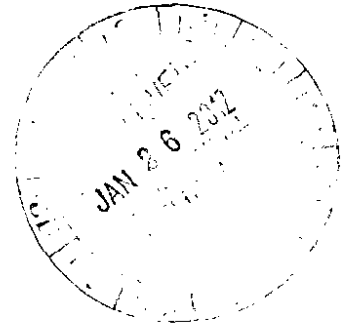


THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III



In the Matter of:

CHEMSOLV, INC., formerly trading as
Chemicals and Solvents, Inc.

and

AUSTIN HOLDINGS-VA, L.L.C.

Respondents,

Chemsolv, Inc.
1111 Industry Avenue, S.E
1140 Industry Avenue, S.E
Roanoke, Virginia 24013

Facility.

COMPLAINANT'S MOTION TO
COMPEL OR IN THE ALTERNATIVE,
MOTION IN LIMINE

EPA Docket No. RCRA-03-2011-0068

Proceeding under Section 3008(a)
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

Pursuant to 40 C.F.R. §§ 22.16(a) and .19(a) and (f), Complainant respectfully moves this Court for an Order compelling each Respondent to provide written notice, on the record, as to whether it intends to take the position that it is unable to pay the penalty proposed by Complainant in this matter or that payment of such penalty will have an adverse impact on its ability to continue in business (and if so,), requiring that each Respondent produce such evidence to Complainant in advance of hearing and for such other requested relief. In the alternative, Complainant seeks an order precluding Respondents from the introduction of any evidence at

hearing pertaining to the claimed inability of either Respondent to pay the proposed penalty or as to any claimed adverse impact such penalty may have on its business. A form of Order is enclosed.

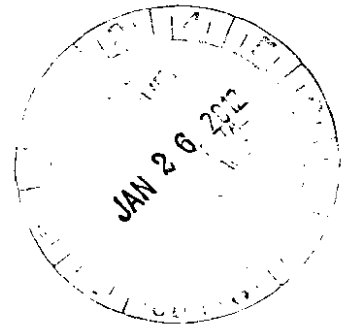
Respectfully submitted,



Joyce A. Howell
Senior Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

Jan. 26, 2012
Date

THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III



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MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S MOTION TO COMPEL
PRODUCTION OF EVIDENCE OR IN THE ALTERNATIVE, MOTION IN *LIMINE* TO
PRECLUDE EVIDENCE OF INABILITY TO PAY THE PROPOSED PENALTY FROM THE
RECORD OF THIS MATTER

The Court's Prehearing Order dated May 31, 2011 required each Respondent to produce evidence to support any claim that it is unable to pay the penalty proposed by Complainant in this proceeding or that the payment of such proposed penalty would have an adverse effect on its

ability to continue to do business. As of the date of this filing, neither Respondent has produced any such information or made any such inability to pay or adverse business claim.

For the reasons set forth below, Complainant respectfully requests, in the interests of fairness, that this Court order Respondents to comply fully with the Court's May 31, 2011 Prehearing Order by: immediately providing Complainant with written notice, on the record, as to whether it intends to take the position that it is unable to pay the penalty proposed by Complainant in this matter or that payment of such penalty will have an adverse impact on its ability to continue in business and by providing to Complainant, with any such affirmative notice and in advance of the scheduled March 20, 2012 hearing date in this matter, all supporting documentation, names of proposed witnesses and witness testimony summaries. Alternatively, Complainant seeks an order precluding each Respondent from introducing any evidence in support of a claim that it is unable to pay the proposed penalty or that the assessment of the proposed penalty would have an adverse effect on either Respondent's ability to continue to do business.

40 C.F.R. § 22.19(a), provides, in pertinent part, that:

Except as provided in [40 C.F.R.] § 22.222(a) a document or exhibit that has not been included in the prehearing information exchange shall not be admitted into evidence.

As noted above, neither Respondent has produced any information or documentation, or identified any witness, supporting a claim of inability to pay the proposed or a claim that payment of the proposed penalty would have an adverse business impact on its ability to continue in business. Information which would support a claim that either or both Respondents are unable to pay the proposed penalty or that the imposition of the proposed penalty would have an adverse effect on a Respondent's ability to continue in business would include the completion of the Financial

Statement of Corporate Debtor (Attachment A), the submission of the most recent three years of federal and state tax returns, and the most recent three years of audited financial statements.

Respondents are obligated to furnish Complainant with relevant financial information in advance of hearing and as exhibits in their Prehearing Exchanges in order to raise an inability to pay claim and offer supporting evidence at hearing. See Taylor-McIlhenny Operating Co., Inc., Docket No. OPA-09-95-01 (February 18, 1997)(J.Pearlstein)(finding that Respondent will be precluded from claiming inability to pay a penalty and will be precluded from offering into evidence financial information if the Respondent fails to provide such financial information pre-hearing). See also, Harrisburg Hospital and First Capital Insulation, Inc., Docket No. CAA-III-076 (June 20, 1997) (J. Charneski) (finding that Respondent will be precluded from offering into evidence at hearing any exhibits which it does not timely provide to EPA prior to hearing).

As this Court has noted, “the Rules of Practice require a respondent to indicate whether it will raise the issue of ability to pay, and if so, to submit evidence to support its claim as part of the prehearing exchange.” IMO Gerald Stubinger, (Docket No. CWA-3-2001-001)(Order, July 12, 2002). Neither Respondent has proffered any such evidence in the joint prehearing exchange that they have filed in this matter or at any other time during the pendency of this proceeding.

The EPA Environmental Appeals Board has recognized the prejudice caused by the late production of evidence. As noted by this Court: “where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an ability to pay claim after being appraised of that obligation during the prehearing process, the Region (Complainant) may properly argue and the presiding officer (Administrative Law Judge) may properly conclude

that any objection to the penalty based upon ability to pay has been waived.” Id., citing In re New Waterbury, Ltd., TSCA Appeal No. 93 – 2, 5 E.A.D. 529, 542 (EAB Oct. 20, 1994).

In that neither Respondent has ever placed its ability to pay the proposed penalty at issue, nor claimed that paying the proposed penalty would have an adverse effect on its ability to continue in business, Complainant herein asserts that the introduction of any evidence or testimony at the upcoming hearing in this matter which relates, in any way, to either Respondent’s purported inability to pay the proposed penalty or as to any purported adverse effect that such proposed penalty might have on either Respondent would greatly prejudice Complainant for each of the following reasons:

- A. Complainant will have had no prior opportunity to review Respondents’ financial evidence in advance of hearing for truthfulness, accuracy, relevance and completeness;
- B. Complainant effectively would be precluded from any independent inquiry into Respondents’ financial condition in advance of hearing (via formal discovery, informal discovery or otherwise) in order to verify or refute the financial evidence and testimony put forth by Respondents;
- C. Complainant will be unable to engage its own expert witness in advance of hearing to perform a critical analysis of Respondents’ financial condition, to formulate his or her own expert opinion as to Respondents’ ability to pay the proposed penalty and to continue in business thereafter and to prepare rebuttal testimony to be presented at hearing; and,
- D. Complainant will be unable to prepare adequately for trial since Complainant does not have such documents, evidence or information in its possession.

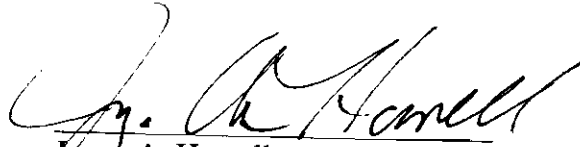
Wherefore, for the reasons set forth above, Complainant respectfully requests that this Court issue an Order that: (1) compels each Respondent, on or before March 1, 2012, to provide written notice, on the record, as to whether it intends to take the position that it is unable to pay the penalty proposed by Complainant in this matter or that payment of such penalty will have an

adverse impact on its ability to continue in business and to include with any such affirmative notice all supporting documentation including, but not necessarily limited to: (a) a fully completed copy of the Financial Statement of Corporate Debtor (Attachment A hereto); (b) the most recent three years of its federal and state tax returns; and (c) the most recent three years of its audited financial statements; (2) compels each Respondent to provide the names of all fact and expert witnesses that each Respondent intends to call at the hearing to testify on this issue, along with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called to testify on this issue; (3) affords Complainant a reasonable opportunity to: (a) review such information for truthfulness, accuracy, relevance and completeness; (b) determine whether such information is of a nature that requires Complainant to perform an independent inquiry into Respondents' financial condition in advance of hearing (via formal discovery, informal discovery or otherwise) in order to verify or refute the financial evidence and proposed testimony proffered by either Respondent; and (c) engage its own financial expert witness(es) in advance of hearing to perform any necessary and critical analysis of Respondent(s)' financial condition, to formulate his or her own expert opinion as to Respondents' ability to pay the proposed penalty and to continue in business thereafter and to prepare rebuttal testimony to be presented at hearing; and (4) provides Complainant with the opportunity to request an extension of the scheduled March 20, 2012 hearing date in order to initiate and complete the above tasks and prepare adequately for hearing on this issue.

In the alternative, Complainant requests that the Court enter an order precluding the Respondents from raising any such inability to pay or adverse business claims in this proceeding.

Respectfully submitted,

Dated:  26, 2012



Joyce A. Howell
Senior Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III



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EPA Docket No. RCRA-03-2011-0068

Proceeding under Section 3008(a)
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

CERTIFICATE OF SERVICE

I certify that I sent by UPS, next day delivery, a copy of Complainant's Motion and Memorandum of Law in Support of Complainant's Motion to Compel Production of Evidence or in the Alternative, Motion in *Limine* to Preclude Evidence of Inability to Pay the Proposed Penalty from the Record of this Matter, together with two alternative proposed Orders, to the addressees listed below. The original and one copy of the same were hand-delivered to the Regional Hearing Clerk, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2029.

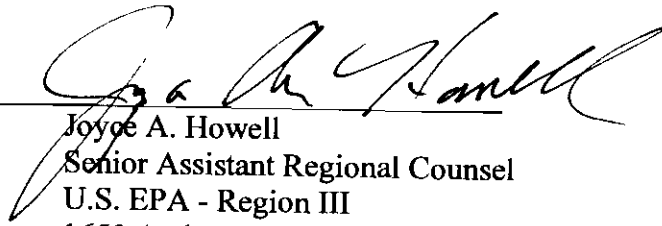
Hon. Barbara A. Gunning, A.L.J.
EPA Office of Administrative Law Judges
1099 14th Street, N.W.
Washington, D.C. 20005

Charles L. Williams, Esq.
Gentry, Locke, Rakes & Moore
800 Sun Trust Plaza
Suite 350 Franklin Court

10 Franklin Road
Roanoke, VA 24011

Dated:

Jan. 26, 2012



Joyce A. Howell
Senior Assistant Regional Counsel
U.S. EPA - Region III
1650 Arch Street
Philadelphia, PA 19103-2029

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
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Section 6928(a)

ORDER REGARDING EVIDENCE OF INABILITY TO PAY THE PROPOSED PENALTY

This matter having been opened to the Court upon Complainant's Motion for an Order compelling Respondents to produce evidence to support any claim that they are unable to pay the penalty proposed by Complainant in this proceeding or that the payment of such proposed penalty would have an adverse effect on the ability of either Respondent to continue in business, or in the alternative, a Motion in *Limine* precluding the introduction of any evidence into the record regarding either Respondent's purported inability to pay the proposed penalty or either Respondent's purported claim that the payment of such proposed penalty would have an adverse effect on either Respondent's ability to continue to do business. The Court having considered the arguments of counsel and for good cause shown, it is hereby:

ORDERED that no later than March 1, 2012, each Respondent shall,:

1. file a written notice with the Regional Hearing Clerk, with a copy served on both the Court and Complainant's counsel, stating that it will not be making any claim in this proceeding, or entering into the record in this matter any evidence to support a claim, that such Respondent is unable to pay the penalty proposed by the Complaint or that the payment of such proposed penalty would have an adverse effect on the ability of such Respondent to continue in business;

or

2. file a written notice with the Regional Hearing Clerk, with a copy served on both the Court and Complainant's counsel, stating that it does intend to take the position that it is unable to pay the penalty proposed by Complainant in this matter and/or that payment of such penalty will have an adverse impact on its ability to continue in business, as appropriate, and in conjunction with such written notice:
 - (a) attach all supporting documentation upon which Respondent intends to rely in support of its claim(s) including, but not necessarily limited to:
 - (i) a fully completed copy of the Financial Statement of Corporate Debtor (Attachment A to Complainant's moving papers);
 - (ii) the most recent three years of its federal and state tax returns; and
 - (iii) the most recent three years of its audited financial statements.
 - (b) provide the names of all fact and expert witnesses that it intends to call at the hearing to testify on its behalf on this issue, along with a brief narrative summary of each witness' expected testimony, or a statement that no witnesses will be called to testify on this issue.

It is further Ordered that in the event that either Respondent avails itself of Option No. 2, immediately above, the Complainant, no later than March 10, 2010, shall then:

1. provide written notice with the Regional Hearing Clerk, with a copy served on both the Court and Respondents' counsel, setting forth the Complainant's position, as to the need, if any, for Complainant, in advance of hearing, to:
 - (a) perform its own inquiry into either Respondent's financial condition (via formal discovery, informal discovery or otherwise); and
 - (b) engage its own financial expert witness(es) to analyze Respondent(s)' submitted financial information and

to formulate an expert opinion as to Respondent(s)' ability to pay the proposed penalty and/or to continue in business;

And

2. file with the Regional Hearing Clerk, with a copy served on both the Court and Respondents' counsel, any motion for further relief that Complainant may seek, such as the rescheduling of the hearing in this matter.

SO ORDERED.

Hon. Barbara A. Gunning
Administrative Law Judge

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

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EPA Docket No. RCRA-03-2011-0068

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Section 6928(a)

**ORDER GRANTING COMPLAINANT'S MOTION *IN LIMINE* AND PRECLUDING
RESPONDENTS; INTRODUCTION OF EVIDENCE PERTAINING TO ANY CLAIM OF
INABILITY TO PAY THE PROPOSED PENALTY OR OF ADVERSE BUSINESS EFFECTS**

This matter having been opened to the Court upon Complainant's Motion for an Order compelling Respondents to produce evidence to support any claim that they are unable to pay the penalty proposed by Complainant in this proceeding or that the payment of such proposed penalty would have an adverse effect on the ability of either Respondent to continue in business, or in the alternative, a Motion in *Limine* precluding the introduction of any evidence into the record regarding either Respondent's purported inability to pay the proposed penalty or either Respondent's purported claim that the payment of such proposed penalty would have an adverse

effect on either Respondent's ability to continue to do business. The Court having considered the arguments of counsel and for good cause shown, it is hereby:

ORDERED that each of the Respondents in this proceeding is precluded from raising any claim, or of introducing at the hearing any purported evidence in support of any claim, that it is unable to pay the penalty proposed by Complainant in this proceeding or that the payment of such proposed penalty would have an adverse effect on the ability of either Respondent to continue in business.

SO ORDERED.

Hon. Barbara A. Gunning
Administrative Law Judge