

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

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In the Matter of:)
)
CHEM-SOLV, INC., formerly trading as)
Chemicals and Solvents, Inc.)
)
and)
)
AUSTIN HOLDINGS-VA, L.L.C.)
)
)
)
Respondents.)
)
Chem-Solv, Inc.)
1111 Industry Avenue, S.E.)
1140 Industry Avenue, S.E.)
Roanoke, VA 24013,)
)
Facility.)

U.S. EPA Docket Number
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)

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

COME NOW Respondents, Chem-Solv, Inc. ("Chem-Solv") and Austin Holdings-VA, L.L.C. ("Austin Holdings") (collectively, the "Respondents"), by counsel, pursuant to Section 22.16(b) of the Consolidated Rules of Practice (40 C.F.R. § 22.16(b)), and file their Response to the Complainant's Motion to Compel or in the Alternative, Motion in *Limine* in the above-styled matter.

I. STATEMENT OF THE CASE

The Prehearing Order entered in this proceeding by the Honorable Barbara A. Gunning, on May 31, 2011, provides in pertinent part:

If either Respondent intends to take the position that he is unable to pay the proposed penalty or that payment will have an adverse effect on his ability to continue to do business, that Respondent shall furnish supporting documentation such as certified copies of financial statements or tax returns.

(Prehearing Order, May 31, 2011.)

On January 26, 2012, the Complainant moved this Court to enter an Order compelling the Respondents to provide written notice concerning whether they intend to take the position that they are unable to pay the civil penalty proposed by the Complainant in this proceeding or that payment of the proposed penalty will have an adverse impact on their ability to continue to do business. If the Respondents intend to raise the issue of inability to pay, the Complainant further moved the Court to enter an Order compelling the Respondents to produce all evidence in support of their inability to pay defense, including all supporting documentation, names of proposed witnesses and witness testimony summaries, to the Complainant in advance of the scheduled March 20, 2012 hearing.

In the alternative, the Complainant moved this Court to enter an Order precluding the Respondents from introducing any evidence at the hearing in this proceeding pertaining to financial inability to pay the proposed penalty.

II. DISCUSSION

A. The Court Should Deny the Complainant's Motion to Compel Because the Respondents Have Not Raised an Inability to Pay Defense.

In its Memorandum of Law in Support of Complainant's Motion to Compel or in the Alternative, Motion in *Limine*, the Complainant implicitly alleges that the Respondents have not complied fully with this Court's May 31, 2011 Prehearing Order. The Respondents respectfully disagree. To the contrary, the Respondents have complied fully with the May 31, 2011 Prehearing Order, which does not require the Respondents to provide the Complainant written

notice, on the record, as to whether they intend to raise an inability to pay defense. As set forth above, the May 31, 2011 Prehearing Order only requires the Respondents to produce supporting documentation such as certified copies of financial statements or tax returns, “if either Respondent intends to take the position that it is unable to pay the proposed penalty or that payment will have an adverse impact on its ability to continue to do business.” (Prehearing Order, May 31, 2011.)

At present, neither of the Respondents intend to raise an inability to pay defense at the hearing in this matter. Accordingly, this Court’s May 31, 2011 Prehearing Order does not require the Respondents to produce supporting documentation such as certified financial statements or tax returns. For these reasons, this Court should deny the Complainant’s Motion to Compel.

B. The Court Should Deny the Complainant’s Motion in *Limine* Because it Is Superfluous.

Because the Respondents have not raised – and presently do not intend to raise – the issue of ability to pay, the Complainant’s Motion in *Limine* is superfluous and unnecessary. In the matter of In re: Blackinton Common, LLC and CG2, Inc., Docket No. RCRA-01-2007-0164, 2008 EPA ALJ LEXIS 43 at *8 (November 13, 2008), this Court addressed a motion in *limine* similar to the Motion filed by the Complainant in the case at bar. In that case, the complainant filed a motion in *limine* requesting that the respondents be precluded from presenting any evidence pertaining to financial inability to pay the proposed penalty. *Id.* at *8. As in this case, the respondents in the Blackinton Common matter did not raise the issue of inability to pay in their answer or their prehearing exchange. *Id.*

The respondents in Blackinton Common opposed the complainant’s motion in *limine* as superfluous, because they had not raised an inability to pay defense and the Consolidated Rules

of Practice contemplate that, upon showing “good cause for failing to exchange the required information and providing the required information to all parties as soon as it had control of the information, or had good cause for not doing so,” the Court may consider admitting documents, exhibits or testimony into evidence under Section 22.22(a)(1) of the Consolidated Rules of Practice, 40 C.F.R. § 22.22(a)(1). *Id.* at *8-9. Although the Court granted the complainant’s motion as a clarifying ruling in that matter, it agreed with the respondents’ assertion that the motion in *limine* was superfluous and held that the respondents were not precluded from proffering evidence concerning ability to pay, if they were to meet the requirements of Section 22.22(a)(1) of the Consolidated Rules of Practice (40 C.F.R. § 22.22(a)(1)). *Id.* at *9.

At present, the Respondents in this matter similarly do not intend to raise an inability to pay defense. However, the Respondents reserve the right to proffer evidence concerning ability to pay in accordance with Section 22.22(a)(1) of the Consolidated Rules of Practice (40 C.F.R. § 22.22(a)(1), in the event that the Respondents’ financial circumstances should change after the date of this Response. Therefore, like the motion in *limine* filed by the Complainant in the Blackinton Common matter, the Complainant’s Motion in *Limine* is superfluous, unnecessary and contrary to the provisions of the Consolidated Rules of Practice. For these reasons, the Complainant’s Motion in *Limine* also should be denied.

III. CONCLUSION

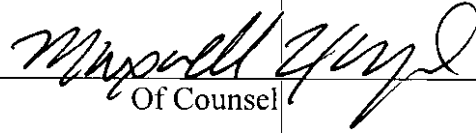
WHEREFORE, for the foregoing reasons, Respondents Chem-Solv, Inc. and Austin Holdings-VA, Inc. respectfully request that this Court deny the Complainant’s Motion to Compel, deny the Complainant’s Motion in *Limine*, and grant the Respondents’ such other and further relief as this Court deems just and proper.

Dated:

2-9-12

Chemsolv, Inc. and Austin Holdings-VA, L.L.C.

By



Of Counsel

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CERTIFICATE OF SERVICE

I certify that, on February 9, 2012, I sent by Federal Express, next day delivery, a copy of the Respondents' Response To Complainant's Motion To Compel or in the Alternative, Motion in *Limine* to the addressees listed below.

The Honorable Barbara A. Gunning
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