BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION III

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)

REPLY BRIEF IN SUPPORT OF RESPONDENTS' MOTION TO TAKE DEPOSITIONS UPON ORAL QUESTIONS

COME NOW Respondents, Chem-Solv, Inc. ("Chem-Solv") and Austin Holdings-VA, L.L.C. ("Austin Holdings") (collectively, the "Respondents"), by counsel, pursuant to Rule 22.16 (b) of the Consolidated Rules of Practice (40 C.F.R. § 22.16(b)), and respectfully submit this Reply Brief in Support of Respondents' Motion to Take Depositions Upon Oral Questions of Kenneth J. Cox, Elizabeth A. Lohman, and Jose Reyna, III (collectively, the "Complainant's Witnesses") (the "Respondents' Motion").

In its response to the Respondents' Motion, the Complainant argues that the Respondents' Motion is deficient because it does not comport with the requirements for "other discovery" set forth in the Consolidated Rules of Practice, 40 C.F.R. Part 22. Specifically, the

Complainant alleges that the Respondents' Motion: (1) fails to describe in detail the nature of the information and/or documents sought; (2) fails to propose any time(s) or place(s) where the proposed depositions would be conducted; (3) unreasonably burdens the Complainant; (4) seeks information that is most reasonably obtained from sources other than Complainant; (5) fails to seek information that has significant probative value on a disputed issue of material fact that is relevant to liability or the relief sought; (6) fails to explain why the information sought cannot reasonably be obtained by alternative methods of discovery; (7) fails to present any reason to support any belief that relevant and probative evidence may otherwise not be preserved for presentation by a witness at hearing; and (8) fails to provide any showing of grounds of necessity for taking oral depositions by the Complainant's Witnesses.

(Complainant's Resp. to Mot. for Dep. 11-12.)

The Respondents state as follows in response to the alleged deficiencies listed above:

A. Respondents Have Adequately Identified the Nature of Information Sought.

In its response to the Respondents' Motion, the Complainant argues that the Respondents fail to identify the nature of the information they seek to obtain from the Complainant's Witnesses. (Complainant's Resp. to Mot. for Dep. 12-15.) The Respondents respectfully disagree. As set forth in the Memorandum of Law in Support of the Respondents' Motion, certain statements made by Complainant's Witnesses in declarations submitted to the Court by the Complainant in support of its Motion for Accelerated Decision are in conflict with statements made by witnesses identified by Respondents in their Initial Prehearing Exchange in affidavits submitted to the Court in opposition to the Complainant's Motion for Partial Accelerated Decision. Specifically, there are conflicts between Complainant's Witnesses' testimony concerning Jamison G. Austin's whereabouts during the May 23, 2007 sampling event and

whether Mr. Austin told the Complainant's Witnesses that the "trench drain" in the "blend room" located at Chem-Solv's facility was connected to a rinsewater holding tank referred to by the Respondents as "Rinsewater Holding Tank No. 1".

Contrary to the Complainant's assertions, the Respondents do not seek additional information concerning the status of the trench drain at the time of the EPA's inspection or the sampling event in May 2007. Instead, the Respondents seek to discover information concerning Mr. Cox's recollections about his alleged conversation with Mr. Lester regarding the "trench drain" and Ms. Lohman and Mr. Reyna's recollections of the sampling event, including Mr. Austin's whereabouts during the entire sampling event, because the declarations and other documentation available to the Respondents do not fully convey the Complainant's witnesses' mental impressions or their understanding of these disputed factual issues. Accordingly, the Respondents seek an opportunity to question Complainant's witnesses concerning what they recall about the alleged statements made by Mr. Austin about the "trench drain," whether Mr. Austin was present during certain portions of the sampling event, and the protocols used by the EPA's inspectors during the sampling event. Clearly, such mental impressions are most reasonably obtained from the Complainant's Witnesses themselves.

B. Respondents Did Not Identify a Proposed Time or Place for the Complainant's Witnesses' Depositions in an Effort to Accommodate the Complainant's Counsel's Schedule and Complainant's Witnesses' Schedules.

The Respondents agree with the Complainant's assertion that the Respondents did not propose a time or place for the Complainant's Witnesses' depositions to be conducted in the Respondents' Motion. As the Complainant states in its response to the Respondents' Motion, Mr. Cox is employed by the U.S. Environmental Protection Agency (the "EPA") and works out of EPA offices located in Philadelphia, Pennsylvania, and Jose Reyna, III is employed by the

EPA and works out of EPA offices located in Fort Meade, Maryland. Moreover, the Respondents further recognize that Elizabeth A. Lohman is employed by the Virginia Department of Environmental Quality (the "VA DEQ") and works out of VA DEQ's Roanoke, Virginia office. Accordingly, in an effort to accommodate the Complainant's Witnesses' schedules, the schedules of the Complainant's counsel, and to provide flexibility for the logistical issues involved in coordinating such schedules, and making necessary travel and lodging arrangements, the Respondents did not propose a time or date certain for the Complainant's Witnesses' depositions in the Respondents' Motion.

The Respondents would be willing to depose Mr. Cox in Philadelphia, Pennsylvania on or before February 28, 2012, Mr. Reyna in Fort Meade, Maryland on or before March 2, 2012, and Ms. Lohman in Roanoke, Virginia on or before March 6, 2012. Should these dates and locations be inconvenient to the Complainant's counsel or the Complainant's Witnesses, the Respondents will agree to depose the Complainant's Witnesses at any reasonable time and at any reasonable location.

C. The Relief Requested Will Not Unreasonably Burden the Complainant.

Complainant argues in its response to the Respondents' Motion that the requested depositions will unreasonably burden the Complainant. The Respondents recognize that the Complainant's Witnesses reside in three different states. For the sake of convenience, if the Complainant could arrange for Mr. Cox and Mr. Reyna, both of whom are EPA employees, to be available on the same day for depositions in Philadelphia, Pennsylvania or Fort Meade, Maryland, the Respondents would be agreeable to such an arrangement. Moreover, the Respondents are willing to schedule the Complainant's Witnesses' depositions at the

convenience of the Complainant's counsel, in order to reduce the burden such depositions would pose on the Complainant as much as possible.

Although, it may be impossible to eliminate burden on the Complainant resulting from the Complainant's Witnesses' depositions, such burden will not be unreasonable under the circumstances. For example, the grounds for Respondents' Motion arose when the Complainant produced declarations by the Complainant's Witnesses in support of its Motion for Accelerated Decision. Accordingly, if the Complainant had not filed such declarations, the Respondents would not need to depose the Complainant's Witnesses concerning the subjects set forth in the Respondents' Motion. Thus, to require the Complainant's counsel to spend time preparing for and attending the Complainant's Witnesses' depositions, both of which are standard activities in civil proceedings in federal court, is not unreasonable under the circumstances. Moreover, the Complainant is represented by two attorneys. Thus, the same attorney will not have to prepare for and attend all three of the Complainant's Witnesses' depositions. For the foregoing reasons, the Respondents submit that the requested depositions of the Complainant's Witnesses would not unreasonably burden the Complainant.

D. Respondents Seek Information That Is Most Reasonably Obtained From the Complainant's Witnesses.

Complainant argues in its response to the Respondents' Motion that the Respondents actually seek to determine whether Mr. Austin provided information to Mr. Cox regarding the "trench drain" in the blend room located at Chem-Solv's facility that is in conflict with statements made in Mr. Austin's Second Affidavit, and whether Mr. Austin actually witnessed the May 23, 2007 sampling event, as set forth in Mr. Austin's initial Affidavit. (Complainant's Resp. Mot. for Dep. 18.) The Respondents respectfully submit that this is a mischaracterization of the information they are seeking.

The Respondents know that the "trench drain" in the blend room located at Chem-Solv's facility was disconnected from the rinsewater holding tank years prior to the May 2007 EPA inspection and sampling event. They further know that Mr. Austin actually witnessed the May 23, 2007 sampling event. Thus, the Respondents are seeking to depose Mr. Cox concerning the statement allegedly made by Mr. Austin to Mr. Cox about the "trench drain" in order to determine the context of this statement and whether Mr. Cox's recollection is faulty. Moreover, the Respondents seek to depose Ms. Lohman and Mr. Reyna concerning their interactions with Mr. Austin during the May 23, 2007 sampling event to determine whether it is possible that Mr. Austin was actually present for portions of this sampling event and to establish that they may not have been aware of his presence at certain times. This information, which concerns the Complainant's Witnesses' mental impressions and recollections, certainly is best obtained from the Complainant's Witnesses themselves. Although the Complainant's Witnesses have made statements concerning their observations during the inspection and sampling event in their declarations, their inspection reports, and their field notes, the Respondents actually seek to explore their mental impressions concerning their conversations with Mr. Austin and interactions with Mr. Austin. These documents raise the questions that the Respondents intend to pose to the Complainant's Witnesses, but do not answer them. This information can only be obtained from the Complainant's witnesses themselves. Any suggestion to the contrary is erroneous.

E. The Information Sought by the Respondents Has Significant Probative Value on a Disputed Issue of Material Fact That Is Relevant to Liability.

Contrary to the Complainant's assertions, Mr. Cox's mental impressions concerning Mr. Austin's statements to him about the "trench drain" located in the "blend room" at Chem-Solv's facility being connected to the rinsewater holding tank are relevant to a disputed issue of material fact concerning liability. The Complainant takes the position that it is solely the nature of the

contents located in Rinsewater Holding Tank No. 1 that has significant probative value on disputed material facts relevant to liability in this matter. As the Court noted in its February 2, 2012 Order Denying Complainant's Motion for Partial Accelerated Decision, the Complainant has previously taken the position that the factual questions of whether or not the "trench drain" was connected to the rinsewater holding tank goes to the issue of whether or not the Respondents used Rinsewater Holding Tank No. 1 to accumulate waste.

For the reasons stated in the Respondents' Response to the Complainant's Motion for Partial Accelerated Decision, it is the Respondents' position that the contents of Rinsewater Holding Tank No. 1 cannot be considered waste until they were removed from the tank and Chem-Solv made the election to dispose of it. Therefore, whether or not the trench drain was connected to the pit in May 2007 is in fact relevant to the central issue underlying the violations alleged in the Complaint, which is whether Rinsewater Holding Tank No. 1 was used by Respondents to accumulate waste. Accordingly, for the reasons stated in Respondents' Motion, Respondents seek information that has the tendency to prove a fact that is of consequence in this matter. As such, it meets the Environmental Appeals Board's Definition of "probative value". See e.g. In re: Chautauqua Hardware Corp., 3 E.A.D. 616, 622 (1991).

Similarly, the Complainant's Witnesses' mental impressions concerning whether or not Mr. Austin was present during the sampling event are relevant to the issue of the EPA's inspectors' flawed sampling methods. Mr. Austin's testimony is the foundation for Respondents' expert witnesses' argument that, due in part to the EPA's inspectors' failure to comply with the EPA's prescribed sample collection requirements, the materials sampled were not representative of any waste stream at the point of generation, undermine the validity of the analytical data upon which a majority of the violations alleged in the Complaint are based. Thus,

contrary to the Complainant's argument, Mr. Austin's observations concerning the EPA's inspectors' sampling methods, or lack thereof, go to the heart of one of the Respondents' defenses.

F. The Information Sought by Respondents Cannot Reasonably be Obtained by Alternate Methods of Discovery.

In its response to the Respondents' Motion, the Complainant argues that the information sought by Respondents can reasonably be obtained by alternate sources and methods of discovery. Again, the Complainant fails to comprehend the nature of the information sought by the Respondents. Neither the Respondents, nor anyone else, can peer inside the minds of the Complainant's Witnesses. Thus, as set forth above, the only available source for the information sought by the Respondents - the Complainant's Witnesses' mental impressions concerning the subjects identified in the Respondents' Memorandum of Law in Support of the Respondents' Motion - is the Complainant's Witnesses themselves.

Furthermore, the "spontaneity that is the hallmark of a deposition – the opportunity and ability to pursue responses (especially unexpected ones or ones pointing in new directions) and follow them to wherever they might lead - is only available through depositions." In re: Isochem North America, LLC, Docket No. TSCA-02-2006-9143, 2008 EPA ALJ LEXIS 8* 17-18 (March 6, 2008). Thus, the requested depositions of the Complainant's Witnesses are the most realistically effective means to obtain substantive evidence critical to the Respondents' understanding of the Complainant's witnesses' mental impressions of the subjects described in the Respondents' Motion and the Memorandum of Law in Support thereof. Cross examination at the hearing would not suffice, given the questions raised by the Complainant's Witnesses' declarations concerning the Complainant's Witnesses' recollections of their interactions with Mr. Austin. Only depositions of such witnesses upon oral questions will lead the Respondents to the

information they are seeking in advance of the hearing, so that they will have an opportunity to adequately prepare their defenses to the alleged violations.

G. Respondents are Not Required to Establish That the Information Sought May Otherwise Not Be Preserved for Presentation by a Witness at the Hearing in this Matter.

Complainant erroneously argues that the Respondents are required to establish that there is a substantial reason to believe that the information sought from the Complainant's Witnesses may not, in the absence of depositions upon oral questions, otherwise be preserved for presentation by such witnesses at the hearing. The Respondents have not made such an argument because they are not required to do so under Section 22.19(e)(3) of the Consolidated Rules of Practice (40 C.F.R. § 22.19(e)(3)).

Contrary to the Complainant's argument, a leave to take a witness deposition upon oral questions under Section 22.19(e)(3) of the Consolidated Rules of Practice (40 C.F.R. § 22.19(e)(3)), the party must meet either of two criteria: (1) the information sought cannot be reasonably obtained by alternate methods of discovery, or (2) there is a substantial reason to believe that relevant probative evidence may otherwise not be preserved for presentation by a witness at the hearing. 40 C.F.R. § 22.19(e)(3); see also In re: Isochem North America, LLC, Docket No. TSCA-02-2006-9143, 2008 EPA ALJ LEXIS 8,* 17-18 (March 6, 2008) (noting that where the Complainant sought leave to take a witness deposition, the Complainant must meet either of the two criteria under 40 C.F.R. § 22.19(e)(3)). Section 22.19(e)(3) of the Consolidated Rules of Practice uses the disjunctive words "either" and "or". Thus, as this Court ruled in the matter of In re: Isochem North America, LLC, the Respondents are not required to establish both of these two criteria. Id. Instead, under Section 22.19(e)(3) of the Consolidated Rules of Practice (40 C.F.R. § 22.19 (e)(3)), the Court may grant the Respondents leave to take

depositions upon oral questions if the Respondents have established the first criterion set forth in 40 C.F.R. § 22.19(e)(3) - that the information sought cannot reasonably be obtained by alternate methods of discovery, which the Respondents respectfully submit is established by their Memorandum of Law in Support of the Respondents' Motion to Take Depositions Upon Oral Questions. The Respondents agree that the second criterion is not applicable where the Complainant's witnesses are listed as witnesses to appear at the hearing in this matter. However, the Respondents still are entitled to take the Complainant's Witnesses' depositions upon oral questions for the reasons set forth in the Respondents' Motion and the Memorandum of Law in Support thereof.

I. CONCLUSION

WHEREFORE, for the foregoing reasons and the reasons stated in Respondents' Memorandum of Law in Support of Respondents' Motion to Take Depositions Upon Oral Questions, Respondents Chem-Solv, Inc. and Austin Holdings-VA, Inc. respectfully request that this Court grant their Motion to Take Depositions Upon Oral Questions, and grant the Respondents' such other and further relief as this Court deems just and proper.

Dated: February 16, 2012

Chem-Solv, Inc. and Austin Holdings-VA, L.L.C.

By _____
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ENVIRONMENTAL PROTECTION AGENCY
REGION III

In the Matter of:	)	
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CHEMSOLV, INC., formerly trading as Chemicals and Solvents, Inc.	)	
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	)	
and	)	
	)	
AUSTIN HOLDINGS-VA, L.L.C.	)	U.S. EPA Docket Number
	)	RCRA-03-2011-0068
	)	
	)	
	)	Proceeding Under Section 3008(a) of
Respondents.	)	the Resource Conservation and
	)	Recovery Act, as amended 42 U.S.C.
Chemsolv, Inc.	)	Section 6928(a)
1111 Industrial Avenue, S.E.	)	
1140 Industrial Avenue, S.E.	)	
Roanoke, VA 24013,	)	
	)	
Facility.	)	

CERTIFICATE OF SERVICE

I certify that, on February 16th, 2012, I sent by Federal Express, next day delivery, a copy of the Respondents' Reply Brief in Support of Respondents' Motion to Take Depositions Upon Oral Questions to the addressees listed below.

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