

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Creative Liquid Coatings, Inc.)
(formerly d/b/a Creative Coatings, Inc.))
2701 S. Coliseum Blvd., Suite 1284)
Fort Wayne, IN 46803)
)
U.S. EPA ID No. INR 000 109 322)
)
Elite Enterprises, Inc.)
)
AND)
)
Randall Geist)
)
Respondents.)

Docket No. RCRA-05-2009-0012

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**MEMORANDUM IN SUPPORT OF COMPLAINANT'S
FIRST MOTION TO SUPPLEMENT PREHEARING EXCHANGE**

Complainant moves the Presiding Administrative Law Judge to allow Complainant to supplement its prehearing exchange to include the additional exhibits identified below. In addition, Complainant's First Supplemental Prehearing Exchange is being filed contemporaneously herewith.

I. Additional Exhibits

Complainant seeks to supplement its prehearing exchanges with the following additional exhibits:

<u>Exhibit</u>	<u>Bates Number</u>	<u>Brief Description</u>
148	CX-0000631a-CX-0000631g	Complete email chain, the first page of which Complainant submitted as Exhibit 83 in its initial Prehearing Exchange dated December 30, 2009 ¹
149	CX-0001500-CX-0001766	Complete transcript of the February 27, 2009, deposition of Randall Geist in the matter captioned <u>Elite Enterprises, Inc., et al. v. Liberty Steel Products, Inc.</u> , Case No. 1:08-CV-00157 (N.D. Indiana)
150	CX-0001767-CX-0001825	Complete transcript of post-judgment February 22, 2007, deposition of Randall Geist and certain exhibits in matter captioned <u>Flex-N-Gate Canada Company v. Elite Enterprises, Inc.</u> , Case No. 1:04-CV-418 (N.D. Indiana)
151	CX-0001826-CX-0001829	Series of agreements, dated January 3, 2004, and executed by and between Elite Enterprises, Inc. and Creative Coatings, Inc.
152	CX-0001830-CX-0001936	Most recent version of the RCRA Civil Penalty Policy, dated June 23, 2003
153	CX-0001937-CX-0001938	Most recent versions of the Penalty Matrices for the RCRA Civil Penalty Policy

¹ Complainant inadvertently failed to submit all of the pages of an email chain that it intended to submit as Exhibit 83 to its initial prehearing exchange dated December 30, 2009. Included in Complainant's First Supplemental Prehearing Exchange as Exhibit 148 is the complete email chain Complainant intended to submit as Exhibit 83 to its initial prehearing exchange.

154	CX-0001939-CX-0001940	Printout from Indiana Secretary of State's website, dated January 26, 2010, showing Randall Geist as the registered agent for Elite Enterprises, Inc.
155	CX-0001941-CX-0001945	Schedule 1.1(a) to Asset Purchase Agreement, dated August 26, 2005, by and among, <i>inter alia</i> , Creative Coatings, Inc., Randall Geist, and Creative Powder Coatings, LLC
156	CX-0001946-CX-0001962	Articles of Incorporation for Creative Coatings, Inc.
157	CX-0001963-CX-0001975	Articles of Incorporation for Elite Enterprises, Inc.
158	CX-0001976-CX-0001996	Certain documents related to Creative's, Elite's, and Mr. Geist's operations at Suites 1158 and 1284
159	CX-0001997-CX-0002052	EPA's February 23, 2010, information request to K-Com Transport Services, Inc. and K-Com's March 5, 2010, response to same
160	CX-0002053-CX-0002056	EPA's February 23, 2010, information request to Systech Environmental Corporation
161	CX-0002057-CX-0002065	Systech Environmental Corporation's March 8, 2010, response to EPA's information request

II. Governing Legal Standard and Argument

The regulation governing supplementation of prehearing exchanges is found at 40 C.F.R. § 22.19(f), which provides, in pertinent part, as follows:

(f) Supplementing prior exchanges. A party who has made an information exchange under paragraph (a) of this section, . . . shall promptly supplement or correct the exchange when the party learns that the information exchanged . . . is incomplete, inaccurate or outdated, and the additional or corrective information has not otherwise been disclosed to the other party pursuant to this section.

In the instant matter, the additional information is necessary to make the record in this proceeding complete and accurate, and is relevant and material to the issues presented in U.S. EPA's Complaints and in Respondents' Answers.

In addition, the rules on the admission of evidence in administrative hearings under the Consolidated Rules allow for supplementation of prehearing exchanges at least 15 days prior to the scheduled hearing, subject to the discretion of the Presiding Officer. 40 C.F.R. § 22.22(a)(1).² In essence, this rule embodies a policy favoring the admission of all relevant and material evidence, and only requires a showing of good cause for the submission of such evidence if it has not been provided to all parties at least 15 days prior to the hearing. See id.; see also In re CDT Landfill Corp., 11 E.A.D. 88, 109-10 (EAB

² 40 C.F.R. § 22.22(a)(1) provides:

(a) General. (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, of little probative value, . . . If, however, a party fails to provide any document, exhibit, witness name or summary of expected testimony required to be exchanged under § 22.19(a), (e) or (f) to all parties at least 15 days before the hearing date, the Presiding Officer shall not admit the document, exhibit or testimony into evidence, unless the non-exchanging party had good cause for failing to exchange the required information and provided the required information to all other parties as soon as it had control of the information, or had good cause for not doing so.

2003) (“Administrative hearings are such that the rules allowing evidence into the record tend to be more liberal than in proceedings in other courts, and normally err toward over-inclusion rather than under-inclusion.”).

A. Timeliness of Complainant’s First Motion to Supplement Prehearing Exchange

In the case at bar, Complainant is supplying the additional exhibits more than 15 days prior to the hearing.³ The additional evidence is scheduled to be delivered to counsel for Respondents Creative Liquid Coatings, Inc. (“Creative”) and Randall Geist and to Randall Geist, as registered agent for Respondent Elite Enterprises, Inc. (“Elite”), by Federal Express on or before March 22, 2010. The hearing in this matter currently is scheduled for May 18, 2010. Hence, the exhibits in Complainant’s first proposed supplement to its prehearing exchange are being provided to Respondents and to the Court more than 59 days before the scheduled hearing, clearly within the time frame established under 40 C.F.R. § 22.22(a)(1).

B. Relevance and Materiality of Additional Evidence

The additional documentary evidence is relevant and material to both liability- and penalty-related issues and to Respondents’ asserted defenses. With respect to the

³ The timeliness of Complainant’s submission of complete transcripts of Mr. Geist’s February 22, 2007 and February 27, 2009 depositions in separate, unrelated civil judicial actions and certain deposition exhibits (CX-0001500-CX-0001825) and the series of agreements dated January 3, 2004 and executed by and between Elite Enterprises, Inc. and Creative Coatings, Inc. (CX-0001826-CX-0001829) is further illustrated by the fact that counsel for Complainant received these documents as enclosures to a letter dated February 24, 2010. Complainant received the responses from K-Com Transportation Services, Inc. (CX-0001997-CX-0002052) and Systech Environmental Corporation (CX-0002057-CX-0002065) with letters dated March 5 and March 8, 2010, respectively. Thus, Complainant’s submission of these documents is likewise prompt.

complete email chain Complainant submits as Exhibit 148 (CX-0000631a-CX-0000631g) to the First Supplemental Prehearing Exchange, this email chain is relevant to, among other allegations, Mr. Geist's control and day-to-day involvement with Elite and/or Creative.

The complete transcripts of the depositions of Mr. Geist (Exhibits 149-50; CX-0001500-CX-0001825) include sworn testimony related to the assets of Elite, the overlapping operations of Elite and Creative, and Mr. Geist's control over the operations of both Elite and Creative during the time period relevant to these matters. In addition, Creative and Mr. Geist have listed putative expert witnesses in their prehearing exchange that may be offered to testify on, *inter alia*, Creative and Mr. Geist's alleged "following of corporate formalities." (Respondents' Prehearing Exchange pp. 2-3). Mr. Geist's prior, sworn deposition testimony regarding Elite and Creative's operations, and his control of the same during the relevant time period, are directly relevant to whether Elite and Creative were mere alter egos of one another, or, as Creative and Mr. Geist contend, were separate corporate entities dealing at arms-length.

Similarly, the series of agreements between Creative and Elite, dated January 3, 2004 (Exhibit 151; CX-0001826-CX-0001829), relate to, among other things, whether Elite and Creative adhered to customary corporate formalities in their various transactions related to Suites 1158 and 1284. These agreements are also relevant to certain allegations in Complainant's Complaints and Creative and Mr. Geist's Answers.

With respect to the applicable versions of the RCRA Civil Penalty Policy (Exhibit 152; CX-0001830-CX-0001936) and the Penalty Matrices for the RCRA Civil Penalty

Policy (Exhibit 153; CX-0001937-CX-0001938), these documents clearly are relevant to the proposed penalties in these matters.

In addition, the printout from the Indiana Secretary of State's website showing that Randall Geist is the registered agent designated to receive service on behalf of Elite (CX-0001939-CX-0001940) is likewise relevant to the issues in these cases. As noted in this Court's October 22, 2009 Prehearing Order, Elite, despite being properly served with the complaints in these matters, has failed to answer or otherwise respond to Complainant's allegations. (10/22/09 Prehearing Order n. 1). In a similar vein, Mr. Geist, in his Answers, repeatedly has denied any knowledge of Elite's alleged operations at both Suites 1158 and 1284 and the alleged violations in these matters. (See generally Creative and Mr. Geist's Answers). Therefore, evidence that Mr. Geist currently is listed as the registered agent of Elite, an apparently viable business, is relevant to material issues in these matters.

Complainant also requests leave to supplement its prehearing exchanges to include Schedule 1.1(a) to an Asset Purchase Agreement by and among, *inter alia*, Creative Coatings, Inc., Randall Geist, as president and sole shareholder of Creative Coatings, and Creative Powder Coatings, LLC. (See Exhibit 155; CX-0001941-CX-0001945); the Articles of Incorporation of both Creative and Elite, which were filed with the Indiana Secretary of State (Exhibits 156-57; CX-0001946-CX-0001975); and certain documents, including quotations, correspondence, emails, and other documents that related to Creative's, Elite's, and Mr. Geist's operations at Suites 1158 and 1284 (Exhibit 158; CX-0001976-CX-0001996). Schedule 1.1(a) to the Asset Purchase Agreement contains a list of equipment and vehicles that were sold by Creative Coatings and Mr.

Geist to Creative Powder Coatings, LLC. Schedule 1.1(a) is relevant to, among other things, certain allegations in the Complaints and the Answers, specifically Creative and Mr. Geist's contention that they are unable to pay any penalty assessed as a result of their violations as alleged in the Complaints. Creative's and Elite's Articles of Incorporation and the documents related to Creative's, Elite's, and Mr. Geist's operations at Suites 1158 and 1284 (Exhibit 158) are relevant to, *inter alia*, Complainant's contention that Creative's and Elite's corporate veils should be pierced and Creative's contention of "corporate separateness."

Complainant also seeks to supplement its prehearing exchanges with responses it received to information requests from K-Com Transport Services, Inc. and Systech Environmental Corporation, transporters Creative and/or Elite hired to transport hazardous waste off-site from Suites 1158 and 1284. (Exhibits 159-61; CX-0001997-CX-0002065). These documents clearly are relevant to the alleged violations and Creative and Mr. Geist's defenses.

Finally, all of the additional exhibits included in Complainant's First Supplemental Prehearing Exchange may also be used in the examination of one or more of the parties' witnesses, and may be relevant to the credibility of such witnesses. See United States v. Abel, 469 U.S. 49, 52, 105 S. Ct. 465, 83 L. Ed. 2d 450 (1984) (stating that "a finder of fact and weigher of credibility [] has historically been entitled to assess all evidence which might bear on the accuracy and truth of a witness' testimony").

In sum, the additional exhibits are relevant and material to Respondents' liability for the violations alleged in the Complaints, the validity of Respondents' defenses, the

examinations of the witnesses identified by the parties, and the proposed penalties in these matters.

C. Absence of Prejudice to Respondents

Allowing Complainant to supplement its prehearing exchange to include the additional documentary evidence will not prejudice Respondents. The complete email chain, submitted herewith as Exhibit 148, include discussions of certain events that occurred at Suites 1158 and 1284 in March and April 2006 and correspondence to Elite. Respondents should be aware of the events giving rise to these discussions. The transcripts of Mr. Geist's depositions include Mr. Geist's prior, sworn testimony elicited on February 22, 2007 and February 27, 2009; consequently, Mr. Geist should be intimately familiar with and should have ready access to these transcripts. In addition, Complainant submitted excerpts from these deposition transcripts in Complainant's Rebuttal Prehearing Exchange filed on February 17, 2010. (See Complainant's Rebuttal Prehearing Exchange, Exhibits 130-31). Furthermore, the RCRA Civil Penalty Policy and Penalty Matrices for the RCRA Civil Penalty Policy are public documents available, among other places, on U.S. EPA's website.⁴ The documentary evidence of Mr. Geist's position as Elite's registered agent is likewise available to the public on the Indiana Secretary of State's website and certainly is (or at least should be) within Mr. Geist's personal knowledge.⁵ Similarly, the exhibits containing the series of agreements dated January 3, 2004 and the documents related to Creative's, Elite's, and Mr. Geist's

⁴ For the RCRA Civil Penalty Policy see <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpp2003-fnl.pdf>, and for the Penalty Matrices for the RCRA Civil Penalty Policy see <http://www.epa.gov/compliance/resources/policies/civil/rcra/rcpprevisedtables2005.pdf>.
⁵ https://secure.in.gov/sos/bus_service/online_corps/view_details_ppv.aspx.

operations at Suites 1158 and 1284 include several documents that were authored or signed by Mr. Geist and/or one or more representatives of Creative or Elite; thus, Respondents should be aware of and have many, if not all, of these documents in their possession. Finally, K-Com Transportation Services, Inc.'s and Systech Environmental Corporation's responses to U.S. EPA's information requests are submitted within days after they were received by Complainant and include documents and information that should be within the knowledge of Respondents; indeed, one or more of representatives of Creative and/or Elite signed some of these documents.

III. Conclusion

For all of the foregoing reasons, Complainant respectfully requests that this Court enter an order granting Complainant's Motion to Supplement Prehearing Exchange in its entirety and accept for filing Complainant's First Supplemental Prehearing Exchange filed contemporaneously herewith.

Respectfully submitted,



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DATE: March 19, 2010

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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's First Motion to Supplement Prehearing Exchange and the Memorandum in Support of Complainant's First Motion to Supplement Prehearing Exchange, dated March 19th, 2010, were sent this day in the following manner to the addresses listed below:

RECEIVED
MAR 19 2010

Original and One-Copy
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Copy by Pouch Mail to:

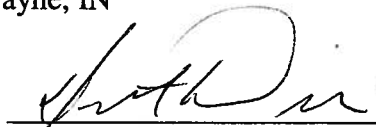
The Honorable Barbara A. Gunning
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Copy by Federal Express to:

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