferred to the Northern District of Texas in the interest of justice.

The "interest of justice" is an independent ground for transferring venue.[31] When the interest of justice is paramount, and the comparative convenience of the transferee and transferor forums is not significant, transfer under section 1404 is appropriate.[32] An

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[30] On the date the EPA filed the present action, February 19, 1997, a motion to dismiss, filed by the EPA based on sovereign immunity, was pending in the Dallas Litigation. Arguably, the EPA would not have waived its sovereign immunity claim by filing a counterclaim in the Dallas Litigation. *See* Fed. R. Civ. P. 13(d); *Citizen Band Potawatomi Indian Tribe v. Tax Comm'n*, 888 F.2d 1303, 1305 (10th Cir. 1989) (holding that Indian Tribe with sovereign immunity coextensive with that of the United States did not waive sovereign immunity as to counterclaim by filing suit as a plaintiff), *aff'd in relevant part*, 498 U.S. 505, 111 S. Ct. 905 (1991). Regardless, however, of whether it would have been strategically advantageous for the EPA to file a counterclaim in the Dallas Litigation, the EPA undisputably had the right to file such a counterclaim. *See* Fed. R. Civ. P. 13(a).

[31] *See Donald v. Seamans*, 427 F. Supp. 32, 33 (E.D. Tenn. 1976); *see also Headrick v. Atchison, T. & S. F. Ry. Co.*, 182 F.2d 305, 310 (10th Cir. 1950) ("Under the provisions of the statute, it is necessary, prior to making a transfer under Section 1404(a), that the court find that such transfer will be not only for the convenience of the parties and their witnesses but further that it is in the interests of justice.").

[32] *Hill's Pet Products v. A.S.U., Inc.*, 808 F. Supp. 774, 777 (D. Kan. 1992) (transferring breach of contract case to federal district court in California where defendant's antitrust and state law claims were pending).

important factor to consider when evaluating the interest of justice is whether related litigation is pending in another forum.[33] "[A]s a general proposition, cases should be transferred to the district where related actions are pending."[34] This general rule exists because, as the Supreme Court has stated, "To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent. Moreover, such a situation is conducive to a race of diligence among litigants for a trial in the District Court each prefers."[35]

Consequently, the "first-filed" rule has developed to address situations when parallel litigation is pending in two different district courts. When two courts share concurrent jurisdiction, the first-filed rule gives priority to the court where jurisdiction first attached.[36] The prevailing standard is that, in the absence of compelling circumstances, the first-filed rule should apply.[37]

For example, in *Ervin and Associates, Inc. v. Cisneros*, a nonminority contractor sued the Department of Housing and Urban Development (HUD) in federal court in Colorado to

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[33] *Id.* (citing 15 Charles A. Wright & Arthur R. Miller ("Wright & Miller"), *Federal Practice & Procedure* § 3854, at 279 (2d ed. 1986)).

[34] *Adair v. Hunt Int'l Resources Corp.*, 526 F. Supp. 736, 743 (N.D. Ill. 1981) (quoting *Sec. and Exch. Comm'n v. First Nat'l Fin. Corp.*, 392 F. Supp. 239, 241 (N.D. Ill. 1975)).

[35] *Continental Grain Co. v. FBL-585*, 364 U.S. 19, 26, 80 S. Ct. 1470, 1474 (1960), *quoted in Cessna Aircraft Co.*, 348 F.2d at 692.

[36] *Harpah Coal Co. v. Chaco Energy Co.*, 673 F.2d 1161, 1163 (10th Cir.), *cert. denied*, 456 U.S. 1007, 102 S. Ct. 2299 (1982); *Gen. Comm. of Adjustment GO-386 v. Burlington N. R.R.*, 895 F. Supp. 249, 251 (E.D. Mo. 1995) (citing *Northwest Airlines v. American Airlines*, 989 F.2d 1002, 1004-1006 (8th Cir. 1993).

[37] *Id.* (quoting *Northwest Airlines*, 989 F.2d at 1005).

challenge HUD's decision to award thirty percent of its physical inspection procurement to a single contractor through a Small Business Administration plan to target socially and economically disadvantaged businesses.[38] HUD argued that the contractor's case should be transferred to the District of Columbia, where the contractor had filed a similar lawsuit against the same defendants, asserting the same claims, and seeking the same relief.[39] Recognizing that there were significant similarities between the District of Columbia case and the case at hand, the Colorado court transferred the case to the District of Columbia "for the convenience of the parties and witnesses, in the interest of justice."[40]

Similarly, in *General Committee of Adjustment GO-386 v. Burlington Northern Railroad*, a group of railroad carriers, represented by their collective bargaining agent, filed suit in federal district court in the District of Columbia, seeking a court order requiring two labor organizations to bargain nationally in pending collective bargaining.[41] After several related cases had been filed and transferred to the D.C. district court, one of the two defendant labor organizations in the original District of Columbia lawsuit filed suit in the Eastern District of Missouri to compel four railroad carriers to bargain locally.[42] The railroad carriers invoked the first-filed rule and asked that the case be transferred to the D.C. district court.[43] The Eastern District of Missouri held that all the pending cases presented

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[38] 939 F. Supp. 793, 794-96 (D. Colo. 1996).

[39] *Id.* at 797-98.

[40] *Id.* at 799.

[41] *Id.* at 251.

[42] *Id.*

[43] *Id.*

the same question: whether the railroad carriers could be compelled to bargain locally instead of nationally.[44] Because the cases all involved the same issue, the court applied the first-filed rule and transferred the Missouri case to the D.C. district court, stating, "Furthermore, it is clear to this court that for the convenience of the parties and probable witnesses, and in the interest of judicial efficiency and swift resolution of this matter, this case should be tried in Washington, D.C."[45]

Likewise, the present lawsuit should be transferred to the Northern District of Texas to promote judicial efficiency and facilitate the swift resolution of this dispute. The present lawsuit and the action pending in the Northern District of Texas are duplicative in that both involve the issue of what remedy Sparton must undertake to correct the unintended environmental impacts of its manufacturing processes and how that decision should be made. In addition, however, the Dallas Litigation will answer the threshold question of whether the EPA violated the AOC when it issued the IAO it seeks to impose on Sparton in the present litigation. Consequently, the outcome of the Dallas Litigation could render this proceeding

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[44] *Id.* at 252.

[45] *Id.* at 253-54; *see also Tingley Sys. v. Bay State HMO Management*, 833 F. Supp. 882 (N.D. Fla. 1993) (applying first-filed rule to transfer breach of contract suit to district where related declaratory judgment action was already pending); *Jarvis Christian College v. Exxon Corp.*, 845 F.2d 523 (5th Cir. 1988) (upholding district court's *sua sponte* transfer of oil field operator's action from the Southern District of Texas to the Eastern District of Texas in part because pending cases in the transferee district involved identical or substantially related issues); *Mfrs. Hanover Trust v. Palmer Corp.*, 798 F. Supp. 161 (S.D.N.Y. 1992) (applying first-filed rule to transfer lender's collection action to District of New Jersey where borrower had previously commenced lender liability action); *Gen. Tire & Rubber Co. v. Watkins*, 373 F.2d 361 (4th Cir.) (ordering district court to transfer case involving patent validity and infringement to Northern District of Ohio where case could be consolidated with pending case involving same parties and issues to prevent wasteful and useless duplication of time and effort by federal courts), *cert. denied*, 386 U.S. 960, 87 S. Ct. 1031 (1967).

moot.[46] Under these circumstances, one "cannot conceive of an arrangement more expensive, time consuming, and inconvenient to the parties, plaintiff as well as defendant, or more exhaustive of judicial resources," than to proceed with both the present action and the Dallas Litigation simultaneously.[47]

To avoid wasting the courts' and the parties' resources by permitting these duplicative actions to proceed simultaneously, the first-filed rule should be applied, and this lawsuit should be transferred to the Northern District of Texas. Absent compelling circumstances, the first-filed rule should be applied whenever multiple actions involving the same parties and the same issues are pending at the same time. Consequently, the burden now shifts to the EPA to demonstrate compelling circumstances for maintaining the present action in this Court.[48]

C. In the present case, convenience considerations do not preclude application of the first-filed rule.

The first-filed rule does not apply when its application is precluded by overwhelming considerations of convenience; in the present case, however, no such overwhelming considerations exist. First, no weight should be given to the EPA's choice of venue in this case. The EPA's choice, as a government agency, is afforded no more weight than the

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[46] These same considerations will likely allow the present litigation to be consolidated with the Dallas Litigation, if this case is transferred to the Northern District of Texas. When separate actions are pending between the same district court or two different courts within the same judicial district, the actions may be consolidated when they involve common questions of law and fact. *See* Fed. R. Civ. P. 42(a); *Enter. Bank v. Saettele*, 21 F.3d 233, 235 (8th Cir. 1994).

[47] *Air Express Int'l Corp. v. Consol. Freightways Inc.*, 586 F. Supp. 889, 892 (D. Conn. 1984) (granting defendants' motion to transfer venue when defendants in federal court action were plaintiffs in related state court action in California).

[48] *See Gen. Comm.*, 895 F. Supp. at 251-252 (holding that plaintiff labor organization had failed to establish compelling circumstances to thwart application of the first-filed rule).

choice of any other plaintiff.[49] In this case, the EPA's choice of venue should receive no weight, since honoring the EPA's choice of venue as plaintiff in this second-filed litigation would in essence deprive Sparton of its choice of venue as plaintiff in the first-filed Dallas Litigation.[50]

Secondly, Sparton, as the party moving for a transfer of venue, is able to meet its burden of showing that the original forum is inconvenient and that the plaintiff would not be substantially inconvenienced by a transfer.[51] As stated, it would be inconvenient and wasteful to litigate the same issues in both Albuquerque and Dallas. Furthermore, it is no more inconvenient for the EPA to litigate in Dallas as opposed to Albuquerque. The most important convenience consideration is the availability and convenience of witnesses.[52] In considering the availability and convenience of witnesses, the trial court must concentrate primarily on key witnesses.[53] In the present case, as set forth in the attached affidavit of R. Jan Appel, Secretary of Sparton Technology, Inc., the location of key witnesses identified Dallas as the most convenient location for litigation.

In addition, neither party's counsel practices in New Mexico. Instead, Sparton's attorneys are located in Dallas, and the EPA's attorneys are located in the District of

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[49] *Sec. and Exch. Comm'n v. First Nat'l Fin. Corp.*, 392 F. Supp. at 242 (transferring venue of SEC action against corporate and individual defendants to transferee district where corporate defendants were involved in bankruptcy proceeding).

[50] *See Merle Norman Cosmetics v. Martin*, 705 F. Supp. 296, 298 (E.D. La. 1988) (relating first-filed rule to rule that plaintiff's choice of forum is given considerable weight).

[51] *Standard Office Sys. v. Ricoh Corp.*, 742 F. Supp. 534, 539 (W.D. Ark. 1990) (quoting 15 Wright & Miller, *Federal Practice & Procedure* § 3849, at 259 (2d ed. 1986)).

[52] *Dupre v. Spanier Marine Corp.*, 810 F. Supp. 823, 825 (S.D. Tex. 1993).

[53] *Id.*

Columbia. The location of counsel becomes a significant factor when, as here, the primary counsel for neither party involved in parallel litigation practices in the transferor district, particularly if other factors also point to a transfer.[54]

In this case, therefore, considerations of convenience do not mandate that this action continue in New Mexico. On the contrary, it would undoubtedly be more convenient for both parties to try the case only once in Dallas than to attempt to maintain parallel litigation.[55] The public interest favors speedy and less-expensive dispute resolution. Consequently, it favors the resolution of all issues arising out of one episode in one forum.[56] In the present case, considerations of judicial efficiency far outweigh any other possible convenience consideration. Because the Dallas Litigation and the present lawsuit involve identical parties and issues, and because resolution of the Dallas Litigation may render this proceeding moot, Sparton requests, in the interest of justice, that this lawsuit be transferred to the Northern District of Texas, so that it may be consolidated with the Dallas Litigation.

IV.
CONCLUSION

Sparton has demonstrated that the most appropriate forum for this action is Dallas. The Court should stay, dismiss or transfer this action.

---

[54] *Dupre*, 810 F. Supp. at 826.

[55] *See, e.g. Tingley*, 833 F. Supp. at 887 (observing that financial hardship of litigating in distant forum would be less than hardship of maintaining parallel litigation in both fora).

[56] *Liaw Su Teng*, 743 F.2d at 1149.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By _____
James P. Fitzgerald
Attorneys for Defendant
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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

On the 31st day March, 1997, a true and correct copy of the foregoing document was served upon all counsel of record by hand-delivery and overnight package express.

_____
James P. Fitzgerald

U.S. DEPARTMENT OF JUSTICE
ENVIRONMENT AND NATURAL RESOURCES DIVISION
ENVIRONMENTAL ENFORCEMENT SECTION
P.O. BOX 7611
WASHINGTON, D.C. 20044-7611
FAX (202) 514-8395

FACSIMILE COVER SHEET

****

TO: Gary O'Dea (505) 768-4525
Ana Marie Ortiz (505) 827-1628
Patrick Trujillo (505) 768-4245
Charles de Saillan (505) 827-4440

****

FROM: **Michael T. Donnellan** (202) 514-4226

DATE: April 4, 1997

NUMBER OF PAGES (including cover sheet): 23

DESTINATION FAX No.:

DESTINATION VOICE COORD:

SUBJECT: U.S. v. Sparton Technology, Inc., No CIV 97 0210M (D.N.M)

MESSAGE:

COPY

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO
ALBUQUERQUE DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CIVIL ACTION NO. 97-0210-M/DJS
	)	
SPARTON TECHNOLOGY, INC.,	)	
	)	
Defendant.	)	

DEFENDANT'S MOTION TO STAY, DISMISS OR TRANSFER VENUE

Defendant Sparton Technology, Inc. ("Sparton") moves this court to stay or dismiss the present lawsuit pursuant to Federal Rule of Civil Procedure 13, or, alternatively, to transfer this lawsuit to the United States District Court for the Northern District of Texas, Dallas Division, pursuant to 28 U.S.C. § 1404(a).

I.

Because the present lawsuit should have been filed as a compulsory counterclaim in litigation already pending in the Northern District of Texas, Dallas Division, this lawsuit should be stayed or dismissed. Since August 1996, a lawsuit has been pending in federal court in Dallas involving the same issue presented by this action; namely, how should environmental impacts associated with a Sparton manufacturing plant be addressed? Since October 1996, an administrative proceeding has been pending before Region VI of the United States Environmental Protection Agency ("EPA"), also seeking to identify how the same

environmental impacts should be addressed. The present lawsuit is the third proceeding seeking to answer this same question. Because the EPA's claims in this lawsuit are logically related to the first filed Dallas Litigation, this action should have been brought as a compulsory counterclaim in the Dallas Litigation. Consequently, pursuant to Federal Rule of Civil Procedure 13, this Court should stay or dismiss this litigation so that it may be brought as a counterclaim in the pending Dallas Litigation.

II.

Alternatively, if this Court chooses not to stay or dismiss the present action, this Court should transfer venue of this action under Section 1404(a) of the Judicial Code. Section 1404 of the Judicial Code allows this Court to transfer the present action, in the interest of justice, to any district where the action might have been brought. Because the present lawsuit should have been filed as a compulsory counterclaim in the pending Dallas Litigation, the Northern District of Texas, Dallas Division, is a district where this suit "might have been brought." Because the interest of justice favors the efficient resolution of this dispute, this case should be transferred to the Northern District of Texas, Dallas Division, where it may be consolidated with the Dallas Litigation.

III.

As support for this motion, Defendant relies on its contemporaneously-filed Brief in Support, and the Declaration of R. Jan Appel.

FOR THESE REASONS Defendant requests that this Court stay or dismiss the present lawsuit, or, alternatively, transfer it to the United States District Court for the Northern District of Texas, Dallas Division.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By _____
James P. Fitzgerald
Attorneys for Defendant
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ATTORNEYS FOR DEFENDANT

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On the 31st day March, 1997, a true and correct copy of the foregoing document was served upon all counsel of record by hand-delivery and overnight package express.

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James P. Fitzgerald

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TO: Gary O'Dea (505) 768-4525
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FROM: Michael T. Donnellan (202) 514-4226

DATE: April 4, 1997

NUMBER OF PAGES (including cover sheet): 23

DESTINATION FAX No.:

DESTINATION VOICE COORD:

SUBJECT: U.S. v. Sparton Technology, Inc., No CIV 97 0210M (D.N.M)

MESSAGE:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE, and THE BERNALILLO COUNTY COMMISSIONERS, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0206-LH/JHG
STATE OF NEW MEXICO, THE NEW MEXICO ENVIRONMENT DEPARTMENT, and THE NEW MEXICO OFFICE OF THE NATURAL RESOURCES TRUSTEE, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0208-JC/RLF
UNITED STATES OF AMERICA, Plaintiff, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0210-M/DJS

MOTION AND BRIEF FOR RULE 16 CONFERENCE

Sparton Technology, Inc. ("Sparton"), Defendant in the above-entitled actions, requests that pursuant to Rule 16 of the Federal Rules of Civil Procedure the Court hold, as soon as possible, a conference to establish early and continuing control of this litigation.

I.
BACKGROUND

On February 19, 1997, the above-referenced actions were simultaneously filed. All three actions involve a request that Sparton be ordered to address impacts to soil and groundwater the company is already correcting. Sparton wants to expand those activities, but has yet to receive from the very same entities suing it, the necessary authorizations to move forward.

The issue of how to address the impacts to soil and groundwater is already the subject of a pending action in Federal Court in Dallas, filed by Sparton against the United States Environmental Protection Agency ("EPA"), Region 6 in August of 1996.

The same issue is also the subject of an administrative proceeding currently pending before EPA Region 6 in Dallas.

Although Sparton's answer date was March 25, 1997, there are already four motions pending in the Albuquerque cases: (1) a motion filed by the Plaintiffs to consolidate; (2) a motion filed by Sparton to stay, dismiss or transfer the action filed by the United States to the pending lawsuit in Dallas; (3) a 32 page motion by the Plaintiffs for a preliminary injunction accompanied by 328 pages of exhibits; and (4) a motion by the Plaintiffs to exceed the limitation in the local rules that not more than 50 pages of exhibits accompany any motion.

Of the three motions directed to it, Sparton has responded to two, leaving only the Motion for Preliminary Injunction requiring a reply.

II.
SPARTON NEEDS LIMITED DEPOSITIONS OF FOUR INDIVIDUALS TO COMPLETE ITS RESPONSE TO THE MOTION FOR PRELIMINARY INJUNCTION

Included in the 318 pages of exhibits is: (1) a two-page affidavit from an employee of the City of Albuquerque, Norman Gaume, setting forth in conclusory terms a purported connection between groundwater impacted by Sparton's past manufacturing operation and the city's water supply; (2) a two-page affidavit from Robert Morrison with a seven page work-plan explaining also in conclusory terms why the Court should order Sparton to install and test a containment well as well as five new monitor wells; (3) two determinations, one by Samuel Coleman, an EPA Region 6 employee, and the other by Mark Weidler, Secretary of the New Mexico Environment Department, of the purported existence of an imminent and substantial endangerment associated with the groundwater impacted by Sparton's past manufacturing activities.

Sparton needs the deposition of the director of public works for the City of Albuquerque to establish that the conclusions set forth in Mr. Gaume's affidavit are incorrect and not supported by the facts. It needs Mr. Morrison's deposition in order to understand the basis for his conclusion, and to develop an effective response. It needs the depositions of Mr. Coleman and Mr. Weidler to explore the process used in reaching the conclusions of both gentlemen, and to understand the facts actually relied upon in reaching the conclusions set forth.

In accordance with the local rules, Sparton conferred with the attorney for the United States to schedule these depositions. See attached correspondence from James B. Harris to David Fishel dated April 3, 1997, attached as Exhibit "A." That request was rejected. See

correspondence from Michael Donnellan to James B. Harris dated April 4, 1997, and response of James B. Harris to Michael Donnellan dated April 4, 1997, attached as Exhibits "B" and "C" respectively. Counsel for Sparton had originally suggested two days for each deposition in order to allow those depositions to cover all issues that might arise in this litigation. Sparton is willing to limit the depositions to issues directly related to the Motion for Preliminary Injunction, so long as Plaintiffs will not object to a second deposition after the preliminary injunction hearing and in preparation for a trial on the merits, if any, for each of the individuals identified. In the event the Plaintiffs are willing to agree to this arrangement, each deposition could be completed in a day or less.

Sparton believes it would need, at most, ten days following the completion of the last deposition to finalize its response to the Motions for Preliminary Injunction so that it can include information developed during the depositions. If the depositions were completed by Friday, April 18, 1997, Sparton's response date would be April 28, 1997.

III.
OTHER OPEN ISSUES REQUIRING ATTENTION

Apart from the dispute regarding the holding of depositions, before Sparton's response is due, there are several other "housekeeping" issues that the Court might want to address now, as opposed to resolving on a piecemeal basis. These include the following:

1. Consolidation of these cases for purposes of determining the claims under the Resource Conservation and Recovery Act and for pretrial purposes. The parties do not disagree that one judge should hear these matters, although the Plaintiffs want all matters heard by one judge.

2. Scheduling of a date for evidentiary hearing on the Motion for Preliminary Injunction.

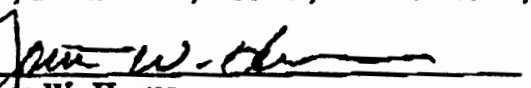
Sparton believes that resolving these issues early on, in one hearing, will allow for a more orderly presentation of the dispute and a more efficient use of judicial resources.

IV.
SCHEDULING A PRE-TRIAL CONFERENCE UNDER RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 16 provides the Court broad discretion to schedule pre-trial conferences to address the types of issues presented in this motion. Sparton submits that holding such a conference as early as possible in these cases is particularly appropriate. Such a conference could be held on relatively short notice, given that lead counsel for all parties, other than the United States and Sparton, are based in Albuquerque or Santa Fe. The court may wish to consider allowing out-of-town counsel to participate by telephone, if they so choose. Such a hearing should not require more than an hour of the Court's time and might be scheduled as early as Wednesday April 9, 1997.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By 

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

On the 8th day April, 1997, a true and correct copy of the foregoing document was served upon all counsel of record by:

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Albuquerque, NM 87103

Patrick Trujillo, Esq.
City of Albuquerque
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Facsimile & Mail to:

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Environmental Enforcement Div.
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Santa Fe, NM 87504-1508

Ana Marie Ortiz, Esq.
N.M. Environment Department
P.O. Box 26110
Santa Fe, NM 87502-6110

David L. Fishel, Esq.
Environmental Enforcement Section
United States Department of Justice
1425 New York Ave. NW, 13th Floor
Washington, D.C. 20005

James P. Fitzgerald

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April 3, 1997

VIA FACSIMILE

David Fishel, Esq.
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
Washington, DC 20530

Re: Albuquerque Litigation

Dear Dave:

The purpose of my attempt to talk with you by telephone this morning was to discuss scheduling issues related to the Albuquerque Litigation.

As I am sure you will agree, the procedural setting of the various motions now pending in those actions is somewhat confused.

Your Motion for Preliminary Injunction was not received at the offices of Sparton's local counsel until approximately 5:00 p.m. on April 1, 1997. I did not see it until I arrived in their offices at approximately 9:30 a.m. on April 2, 1997. After reviewing that pleading, I continue to oppose your request to exceed the local rule limitation on exhibit pages. We hope to have a response to your motion on this subject very quickly. Obviously I need a determination on that issue in order to know exactly how to respond to your motion for preliminary injunction.

It also strikes me that decisions on the motion to consolidate and motion to stay, dismiss, or transfer need to be made in advance of any consideration of the motion for preliminary injunction.

Additionally, depending on the Court's ruling on your request to exceed page limitations for exhibits, I will probably want to take at least four depositions -- the Director of Public Works with the City of Albuquerque, Mr. Morrison, Sam Coleman, and Mark Weidler. I anticipate that each one of these depositions will take two days, and the information from those depositions will be needed in order to allow me to respond to your Motion for Preliminary Injunction, in the event that the Court allows it to be filed in its current form.

Finally, in order to complete a response to your motion, I am going to need some reasonable period of time in order to synthesize: (1) the information from the depositions (in

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the event that they are necessary); (2) input from Sparton's recently retained experts; and (3) analysis of the legal points you have raised. I do not think this work can be accomplished within the next fourteen (14) days, even if the Court grants your motion to exceed page limitations on exhibits.

Given all of these factors, it seems to me that the most reasonable approach is to request an immediate scheduling conference with Judge Conway, who is the chief judge of the New Mexico District, in order to agree upon the process by which the pending motions will be considered, as well a briefing and hearing schedule.

Please let me know, no later than early tomorrow morning, how you want to proceed.

Yours very truly,

James B. Harris

JBH/eshd
cc: Bruce Hall
James Fitzgerald
R. Jan Appel
40310 00001 LEGAL 57925

U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section

Assistant Attorney General
P.O. Box 7611
Washington, D.C. 20044-7611

Victor's direct telephone (202) 514-4124
FAX: (202) 514-0097

April 4, 1997

By telefax and first class U.S. mail
James B. Harris
Thompson and Knight, P.C.
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Dallas, Texas 75201-4639
(214) 969-1700
FAX: (214) 969-1751

re: U.S. v. Sparton Technology, Inc., No. CIV-97-0210-M

Dear Jim:

I am writing in response to your letter dated yesterday. Please understand that I can only speak for the United States and not for the other parties to the Joint Preliminary Injunction Motion. I will try to address the issues in the order in which you raise them.

To the extent that you intend to seek an extension of the preliminary injunction briefing schedule based upon your delayed receipt of the motion, please so notify the United States.

With regard to your opposition to the motion to exceed the exhibit page number limit, the United States would certainly not oppose an accelerated briefing schedule.

With regard to the impact of "Defendant's Motion to Stay, Dismiss, or Transfer Venue" on the preliminary injunction briefing schedule, the United States will not consent to modifying the briefing schedule based upon that motion. While the United States will file a brief fully setting forth the grounds for its opposition, the United States generally considers the motion to be without merit.

Since the preliminary injunction motions can be considered regardless of the ruling on the motion to consolidate, the United States will not consent to a delay in the briefing schedule based upon that motion.

With regard to your request to depose Dr. Morrison and Messrs. Gurule, Coleman and Weidler, the United States would be willing to consider scheduling one day depositions of appropriate witnesses from both sides after briefing on the preliminary injunction motion has been completed. At this point, the United States does not understand why depositions of Messrs. Gurule, Coleman and Weidler are appropriate. Consequently, the United States will not

consent to an extension of the briefing schedule for the preliminary injunction to accommodate depositions.

With regard to your suggestion that a scheduling conference with Judge Conway be requested, the United States does not see the need for such a conference at this time. I suggest that upon completion of briefing for the preliminary injunction motion, we attempt to reach agreement on a schedule. Should we fail to reach agreement at that time, a scheduling conference may be appropriate.

Please contact me if you have any questions.

Sincerely,

Michael T. Domeier

cc: Morse

Zavitz

de Saillan

Ortiz

O'Dea

Trujillo

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AUSTIN
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DIRECT DIAL:

(214) 969-1102

April 4, 1997

VIA FACSIMILE and FIRST CLASS U.S. MAIL

Michael T. Donnellan
U.S. Department of Justice
Environment and Natural Resource Division
Environmental Enforcement Section
Benjamin Franklin Station
P.O. Box 7611
Washington, DC 20044-7611

Re: Albuquerque Litigation

Dear Michael:

I have received and now have had a chance to review your letter of April 4, 1997, which was faxed to me. As I am sure you can appreciate, I am disappointed with your position, which I understand to be as follows:

1. Sparton's response to the motion for preliminary injunction is due on or before April 15, 1997, no extension will be considered;

2. No depositions should occur until after briefing on the preliminary injunction motion is completed.

3. Only depositions of "appropriate" person should be allowed; I assume that you probably believe that Mr. Gurule, Mr. Coleman, and Mr. Weidler are not "appropriate" witnesses.

4. It is unnecessary for your motion to consolidate or Sparton's motion to stay, dismiss, or transfer to be decided before action is taken on the motion for preliminary injunction.

5. You are unwilling to join in a request for a scheduling conference.

Sparton was hoping that you would have agreed to the depositions we requested and a short extension of the briefing schedule on the motion for preliminary injunction (assuming, of course, that your motion and exhibits, which do not comply with the local rules, actually triggered a 14 day response period). If you had done so, we could have been much more flexible on your request to exceed the local rule limit on exhibit pages.

THOMPSON & KNIGHT
A PROFESSIONAL CORPORATION

I ask that you reconsider your position. If you are willing to do so, I suggest that an agreed order be drafted setting forth when matters will be presented, how the 328 pages of exhibits will be handled, and that the order be sent to Judge Hansen (the judge assigned to the first filed case) for his approval.

Please let me know Monday morning whether your position has changed. I am sending a copy of this letter to counsel of record for the other plaintiffs, and I am likewise asking them to advise me by Monday morning of their respective positions.

Yours very truly,

James B. Harris

JBH/eshd
Enclosure

cc: Bruce Hall
James Fitzgerald
R. Jan Appel
Charlie de Sailen
Ana M. Ortiz
Gary O'Dea
Patrick Trujillo

RODEY, DICKASON, SLOAN, AKIN & ROBB, P. A.
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TELEPHONE (505) 765-5900

FACSIMILE (505) 768-7395

April 8, 1997

WRITER'S DIRECT NUMBER
768-7315

HAND-DELIVERED

Honorable C. LeRoy Hansen
Federal Building & U.S. Courthouse
500 Gold Avenue SW
Albuquerque, NM 87103

Re: City of Albuquerque v. Sparton Technology, Inc. (97-0206-LH/JHG); State of New Mexico v. Sparton Technology, Inc. (97-0208-JC/RLP); and U.S.A. v. Sparton Technology, Inc. (97-0210 M/DJS)

Dear Judge Hansen:

We represent Sparton Technology, Inc., the Defendant in each of the three suits referenced above. We are addressing this letter to you because you were assigned the first filed, lowest numbered case.

Plaintiffs in each of the three cases seek a preliminary injunction against Sparton and make claims under RCRA. Plaintiffs in all cases also ask for possible additional or different relief under causes of action other than RCRA, so the cases are close, but not quite the same in causes of action and potential proof and discovery. Plaintiffs have filed motions to consolidate the cases, which are pending. Sparton does not object to consolidation for discovery matters and for case management.

We are writing you to seek your guidance on how to proceed to quickly resolve several issues that significantly impact our client's ability to timely respond to the Motions for Preliminary Injunction. We believe a Rule 16 conference should be held as soon as possible, with involvement of out-of-town counsel by telephone, if necessary, to discuss these issues, which could easily and quickly be resolved at such a conference. Today we filed a motion and brief requesting such a conference, a copy of which is attached to this letter. Hopefully, early control will substantially speed

RODEY, DICKASON, SLOAN, AKIN & ROBB, P. A.

preparation and will eliminate unnecessary motions with attendant briefing expense and delay.

Sincerely yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By
Jonathan W. Hewes

JWH/jkj
Enclosure

cc w/encl: David L. Fishel, Esq. (Via Facsimile & Regular Mail)
Charles De Saillan, Esq.
Ana Marie Ortiz, Esq.
Honorable John C. Conway
Honorable Edwin L. Mechem
James B. Harris, Esq.

John W. Zavitz, Esq. (Via Hand-Delivery)
Gary A. O'Dea, Esq.
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Bruce Hall, Esq.

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FACSIMILE NO. (505) 768-7395
COVER PAGE

DATE: April 8, 1997

TO: Ana Marie Ortiz, Esq.

TELEPHONE NO: (505) 827-2990

FACSIMILE NO.: (505) 827-1628

FROM: James P. Fitzgerald

 # PAGE: 15 Includes this cover page

If you do not receive any of these pages, please call 768-7399.

OPERATOR: Jennifer Jelson

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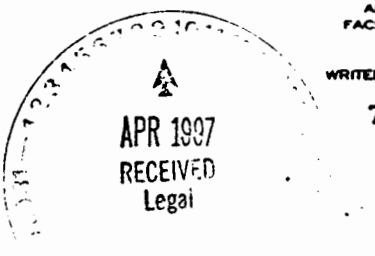
April 8, 1997

WRITER'S DIRECT NUMBER

768-7315



HAND-DELIVERED

Honorable C. LeRoy Hansen
Federal Building & U.S. Courthouse
500 Gold Avenue SW
Albuquerque, NM 87103

Re: **City of Albuquerque v. Sparton Technology, Inc. (97-0206-LH/JHG); State of New Mexico v. Sparton Technology, Inc. (97-0208-JC/RLF); and U.S.A. v. Sparton Technology, Inc. (97-0210 M/DJS)**

Dear Judge Hansen:

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We are writing you to seek your guidance on how to proceed to quickly resolve several issues that significantly impact our client's ability to timely respond to the Motions for Preliminary Injunction. We believe a Rule 16 conference should be held as soon as possible, with involvement of out-of-town counsel by telephone, if necessary, to discuss these issues, which could easily and quickly be resolved at such a conference. Today we filed a motion and brief requesting such a conference, a copy of which is attached to this letter. Hopefully, early control will substantially speed

preparation and will eliminate unnecessary motions with attendant briefing expense and delay.

Sincerely yours,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By
Jonathan W. Hewes

JWH/jkj
Enclosure

cc w/encl: David L. Fishel, Esq. (Via Facsimile & Regular Mail)
Charles De Saillan, Esq.
Ana Marie Ortiz, Esq.
Honorable John C. Conway
Honorable Edwin L. Mechem
James B. Harris, Esq.

John W. Zavitz, Esq. (Via Hand-Delivery)
Gary A. O'Dea, Esq.
Patrick Trujillo,

James P. Fitzgerald, Esq.
Bruce Hall, Esq.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE, and THE BERNALILLO COUNTY COMMISSIONERS, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0206-LH/JHG
STATE OF NEW MEXICO, THE NEW MEXICO ENVIRONMENT DEPARTMENT, and THE NEW MEXICO OFFICE OF THE NATURAL RESOURCES TRUSTEE, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0208-JC/RLF
UNITED STATES OF AMERICA, Plaintiff, v. SPARTON TECHNOLOGY, INC., Defendant.	§	CIVIL ACTION NO. CIV-97-0210-M/DJS

MOTION AND BRIEF FOR RULE 16 CONFERENCE

Sparton Technology, Inc. ("Sparton"), Defendant in the above-entitled actions, requests that pursuant to Rule 16 of the Federal Rules of Civil Procedure the Court hold, as soon as possible, a conference to establish early and continuing control of this litigation.

I.
BACKGROUND

On February 19, 1997, the above-referenced actions were simultaneously filed. All three actions involve a request that Sparton be ordered to address impacts to soil and groundwater the company is already correcting. Sparton wants to expand those activities, but has yet to receive from the very same entities suing it, the necessary authorizations to move forward.

The issue of how to address the impacts to soil and groundwater is already the subject of a pending action in Federal Court in Dallas, filed by Sparton against the United States Environmental Protection Agency ("EPA"), Region 6 in August of 1996.

The same issue is also the subject of an administrative proceeding currently pending before EPA Region 6 in Dallas.

Although Sparton's answer date was March 25, 1997, there are already four motions pending in the Albuquerque cases: (1) a motion filed by the Plaintiffs to consolidate; (2) a motion filed by Sparton to stay, dismiss or transfer the action filed by the United States to the pending lawsuit in Dallas; (3) a 32 page motion by the Plaintiffs for a preliminary injunction accompanied by 328 pages of exhibits; and (4) a motion by the Plaintiffs to exceed the limitation in the local rules that not more than 50 pages of exhibits accompany any motion.

Of the three motions directed to it, Sparton has responded to two, leaving only the Motion for Preliminary Injunction requiring a reply.

II.
SPARTON NEEDS LIMITED DEPOSITIONS OF FOUR INDIVIDUALS TO COMPLETE ITS RESPONSE TO THE MOTION FOR PRELIMINARY INJUNCTION

Included in the 328 pages of exhibits is: (1) a two-page affidavit from an employee of the City of Albuquerque, Norman Gaume, setting forth in conclusory terms a purported connection between groundwater impacted by Sparton's past manufacturing operation and the city's water supply; (2) a two-page affidavit from Robert Morrison with a seven page work-plan explaining also in conclusory terms why the Court should order Sparton to install and test a containment well as well as five new monitor wells; (3) two determinations, one by Samuel Coleman, an EPA Region 6 employee, and the other by Mark Weidler, Secretary of the New Mexico Environment Department, of the purported existence of an imminent and substantial endangerment associated with the groundwater impacted by Sparton's past manufacturing activities.

Sparton needs the deposition of the director of public works for the City of Albuquerque to establish that the conclusions set forth in Mr. Gaume's affidavit are incorrect and not supported by the facts. It needs Mr. Morrison's deposition in order to understand the basis for his conclusion, and to develop an effective response. It needs the depositions of Mr. Coleman and Mr. Weidler to explore the process used in reaching the conclusions of both gentlemen, and to understand the facts actually relied upon in reaching the conclusions set forth.

In accordance with the local rules, Sparton conferred with the attorney for the United States to schedule these depositions. See attached correspondence from James B. Harris to David Fishel dated April 3, 1997, attached as Exhibit "A." That request was rejected. See

correspondence from Michael Donnellan to James B. Harris dated April 4, 1997, and response of James B. Harris to Michael Donnellan dated April 4, 1997, attached as Exhibits "B" and "C" respectively. Counsel for Sparton had originally suggested two days for each deposition in order to allow those depositions to cover all issues that might arise in this litigation. Sparton is willing to limit the depositions to issues directly related to the Motion for Preliminary Injunction, so long as Plaintiffs will not object to a second deposition after the preliminary injunction hearing and in preparation for a trial on the merits, if any, for each of the individuals identified. In the event the Plaintiffs are willing to agree to this arrangement, each deposition could be completed in a day or less.

Sparton believes it would need, at most, ten days following the completion of the last deposition to finalize its response to the Motions for Preliminary Injunction so that it can include information developed during the depositions. If the depositions were completed by Friday, April 18, 1997, Sparton's response date would be April 28, 1997.

III.
OTHER OPEN ISSUES REQUIRING ATTENTION

Apart from the dispute regarding the holding of depositions, before Sparton's response is due, there are several other "housekeeping" issues that the Court might want to address now, as opposed to resolving on a piecemeal basis. These include the following:

1. Consolidation of these cases for purposes of determining the claims under the Resource Conservation and Recovery Act and for pretrial purposes. The parties do not disagree that one judge should hear these matters, although the Plaintiffs want all matters heard by one judge.

2. Scheduling of a date for evidentiary hearing on the Motion for Preliminary Injunction.

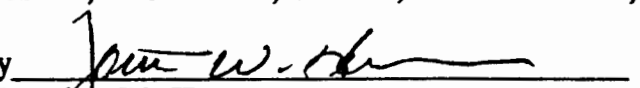
Sparton believes that resolving these issues early on, in one hearing, will allow for a more orderly presentation of the dispute and a more efficient use of judicial resources.

IV.
SCHEDULING A PRE-TRIAL CONFERENCE UNDER RULE 16 OF THE FEDERAL RULES OF CIVIL PROCEDURE

Federal Rule of Civil Procedure 16 provides the Court broad discretion to schedule pre-trial conferences to address the types of issues presented in this motion. Sparton submits that holding such a conference as early as possible in these cases is particularly appropriate. Such a conference could be held on relatively short notice, given that lead counsel for all parties, other than the United States and Sparton, are based in Albuquerque or Santa Fe. The court may wish to consider allowing out-of-town counsel to participate by telephone, if they so choose. Such a hearing should not require more than an hour of the Court's time and might be scheduled as early as Wednesday April 9, 1997.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By 

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

On the 8th day April, 1997, a true and correct copy of the foregoing document was served upon all counsel of record by:

Hand-Delivery to:

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Albuquerque, NM 87102

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City of Albuquerque
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Albuquerque, NM 87103

Patrick Trujillo, Esq.
City of Albuquerque
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Facsimile & Mail to:

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Environmental Enforcement Div.
P.O. Drawer 1508
Santa Fe, NM 87504-1508

Ana Marie Ortiz, Esq.
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P.O. Box 26110
Santa Fe, NM 87502-6110

David L. Fishel, Esq.
Environmental Enforcement Section
United States Department of Justice
1425 New York Ave. NW, 13th Floor
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James P. Fitzgerald

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AUSTIN
FORT WORTH
HOUSTON
MONTERREY, MEXICO

April 3, 1997

VIA FACSIMILE

David Fishel, Esq.
U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section
Washington, DC 20530

Re: Albuquerque Litigation

Dear Dave:

The purpose of my attempt to talk with you by telephone this morning was to discuss scheduling issues related to the Albuquerque Litigation.

As I am sure you will agree, the procedural setting of the various motions now pending in those actions is somewhat confused.

Your Motion for Preliminary Injunction was not received at the offices of Sparton's local counsel until approximately 5:00 p.m. on April 1, 1997. I did not see it until I arrived in their offices at approximately 9:30 a.m. on April 2, 1997. After reviewing that pleading, I continue to oppose your request to exceed the local rule limitation on exhibit pages. We hope to have a response to your motion on this subject very quickly. Obviously I need a determination on that issue in order to know exactly how to respond to your motion for preliminary injunction.

It also strikes me that decisions on the motion to consolidate and motion to stay, dismiss, or transfer need to be made in advance of any consideration of the motion for preliminary injunction.

Additionally, depending on the Court's ruling on your request to exceed page limitations for exhibits, I will probably want to take at least four depositions -- the Director of Public Works with the City of Albuquerque, Mr. Morrison, Sam Coleman, and Mark Weidler. I anticipate that each one of these depositions will take two days, and the information from those depositions will be needed in order to allow me to respond to your Motion for Preliminary Injunction, in the event that the Court allows it to be filed in its current form.

Finally, in order to complete a response to your motion, I am going to need some reasonable period of time in order to synthesize: (1) the information from the depositions (in

the event that they are necessary); (2) input from Sparton's recently retained experts; and (3) analysis of the legal points you have raised. I do not think this work can be accomplished within the next fourteen (14) days, even if the Court grants your motion to exceed page limitations on exhibits.

Given all of these factors, it seems to me that the most reasonable approach is to request an immediate scheduling conference with Judge Conway, who is the chief judge of the New Mexico District, in order to agree upon the process by which the pending motions will be considered, as well a briefing and hearing schedule.

Please let me know, no later than early tomorrow morning, how you want to proceed.

Yours very truly,

James B. Harris

JBH/eshd
cc: Bruce Hall
James Fitzgerald
R. Jan Appel
40310 00001 LERA 57925

U.S. Department of Justice
Environment and Natural Resources Division
Environmental Enforcement Section

Benjamin Franklin Station
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Washington, D.C. 20044-7611

Writer's direct extension: (202) 514-0226
FAX: (202) 514-0097

90-5-1-1-675

April 4, 1997

By telefax and first class U.S. mail
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FAX: (214) 969-1751

re: U.S. v. Sparton Technology, Inc., No. CIV-97-0210-M

Dear Jim:

I am writing in response to your letter dated yesterday. Please understand that I can only speak for the United States and not for the other parties to the Joint Preliminary Injunction Motion. I will try to address the issues in the order in which you raise them.

To the extent that you intend to seek an extension of the preliminary injunction briefing schedule based upon your delayed receipt of the motion, please so notify the United States.

With regard to your opposition to the motion to exceed the exhibit page number limit, the United States would certainly not oppose an accelerated briefing schedule.

With regard to the impact of "Defendant's Motion to Stay, Dismiss, or Transfer Venue" on the preliminary injunction briefing schedule, the United States will not consent to modifying the briefing schedule based upon that motion. While the United States will file a brief fully setting forth the grounds for its opposition, the United States generally considers the motion to be without merit.

Since the preliminary injunction motions can be considered regardless of the ruling on the motion to consolidate, the United States will not consent to a delay in the briefing schedule based upon that motion.

With regard to your request to depose Dr. Morrison and Messrs. Gurule, Coleman and Weidler, the United States would be willing to consider scheduling one day depositions of appropriate witnesses from both sides after briefing on the preliminary injunction motion has been completed. At this point, the United States does not understand why depositions of Messrs. Gurule, Coleman and Weidler are appropriate. Consequently, the United States will not

consent to an extension of the briefing schedule for the preliminary injunction to accommodate depositions.

With regard to your suggestion that a scheduling conference with Judge Conway be requested, the United States does not see the need for such a conference at this time. I suggest that upon completion of briefing for the preliminary injunction motion, we attempt to reach agreement on a schedule. Should we fail to reach agreement at that time, a scheduling conference may be appropriate.

Please contact me if you have any questions.

Sincerely,

Michael

Michael T. Donnellan

cc: Moran

Zavitz

de Saillen

Ortiz

O'Dea

Trujillo

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April 4, 1997

VIA FACSIMILE and FIRST CLASS U.S. MAIL

Michael T. Donnellan
U.S. Department of Justice
Environment and Natural Resource Division
Environmental Enforcement Section
Benjamin Franklin Station
P.O. Box 7611
Washington, DC 20044-7611

Re: Albuquerque Litigation

Dear Michael:

I have received and now have had a chance to review your letter of April 4, 1997, which was faxed to me. As I am sure you can appreciate, I am disappointed with your position, which I understand to be as follows:

1. Sparton's response to the motion for preliminary injunction is due on or before April 15, 1997, no extension will be considered;

2. No depositions should occur until after briefing on the preliminary injunction motion is completed.

3. Only depositions of "appropriate" person should be allowed; I assume that you probably believe that Mr. Gurule, Mr. Coleman, and Mr. Weidler are not "appropriate" witnesses.

4. It is unnecessary for your motion to consolidate or Sparton's motion to stay, dismiss, or transfer to be decided before action is taken on the motion for preliminary injunction.

5. You are unwilling to join in a request for a scheduling conference.

Sparton was hoping that you would have agreed to the depositions we requested and a short extension of the briefing schedule on the motion for preliminary injunction (assuming, of course, that your motion and exhibits, which do not comply with the local rules, actually triggered a 14 day response period). If you had done so, we could have been much more flexible on your request to exceed the local rule limit on exhibit pages.

I ask that you reconsider your position. If you are willing to do so, I suggest that an agreed order be drafted setting forth when matters will be presented, how the 328 pages of exhibits will be handled, and that the order be sent to Judge Hansen (the judge assigned to the first filed case) for his approval.

Please let me know Monday morning whether your position has changed. I am sending a copy of this letter to counsel of record for the other plaintiffs, and I am likewise asking them to advise me by Monday morning of their respective positions.

Yours very truly,

James B. Harris

JBH/eshd
Enclosure

cc: Bruce Hall
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R. Jan Appel
Charlie de Sailen
Ana M. Ortiz
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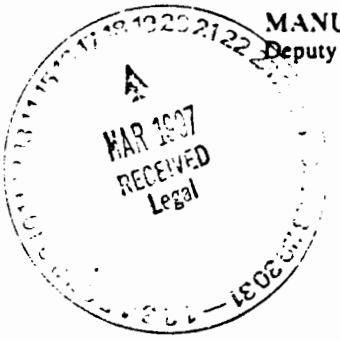
March 17, 1997



BY OVERNIGHT MAIL

Mr. James B. Harris
Thompson & Knight
1700 Pacific Avenue
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Dallas, Texas 74201-4693

Re: Motion to Consolidate United States Sparton Technology, Inc., No. CIV-97-0210-M; State of New Mexico v. Sparton Technology, Inc., No. 97-0208-JC; City of Albuquerque v. Sparton Technology, Inc., No. CIV-97-0206-LH

Dear Jim:

This letter is to serve on Sparton Technology, Inc. a copy of the enclosed Joint Motion to Consolidate, and Memorandum in support thereof. We intend to file the Motion in the above-referenced cases in accordance with Rule 7.3(a) of the Local Civil Rules of the U.S. District Court for the District of New Mexico. I understand from our telephone conversation of March 6, 1997 that the Motion is opposed.

If you have any questions on this matter, you may call me at (505) 827-6939.

Sincerely,

Charles de Saillan
Assistant Attorney General

cc: Counsel of Record

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE, and THE BERNALILLO COUNTY COMMISSIONERS, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	CIVIL ACTION NO. CIV-97-0206-LH
STATE OF NEW MEXICO, THE NEW MEXICO ENVIRONMENT DEPARTMENT, and THE NEW MEXICO OFFICE OF THE NATURAL RESOURCES TRUSTEE, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	CIVIL ACTION NO. CIV-97-0208-JC
UNITED STATES OF AMERICA, Plaintiff, v. SPARTON TECHNOLOGY, INC., Defendant.	CIVIL ACTION NO. CIV-97-0210-M

JOINT MOTION TO CONSOLIDATE

Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, and in accordance with Rule 7 of the Local Civil Rules of this Court, the United States, the State of New Mexico, the

New Mexico Environment Department, the New Mexico Office of the Natural Resources Trustee, the City of Albuquerque, and the Bernalillo County Commissioners (the "Plaintiffs"), hereby respectfully move this Court for an order consolidating the above-captioned actions. As set forth more fully in the accompanying Memorandum in Support of this Motion, these actions involve common questions of both law and fact, and consolidation of these actions would promote judicial economy and efficiency.

In accordance with Rule 7.2(a) of the Local Civil Rules of this Court, on March 6, 1997, counsel for the Plaintiff, State of New Mexico, contacted counsel for the Defendant and determined that this Motion is opposed.

Respectfully submitted,

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Attorneys for the Bernalillo County Commissioners

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE, and THE BERNALILLO COUNTY COMMISSIONERS, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	CIVIL ACTION NO. CIV-97-0206-LH
STATE OF NEW MEXICO, THE NEW MEXICO ENVIRONMENT DEPARTMENT, and THE NEW MEXICO OFFICE OF THE NATURAL RESOURCES TRUSTEE, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	CIVIL ACTION NO. CIV-97-0208-JC
UNITED STATES OF AMERICA, Plaintiff, v. SPARTON TECHNOLOGY, INC., Defendant.	CIVIL ACTION NO. CIV-97-0210-M

MEMORANDUM IN SUPPORT OF
JOINT MOTION TO CONSOLIDATE

On February 19, 1997, the United States, the State of New Mexico, the New Mexico Environment Department, the New Mexico

Office of the Natural Resources Trustee, the City of Albuquerque, and the Bernalillo County Commissioners (the "Plaintiffs"), filed these actions seeking injunctive relief to address an imminent and substantial endangerment to health and the environment under sections 7002(a)(1)(B) and 7003(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972(a)(1)(B) and 6973(a). The actions also seek identical injunctive relief under various other provisions of state and federal law, as well as restitution of costs.

Pursuant to Rule 42(a) of the Federal Rules of Civil Procedure, and in accordance with Rule 7 of the Local Civil Rules of this Court, the Plaintiffs have jointly moved this Court for an order consolidating the above-captioned actions. This Memorandum is submitted in support of that Motion.

I. STANDARD OF REVIEW

Rule 42(a) of the Federal Rules of Civil Procedure provides:

> Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay.

FED. R. CIV. P. 42(a).

Whether to grant a motion to consolidate is committed to the discretion of the trial court. *Shump v. Balka*, 574 F.2d 1341, 1344 (10th Cir. 1978). The court "initially should determine that the cases to be consolidated 'involve[e] a common question of law or fact.'" *Servants of the Peraclete, Inc. v. Great*

American Insurance Co., 866 F. Supp. 1560, 1572 (D.N.M. 1994). If the cases involve a common question of law or fact, the court "should then weigh the interests of judicial convenience in consolidating the cases against the delay, confusion, and prejudice consolidation might cause." *Id.*

II. ARGUMENT

A. These Actions Involve Common Questions of Law and Fact

These actions involve common questions of both law and fact, and those common questions predominate over other issues in the actions. The primary count in each of these actions is for injunctive relief to address an imminent and substantial endangerment under RCRA. The State, City, and County Plaintiffs have filed their actions under section 7002(a)(1)(B) of RCRA, 42 U.S.C. § 6972(a)(1)(B), while the United States has filed its action under section 7003(a) of RCRA, 42 U.S.C. § 6973(a). The language in these two provisions is virtually identical, and they have been interpreted interchangeably. *See, e.g., Zands v. Nelson*, 779 F. Supp. 1254, 1263 (S.D. Cal. 1991); *see also* SEN. REP. No. 284, 98th Cong., 1st Sess. 56-57 (1983) (the citizen suit provisions "are intended to allow citizens exactly the same broad substantive and procedural claim for relief which is already available to the United States under section 7003").

In each of these actions, the primary issue will be to determine the appropriate injunctive relief to address the alleged imminent and substantial endangerment to health or the environment. In each of these actions, the factual and expert

testimony and other evidence on this issue will be virtually identical. Although these actions include various additional counts for injunctive relief under federal and state law, the Plaintiffs are seeking the same injunctive relief under each of these counts.

B. Consolidation of These Cases Will Promote Judicial Efficiency

Consolidation of these actions will promote judicial economy and efficiency. It will avoid duplicative proceedings in different courtrooms on the same issues based on the same evidence. It will also avoid separate and potentially conflicting judgments. It will thereby reduce the costs expended by the Court, by the Plaintiffs, and by the Defendant.

On the other hand, consolidation of these actions will not create any significant delay, confusion, or prejudice. None of these actions is any further along than any of the others, so there is no risk of delaying one action by consolidating it with the others. Moreover, because each of these cases is at a very early stage its proceedings, consolidation will not cause confusion, nor will consolidation create any prejudice to any of the parties.

CONCLUSION

For the foregoing reasons, the Plaintiffs respectfully move this Court for an order consolidating these actions.

Respectfully submitted,

LOIS J. SCHIFFER
Assistant Attorney General for
Environment and Natural Resources

By: _____

DAVID FISHEL
Trial Attorney
Environmental Enforcement Section
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Post Office Box 7611
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By: _____

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March ___, 1997

Attorneys for the Bernalillo
County Commissioners

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 1997, a copy of the foregoing Joint Motion to Consolidate and Memorandum in support thereof were sent by overnight mail to:

James B. Harris
Thompson & Knight
1700 Pacific Avenue
Suite 3300
Dallas, Texas 75201-4693

and by first class mail to:

James P. Fitzgerald
Rodey, Dickason, Sloan, Akin & Robb, P.A.
P.O. Box 1888
Albuquerque, New Mexico 87103

Charles de Saillan

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE and THE BERNALILLO COUNTY COMMISSIONERS, Plaintiffs, v. SPARTON TECHNOLOGY, INC., Defendant.	Civil Action No. CIV 97 0206 LH/JHG Consolidated with: CIV 97 0208 JC/RLP CIV 97 0210 M/DJS CIV 97 0981 LH/JHG

NOTICE OF DEPOSITION PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 30(B)(6)

You are hereby notified that the United States of America, State of New Mexico, New Mexico Office of the Natural Resources Trustee, New Mexico Environment Department, City of Albuquerque, and Bernalillo County Commissioners ("Plaintiffs"), pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure, will take the deposition of the designated representative(s) of Sparton Technology, Inc. at 9:00 A.M. on May 8, 1998 before a shorthand reporter or other person duly authorized to administer oaths, at the offices of the U.S. Attorney, 200 3rd St, NW, Ste 900, Albuquerque, New Mexico.

Pursuant to Rule 30(b)(6), Sparton Technology, Inc. shall designate and produce one or more of its officers, directors, managing agents, or persons who has the most knowledge of and will testify on behalf of Sparton Technology, Inc. on the subjects listed below.

In its May 13, 1996 Draft Final Corrective Measurses Study ("CMS Report"), Sparton stated that it generated aqueous plating wastes which were placed on-site in a concrete basin and in surface impoundments through 1983. In the CMS Report, Sparton also stated that it generated waste solvents which were placed on-site in a sump through 1980. Each subject listed below shall be understood to be limited to the time period from 1961-1983 and to the aqueous plating wastes and spent solvents referred to in the CMS Report.

1. With regard to the aqueous plating wastes and spent solvents:

(a) The chemical composition of the aqueous plating wastes and spent solvents;

(b) With regard to the spent solvents, the chemical composition, brand name, and manufacturer of each solvent before use;

(c) The specific manufacturing or other processes which generated the aqueous plating wastes and spent solvents;

(d) The specific location(s) where the aqueous plating wastes and spent solvents were treated, stored, disposed of, or otherwise handled; and

(e) The specific method(s) by which the aqueous plating wastes and spent solvents were treated, stored, disposed of, or otherwise handled.

2. All decisions related to the placement of the aqueous plating wastes in the concrete basin and surface impoundments and related to the placement of the spent solvents in the concrete sump, including but not limited to decisions related to where to place the aqueous plating wastes and spent solvents and decisions related to the design and construction of the concrete basin, surface impoundments, and concrete sump, including:

(a) The name, position, and last known address and telephone number of the individual(s) who made such decisions;

(b) Any and all positions which the individual(s) who made such decisions held at any time with Sparton Corporation or any of Sparton Corporation's subsidiaries;

(c) The specific decision the individual(s) made regarding the placement of aqueous plating wastes and spent solvents;

(d) Any instance in which such decisions were based in whole or in part a specific requirement and/or policy of Sparton Corporation;

(e) Policies, directives, procedures, or other guidance, written or unwritten, applicable to such decisions; and

(f) The source of the funds used to implement each such decision.

3. All decisions regarding the specific processes at Sparton Technology, Inc.'s Coors Road facility which generated the aqueous plating wastes and spent solvents, including:

(a) The name, position, and last known address and telephone number of the individual(s) who made the decision;

(b) Any and all positions which the individual(s) who made the decision held at any time with Sparton Corporation or any of Sparton Corporation's subsidiaries;

(c) The specific decision the individual(s) made regarding such manufacturing or other processes;

(d) Any instance in which a decision regarding such manufacturing or other processes was based in whole or in part a specific requirement and/or policy of Sparton Corporation;

(e) Policies, directives, procedures, or other guidance, written or unwritten, applicable to decisions made regarding such manufacturing or other processes; and

(f) The source of the funds used to implement each decision regarding such manufacturing or other processes.

FROM: Department of Justice
Environment and Natural Resources Division
Envionmental Enforcement Section
P.O. Box 7611
Washington, D.C. 20044
Fax No. 202 514 8395
Voice No. 202 514 4226

SENT BY: Michael Donnellan

TO: Dennis McQuillan

FAX No. 8,-505-827-2965

NUMBER OF PAGES SENT (INCLUDING COVER PAGE): 5

SPECIAL INSTRUCTIONS:

Draft 30(b)(6) notice. Final will need to be served on Monday. Comments on Monday or by voicemail. Please read subject three w/ an eye to how we can narrow it. Thanks, Michael

UNITED STATES DISTRICT COURT
500 Gold Avenue SW - Post Office Box 67
Albuquerque, New Mexico 87103

ROBERT J. DeGIACOMO
Magistrate Judge

(505) 248-8061
Fax: 248-8066

August 7, 1997

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	Barbara Pace, Esq.	Wendy L. Blake, Esq.	Cheryl Boyd, Esq.

Re: *City of Albuquerque v. Sparton Technology, Inc.*, **CIV 97-0206 LH/JHG**

ORDER

In an effort to facilitate a final disposition of this case, a mandatory settlement conference will be conducted by the undersigned in accordance with the provisions of Federal Rules of Civil Procedure 16(a)(5) and 16(f). This conference will be held on **Wednesday, August 20, 1997**, beginning at **2:00**. Report to Courtroom 9 West, U.S. Courthouse, 500 Gold Ave. SW, Albuquerque, New Mexico. Set aside the greater part of the afternoon for this conference.

As soon as possible, in any event, no later than five days prior to the date of the settlement conference, counsel for each party shall submit a brief, confidential letter outlining the strengths and weaknesses of the case and the party's position with regard to settlement.

Counsel of record, Plaintiff(s), and Defendant(s) must be present, or a designated, qualified representative(s) of Plaintiff(s) and Defendant(s), with authority to negotiate in good faith and approve a settlement. Should adequate cause be proffered, advance provisions may be made with the Court for adequate, good-faith participation by means of a qualified representative, reasonably and promptly accessible, with authority to negotiate and approve a settlement. Any request to excuse a party or trial counsel from attendance at this settlement conference must be presented to the Court in writing.

Prior to the conference, counsel are required to confer with one another in a good-faith effort to resolve the litigation.

SO ORDERED.

ROBERT J. DeGIACOMO
United States Magistrate Judge

cc: Magistrate Judge Galvan
Courtroom Deputy
court file

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

THE CITY OF ALBUQUERQUE, a Municipal Corporation, and THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF BERNALILLO, Plaintiffs, -vs- SPARTON TECHNOLOGY, INC., Defendant.	§	CV 97-206 LH/JHG LEAD CASE CONSOLIDATED WITH CV 97-208 LH/JHG CV 97-210 LH/JHG
SPARTON TECHNOLOGY, INC., Plaintiff, -vs- ENVIRONMENTAL PROTECTION AGENCY, et al., Defendants.	§	CV 97-981 LH/JHG

RESPONSE OF SPARTON TECHNOLOGY, INC. TO THE GOVERNMENTAL ENTITIES' MOTION TO AMEND WORK PLAN

Sparton Technology, Inc. ("Sparton") opposes the request of the governmental entities to modify their work plan because the work plan it is not conditioned upon issuance of necessary permits and granting appropriate authorization to discharge recovered and treated groundwater, which are necessary to make the work plan work now. In its current form, the work plan will only result in additions to the ten years of data already collected, not immediate corrective action.

Sparton has been willing since July 1996, to voluntarily implement a work plan where recovered and treated groundwater can be discharged in a manner that is technically practicable and economically affordable. In fact, Sparton has only a few minor objections to the revised

work plan itself, if it immediately allows corrective action. To that end, Sparton applied in December of 1997, for permit approval from NMED, and has been working with the city for sometime to obtain necessary authorization that would result in the work plan becoming a corrective action.

Sparton reiterates its opposition to the use of injunctive relief to require implementation of the revised work plan, for the same reasons advanced in its response to the governmental entities's motion for preliminary injunction. Moreover, the governmental entities, by limiting the work plan to testing, effectively concede there is no "imminent and substantial endangerment" warranting injunctive relief.

ARGUMENT

A. THE REVISED WORK PLAN, ITSELF, WHILE A STEP IN THE RIGHT DIRECTION, IS DEFICIENT IN FAILING TO ALLOW CORRECTIVE ACTION INSTEAD OF MERE TESTING.

The original work plan presented by the governmental entities involved the installation of five new monitor wells, one extraction or containment well, and three observation wells. The five new monitor wells were purportedly necessary to confirm the horizonal and vertical extent of impacts to groundwater, information supposedly critical to the proper location of a containment well. The observation wells were supposedly necessary to evaluate whether a containment well was stopping expansion of the plume at its leading edge.

Sparton in its initial response argued that five new monitor wells were unnecessary, because sufficient information existed to install a containment well, and that the existing system of some sixty plus monitor wells was sufficient to measure whether the containment well was doing what it was supposed to do.

The governmental entities' modified work plan has adopted, with one very major exception, almost all of the positions advanced by Sparton. The plan now recognizes that a single containment well, at a location proposed by Sparton, could be sufficient to stop the leading edge of the plume from expanding. It also recognizes that, with one exception, no additional information is necessary about the horizonal and vertical extent of the plume in order to effectively design a containment system. In that regard, the number of new monitor wells has been reduced from 5 to 1, with the potential for a second depending upon results obtained from the installation of the first new monitor well. Finally, the modified work plan recognizes that, given the existing system of monitor wells, only two new observation wells are necessary in order to confirm that the containment well has stopped the expansion of the leading edge of the plume.

The modified work plan fails, however, to address what to Sparton is the most critical aspect of a containment system -- operation. Further testing and evaluation does nothing to stop the expansion of the leading edge of the plume, which the governmental entities claim presents an imminent and substantial endangerment. Unless Sparton can operate this system once it is installed, the purported endangerment is not addressed. Dealing with "endangerment" is the sole basis upon which this Court is supposed to act under § 7002 or § 7003 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. §§ 6972, 6973, the statutory provisions upon which the governmental entities have relied in seeking injunctive relief from this Court.

The language of § 7002 and § 7003 or RCRA could not be more clear. If an imminent and substantial endangerment exists, the law is supposed to prevent a defendant from acting in

a way that continues to contribute to the problem. The language of those sections does not suggest the court is suppose to order further testing to define the danger. That relief is provided for in § 3013 of RCRA. 42 U.S.C. § 6934(d)(1). Obviously, if additional testing was necessary to define the danger, the Court would not have a jurisdictional basis to grant relief, because it could not conclude a danger is present.

B. AN INJUNCTION IS NOT NECESSARY FOR IMPLEMENTATION OF THE REVISED WORK PLAN

The governmental entities do not need a court order for Sparton to conduct the modified the work plan. They need to issue necessary permits and grant appropriate authorizations so Sparton will have a place to dispose of the treated water, practically and affordably, the sine qua non of making the work plan work.[1]

The governmental entities can obtain what they want, without court intervention, if they will only authorize Sparton to discharge recovered and treated groundwater to an infiltration gallery buried underneath the bed of Calabacillas Arroyo. The governmental entities have the authority to approve such a discharge. They only need to exercise that authority. Since July 1996 Sparton has made it clear that it is prepared to contain the leading edge of the plume if that typed authorization is provided. Under the modified work plan, that objective can be achieved if the governmental entities would only allow the discharge. Moreover, if such

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[1] Of course, because the governmental entities believe the modified work plan involves only testing, the governmental entities could perform the modified work plan themselves, and then seek reimbursement from Sparton. 42 U.S.C. § 6934(d)(1) (The Administrator of EPA may "conduct monitoring, testing, or analyses ... which he deems reasonable to ascertain the nature and extent of the hazard associated with the site ... and require ... [reimbursement] ... for the costs of such activity."). In essence then, the governmental entities are trying to transform a claim for damages into an equitable action. This they cannot do. *United States v. Price*, 523 F. Supp. 1055, 1067 (D.N.J. 1981).

authorization were forthcoming, the parties could reach their own agreement about implementation of the modified work plan, reducing, if not eliminating, the need for the Court to be involved.

If the governmental entities were to grant the necessary permits and authorizations, and Sparton's uncontested motion for summary judgment was granted, these consolidated lawsuits would essentially be reduced to a determination (to be made at a trial on merits) of what further corrective action, if any, is necessary, and whether the governmental entities are entitled to recover any past costs or penalties. All of the claims related to the Final Administrative Order would be resolved.

C. THE GOVERNMENTAL ENTITIES CAN HAVE SPARTON IMPLEMENT THE MODIFIED WORK PLAN WHENEVER THEY WANT.

All Sparton asks is that before it is obligated to install a containment well, two observation wells, and at least one new monitor well at significant cost to the company, it have in hand the necessary permits and authorizations that would allow it to operate the system it is constructing. Such relief protects Sparton from investing money in a system that it cannot then operate. It also addresses the public interest by insuring that a system that actually prevents expansion of the leading edge of the plume is installed as promptly as possible.

To the extent the governmental entities are truly concerned that the expansion of the leading edge of the plume constituents an imminent and substantial endangerment, they should have every reason to promptly process and act upon necessary permits and authorizations in order to have Sparton begin work as promptly as possible. Requiring these activities be taken care of before the project begins avoids shutting down the system after it is installed leading to maintenance and restart problems, and it should reduce the potential for conflict regarding the

issuance of permits or granting appropriate authorizations. The length of any delay in beginning the system rests solely with the governmental entities who are complaining of a danger, thereby pushing them to act quickly and reasonably. To date, as evidence at the preliminary injunction hearing will establish, the governmental entities have been less than fully committed to addressing permitting and authorization matters quickly.

D. IF NECESSARY PERMITS AND AUTHORIZATIONS HAD BEEN GRANTED, SPARTON WOULD HAVE ONLY FOUR RELATIVELY MINOR SUBSTANTIVE DISAGREEMENTS WITH THE REVISED WORK PLAN.

The revised work plan requires that, under certain conditions, a second new monitor well be installed. Sparton will provide expert testimony at the preliminary injunction hearing that such a second well is unnecessary.

The revised work plan provides a schedule for recovering data during a "constant rate test." Sparton believes that schedule is inappropriate. It will introduce expert testimony at the preliminary injunction hearing describing a better system for data collection.

As testimony at the preliminary injunction hearing will establish, the modified work plan provides insufficient flexibility on the location of two observation wells.

Sparton also believes that the work plan should be subject to modification not only when all parties agree, but also if ordered by the Court.

CONCLUSION

Movants modified work plan, especially its characterization of that plan as "testing" rather than corrective action, concedes that there is no imminent damages warranting injunctive relief.

Sparton is and has been prepared to address the purported "danger" the governmental entities believe exists. But it wants to begin such work knowing that once a system is installed, it can be operated. The modified work plan does not allow operation.

Additionally, if the court were to grant Sparton's unopposed motion for summary judgment, all claims related to EPA's final administrative order would be resolved, yet the court would retain jurisdiction to determine if any additional corrective action is needed, after implementation of the containment system.

Respectfully submitted,

RODEY, DICKASON, SLOAN, AKIN & ROBB, P.A.

By _____

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ATTORNEYS FOR SPARTON TECHNOLOGY, INC.

CERTIFICATE OF SERVICE

We hereby certify that a copy of the foregoing was faxed and mailed to counsel of record addressed as follows this 13th day of March, 1998.

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