

SuperClean Brands, Inc. (formerly Fox Packaging)

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13 July 2007

Via UPS Mail

Ms. Sonja Brooks-Woodward
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 5, E-19J
77 West Jackson Boulevard
Chicago, IL 60604-3590

Re: SuperClean Brands, Inc.
Docket No. EPCRA 05-2007-0013

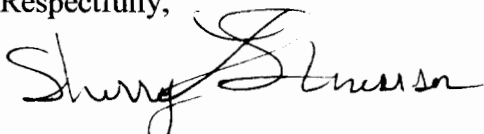
Dear Ms. Brooks-Woodard:

Enclosed for filing please find one original and one copy of the following documents in the above referenced matter:

1. Respondent's Initial Prehearing Exchange;
2. Respondent's List of Exhibits; and
3. Certificate of Service.

Thank you.

Respectfully,



Sherry L. Stenerson, Esq.

Enclosures

c: The Honorable Spencer T. Nissen, Administrative Law Judge
Mr. Jeffery M. Trevino, Associate Regional Counsel

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

DOCKET NO. EPCRA 05-2007-0013

SuperClean Brands, Inc.

Honorable Spencer T. Nissen

Respondent.

July 13, 2007

RESPONDENT'S INITIAL PREHEARING EXCHANGE

Pursuant to the Presiding Officer's Orders dated June 7, 2007, and July 3, 2007, and 40 CFR 22.19, Respondent hereby respectfully submits its Initial Prehearing Exchange.

1. *Desired or required location of the hearing.*

Respondent submits that an appropriate place of hearing is Ramsey County, Minnesota, the county where Respondent conducts the business that the hearing concerns. Respondent notes that both Complainant and Respondent plan to rely on testimony from witnesses who reside in the Twin Cities area.

2. *A list of prospective witnesses, a brief narrative summary of their anticipated testimony, and a copy of each document or exhibit to be proffered in evidence to the extent not covered by the specific requests below.*

Respondent intends to call the following witnesses: Mr. Elliott Badzin, Mr. Kraig Reash and Mr. Gene Jensen. A brief narrative summary of the witnesses' expected testimony follows:

- i. Mr. Elliott Badzin; President - SuperClean Brands, Inc.

Mr. Badzin will testify to his background, philosophy regarding running a company and communications with staff of the U.S. Environmental Protection Agency. He will testify about his duties as President of SuperClean Brands, Inc., ("SuperClean") a Minnesota corporation, with a facility located at 51 East Maryland, St. Paul, Minnesota. He will describe SuperClean's financial condition

ii. Mr. Kraig Reasch; Chief Operating Officer - SuperClean Brands, Inc.

Mr. Kraig Reasch will testify to his background, philosophy regarding managing operations of a company and the challenges faced by the company during the 2004-2006 timeframe.

iii. Mr. Gene Jensen; Plant Manager - SuperClean Brands Inc.

Mr. Gene Jensen will testify to his educational background, the processing for managing the plant, his record keeping practices, his efforts at learning about being in full compliance with regulatory matters, and the challenges he faced upon taking the role as plant manager.

Respondent expects to introduce into evidence Respondent's Exhibits identified on Respondent's List of Exhibits submitted as part of this Prehearing Exchange.

Pursuant to additional items by Respondent listed in the Presiding Officer's Order,

Respondent hereby respectfully submits the following:

1. *If not provided in responses to specific items below, summarize any facts supporting denial of the violations alleged in the Complaint.*

See below.

2. *Describe the unique circumstances alleged as the reason for Respondent's failure to timely file the Chemical Inventory Reports for the year 2005.*

Respondent's failure to submit reports was due to unique circumstances that are not likely to recur. In the second half of 2004, management of the plant transitioned to a new staff, with Mr. Jensen taking over as plant manager. Shortly after Mr. Jensen had begun the learning process of plant management, sales started to spike and Respondent experienced astronomical growth. By mid-2005 the plant had experienced a surge in orders that virtually doubled the normal volume. This put a tremendous strain on managing the supply chain as well as the production facilities; all solely done by Mr. Jensen. Mr. Jensen repeatedly requested an assistant. Unfortunately, one was not hired until late 2005. However, on the day the new team member

was to report for work, she elected to take a different job, which further strained the workload for Mr. Jensen. During the beginning of 2006, Mr. Jensen worked diligently to keep all aspects of supply chain and plant management on track, doing his best not to allow anything to slip through the cracks.

Mr. Jensen's inadvertent late filing (See Exhibit 1) was contributed to by the immense workload at the time due to staff shortages, increased workload and rapid growth of a historically small business at a time when he, himself, was learning a new position. In addition, as noted in Section 4 below, there was some confusion about the filing deadline for the Tier II Hazardous Chemical Inventory Forms, due to a similar filing requirement of Minnesota state form that was not due until July. Notwithstanding the fact that the report filings were delayed, SuperClean had consistently filed all reports in prior years, thereby ensuring that the SERC and local fire departments had appropriate information for emergency response situations (See Exhibits 2-3).

3. *Submit a memorandum supporting the arguments that Complainant failed to properly apply the statutory adjustment factors for ability to pay, degree of culpability, other matters as justice may require, size of business, attitude and voluntary disclosure and that Complainant misapplies the Enforcement Response Policy.*

Respondent just received the Narrative Explanation and Penalty Calculation Worksheet. As such, Respondent submits this preliminary response and respectfully reserves the right to supplement this request. Respondent believes that the proposed penalty should be reduced or eliminated. Respondent will exercise its right to defend against the proposed penalty by way of direct evidence, rebuttal evidence and through cross-examination of the Complainant's witnesses. Respondent intends to rely upon the listed Exhibits in support of its position that the proposed penalty should be reduced or eliminated.

Between Counts 1 and 2, Complainant seeks a combined penalty of \$48,178.00 for the alleged failure to file the Tier II Hazardous Chemical Inventory reports (Tier II Reports) with the Minnesota state emergency response commission (SERC) and the local area Fire Department (a claimed penalty amount of \$24,089.00 for failure to file with each entity). Respondent maintains that Complainant has failed to meet its burden of presentation and persuasion as required by 40 CFR 22.24, including but not limited to, the following:

1. Gravity Calculation. Respondent has consistently filed its Tier II Reports with the SERC and the Fire Department (See Exhibits 2-4). Because such entities were on repeated notice of the quantities of hazardous materials at Respondent's facility, the potential for harm to the community through hindering its ability to anticipate responses in emergencies due to lack of knowledge or otherwise is extremely low. In light of Respondent's history of conducting itself in a compliant manner and having been a first time, Complainant could have utilized one of the other, lower quantity hazardous materials in calculating the proposed penalties. Respondent asserts that Matrix Level B should have been utilized based on the facts in this case.
2. Circumstances. Respondent asserts that Complainant's election to assess a "medium" penalty range for circumstances is excessive. As noted above, Respondent has a consistent record of filing the Tier II reports with the SERC and the local Fire Department. The assessment of medium suggests that somehow the communities and emergency response teams did not have adequate notice of the existence of hazardous materials at Resondent's facility. Such a situation is simply not the case. All emergency response personnel had the relevant information to effectively do their jobs. Further, Respondent in now way was trying to avoid its obligations, it simply had a short

oversight due to unusual circumstances, as discussed above. Respondent asserts that an appropriate range in which to calculate the proposed penalty would be “low,” given the facts in this case.

3. Attitude. Since receipt of the Notice of Intent to File Civil Administrative Complaint (“Notice of Intent”), Respondent has worked cooperatively with the Environmental Protection Agency (“EPA”). Respondent did an initial inquiry and responded with full candor to the Notice of Intent. Respondent then undertook an in-depth inquiry into reported volumes of hazardous materials in comparison to reported volumes for the years 2004 and 2005 (See Exhibit 5). Respondent not only found that it had, year-after-year, filed the Tier II Reports, but that it had taken the approach that it was better to over-report quantities to the SERC and the Fire Department than to attempt to report less than what the facility had in its possession. This approach was taken to ensure communities and emergency response teams have the most relevant information they need and the belief that it is important to have full disclosure.

In light of Respondent’s cooperative posture from the moment it received the Notice of Intent, Respondent is entitled to a reduction in proposed penalty for its attitude throughout the process.

Respondent maintains that any violation posed at most a minor potential for harm and should be considered, at most, a minor deviation from the regulatory requirements, particularly in light of the fact that Respondent’s practice prior to the alleged violation had been to regularly file, thereby putting all authorities on notice of the hazardous materials and quantities thereof present at Respondent’s facility. Respondent maintains that any penalty that may be imposed for any possible remaining violation should be further reduced based on the following: 1)

Respondent's good faith efforts to comply; 2) Confusion generated by other forms required to be filed within the State of Minnesota; 3) Respondent's status as a small business; and 4) other factors as justice may require.

4. *Explain in detail the contention that doctrines of accord and satisfaction, settlement and waiver, lack of jurisdiction, equitable estoppel and laches bar the Complainant from imposing or enforcing any civil penalties in this instance.*

The State of Minnesota requires the annual filing of the Minnesota Pollution Prevention Progress Report form ("Pollution Form") (See Exhibit 6). This Pollution Form contains very similar information to the Tier II Report and is required to be filed by July 1 of each year. In addition, the Pollution Form is submitted to the Minnesota EPCRA program office. Such a required filing on substantially similar information led to the confusion that both the Pollution Form and the Tier II Report were required to be filed in July. As such, there was a misunderstanding that the Tier II Report was to be filed before July 1. This

In addition, the SuperClean believed that it was in compliance with all required environmental filings. On October 18, 2006, John D. Myhre, EPCRA Compliance Inspector, audited the Facility for calendar year 2005, the same year period Complainant alleges that Respondent failed to timely file the Tier II Hazardous Chemical Inventory forms (See Exhibits 7 and 8). He was accompanied by Steve Tomlyanovich of the Minnesota SERC. As part of the audit, Mr. Myhre asked Mr. Tomlyanovich if SuperClean's reports had been filed; Mr. Tomlyanovich confirmed that they had. He did not ask about when the filing was made or otherwise indicate that timeliness was a critical factor. With that information and other facts gathered during the audit, Mr. Myhre submitted his audit outcomes to SuperClean, requesting only that SuperClean provide invoices for purchases of methanol, ethylene glycol and isopropyl alcohol, as well as Material Safety Data Sheets for the same (See Exhibits 9 and 10). No other

audit outcomes were delivered, nor were outcomes of failure to timely file raised. As such, SuperClean was led to believe that it was in compliance with environmental filing and permitting requirements.

Moreover, the Minnesota Pollution Control Agency conducted an Air Pollutant Emissions Inventory Report for calendar year 2005 (See Exhibit 11). The report specifically addressed Respondent's usage of the same hazardous materials that are reported in the Tier II Hazardous Chemical Inventory reports. Once again, no indication was given to SuperClean that is somehow failed to comply with environmental compliance requirements. SuperClean had no reason to believe there was anything to correct, voluntarily report, or otherwise bring itself into compliance.

[5]. *If Respondent is contending that the proposed penalty exceeds its ability to pay, provide financial statements, copies of income tax returns or other data to support such contention.*

Not applicable.

Dated: July 13, 2007.

Respectfully submitted,

By:



Sherry L. Stenerson
1380 Corporate Center Curve, Suite 200
Eagan, Minnesota 55121
(651) 405-7718
Attorney for SuperClean Brands, Inc.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:

DOCKET NO. EPCRA 05-2007-0013

SuperClean Brands, Inc.

Honorable Spencer T. Nissen

Respondent.

July 13, 2007

RESPONDENT'S LIST OF EXHIBITS

1. Tier II Emergency and Hazardous Chemical Inventory - 2005
2. Tier II Emergency and Hazardous Chemical Inventory - 2004
3. Tier II Emergency and Hazardous Chemical Inventory – 2003
4. Tier II Emergency and Hazardous Chemical Inventory – 2006
5. SuperClean Brands Tier II Filing Spreadsheet comparing reported and actual quantities for 2004 and 2005 – dated March 29, 2007
6. Minnesota Pollution Prevention Progress Report Form - 2005
7. Letter from Mr. John D. Myhre regarding upcoming EPCRA audit of Respondent for calendar year 2005 – dated September 13, 2006
8. Notice of Inspection – dated October 18, 2006
9. Receipt for Samples and Documents – dated October 18, 2006
10. Letter from Mr. John D. Myhre regarding need for additional submissions of receipts and Material Safety Data Sheets – dated December 6, 2006
11. Minnesota Pollution Control Agency Air Pollutant Emissions Inventory Report for Inventory Year 2005

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5

In the Matter of:

DOCKET NO. EPCRA 05-2007-0013

SuperClean Brands, Inc.

Certificate of Service

Respondent.

STATE OF MINNESOTA)
) ss.
COUNTY OF DAKOTA)

I, David J. Sandvik, being first duly sworn on oath, deposes and states that on the 13th day of July, 2007, he caused a copy of the following documents:

1. Respondent's Initial Prehearing Exchange; and
2. Respondent's List of Exhibits;

to be delivered, postage prepaid, to each of the following persons and addresses, in the following manners:

VIA UPS MAIL

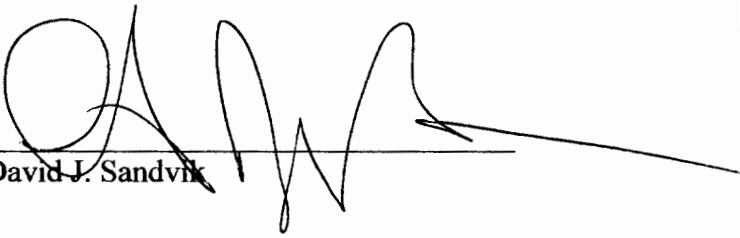
The Honorable Spencer T. Nissen
Administrative Law Judge
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington D.C 20460-2001

VIA UPS MAIL

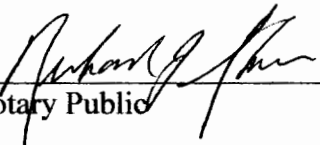
Mr. Jeffery M. Trevino, Esq.
Associate Regional Counsel
U.S. Environmental Protection Agency
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77 West Jackson Boulevard
Chicago, IL 60604-3590

✓ VIA UPS MAIL

Ms. Sonja Brooks-Woodward
Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 5, E-19J
77 West Jackson Boulevard
Chicago, IL 60604-3590


David J. Sandvik

Subscribed and sworn to before me
this 13th day of July, 2007.


Notary Public

