

January 21, 2015

**[CB-CDA 2015-005]**

## **ORDER OF THE BOARD**

The Board has destroyed the confidential and highly confidential information of BBI and FWS. Also, as per BBI's request, and although it appears that the parties involved have already done so, the Board orders that CCC, CRC and FWS destroy the confidential and highly confidential information of BBI. The Board also orders that CCC, CRC and BBI do same with respect to FWS' highly confidential information.

There shall be no sanction on the BDUs. Nevertheless, the Board agrees with BBI and FWS that the BDUs should have consulted with BBI and FWS prior to filing their motions for deficiencies with a view to agree on a manner to protect the confidential and highly confidential information of BBI and FWS. This would have been all the more simple to achieve since such information is not necessary to dispose of the BDUs' motions for deficiencies. Moreover, in one instance, the BDUs filed the response to an interrogatory (**FWS11**) that contains highly confidential information while not raising any deficiency motion in respect of that interrogatory. This should not have occurred.

The BDUs ought to have asked the Board for leave to file supplementary deficiency motions, which entails a modification of the Schedule of Proceedings. Changes to the Schedule of Proceedings – which provides for only one round of deficiency motions – cannot be made unilaterally by a party. The fact that the BDUs had previously raised the possibility of filing supplementary motions did not prevent them from having to seek leave. Had they done so, and if granted, the Board would have established the necessary timelines and would have advised the parties that the process described in B.4 of the Directive on Procedure (Responses Considered Incomplete or Unsatisfactory) – a process with which the parties are familiar with – was to be followed.

Pursuant to the Directive, the person [BDUs] unsatisfied with the responses provided by another person [BBI, CCC, CRC, FWS] sends to that person the reasons why it believes the responses are unsatisfactory; then, the person who provided the responses serves on the unsatisfied person and files with the Board the interrogatory, the response, the unsatisfied person's deficiency motions and the grounds upon which the person who provided the response relies to conclude that the response is sufficient.

Instead, the BDUs directly filed with the Board their deficiency motions. Had the BDUs followed the Directive, it is the Collectives, not the BDUs, that would have filed with the Board the BDUs' interrogatories, the Collectives' responses, the BDUs' deficiency motions and the Collectives' replies. In so doing, the Collectives would have had the opportunity to prevent the unnecessary disclosure of their highly confidential and confidential information and this issue would never have arisen in the first place.