

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

IN THE MATTER OF )  
)  
FRM CHEM, INC., ) DOCKET NO. FIFRA-07-2008-0035  
ADVANCED PRODUCTS TECHNOLOGY, INC., ) DOCKET NO. FIFRA-07-2008-0036  
SYNISYS, INC., ) DOCKET NO. FIFRA-07-2009-0041  
CUSTOM COMPOUNDERS, INC., ) DOCKET NO. FIFRA-07-2009-0042  
)  
RESPONDENTS. )

**CORPORATE RESPONDENTS' REPLY TO COMPLAINANT'S MOTION  
FOR ADVERSE INFERENCE AND TO EXCLUDE EVIDENCE OR, IN THE  
ALTERNATIVE, MOTION TO COMPEL AND MOTION FOR EXTENSION OF TIME**

COMENOW Respondents FRM Chem, Inc. ("FRM"), Advanced Products Technology, Inc. ("APT"), Synisys, Inc. ("SYN") and Custom Compounders, Inc. ("CCI") (collectively, "Corporate Respondents"), and for their Reply to Complainant's Motion for Adverse Inference and to Exclude Evidence or, in the Alternative, Motion to Compel and Motion for Extension of Time, state as follows:

1. Each Corporate Respondent filled out and provided Complainant with a Business Organization Ability to Pay Form in February, 2010, before this tribunal ordered any discovery.
2. Each Corporate Respondent filled out and mailed to the Internal Revenue Service Form 4506-T (Request for Transcript of Tax Return) granting Complainant's counsel access to the requested tax information (Form 1120S) for the tax years 2005 - 2009. This was done in February, 2010, at the request of Complainant before any discovery order was issued by this tribunal.
3. Each Corporate Respondent provided copies of their 2005 - 2009 tax returns to Complainant in February, 2010, before any discovery was ordered.

4. Pursuant to the Court's Order of May 27, 2010, Corporate Respondents, by letters dated July 8, 2010, July 13, 2010 and July 16, 2010, provided the following:

- Corporate Record Books of SYN;
- Corporate Record Books of APT;
- Loan documentation from Ann P. Kastendieck to APT, SYN and FRM;
- Loan documentation from Raymond E. Kastendieck to APT, SYN, FRM and CCI;
- Loan documentation from Keith G. Kastendieck to APT, SYN and FRM;
- Loan documentation from V.L. Clark Chemical Company, Inc. to SYN;
- Payments due SYN which were applied to loans from V.L. Clark Chemical Company, Inc.;
- Uncashed payroll checks of Keith G. Kastendieck;
- Uncashed payroll checks of Raymond E. Kastendieck;
- Uncashed payroll checks of Ann P. Kastendieck;
- 2005 - 2009 tax returns for Keith G. Kastendieck;
- 2005 - 2009 tax returns for Ann P. Kastendieck;

See letters to Complainant's counsel from Corporate Respondents' counsel attached hereto as Exhibits "A", "B" and "C" and incorporated by reference herein.

5. Moreover, counsel's letter of July 13, 2010 noted a response to Items 6, 11, 16 and 17. Additionally, in light of the difficulties in producing discovery which counsel and his clients were experiencing, counsel offered to produce Ms. Kastendieck for a deposition with respect to the Complainant's Information Request. See Exhibit "B".

6. Counsel and Corporate Respondents' difficulties were fourfold during this production process.

- (A) Counsel does not represent nor could he get responses from Ray Kastendieck, Karlan Kastendieck (shareholders) and/or Jim McQuie. None of these individuals work at the companies and have not done so for quite some time;
- (B) As noted in counsel's letter, the Corporate Respondents are not readily adept at keeping records in an extremely orderly fashion;
- (C) Counsel experienced the death of a dear friend; and
- (D) Counsel had to have an unanticipated MRI brain scan performed suddenly the week of July 26, 2010.

7. As stated in Complainant's Motion at Paragraph 5, Complainant agreed to an informal request made by Corporate Respondents' counsel to extend the production date for the balance of the documents to July 28, 2010. See Exhibit "D" attached hereto and incorporated by reference herein.

8. Due to the medical urgency requiring the MRI, counsel requested until August 6, 2010, to provide the additional documentation and Complainant's counsel said he could not agree and would have to file the instant motion.

9. By letter dated August 4, 2010, Corporate Respondents have delivered by overnight mail to Complainant's counsel an index of the additional documentation requested, the balance of the documents referred to in the Additional Information Request, and the Affidavit of Ann P. Kastenedieck concerning certain documents that are not in Corporate Respondents' possession or control. See Exhibit "E" attached hereto and incorporated by reference herein.

10. To the best of counsel's information and belief, Individual Respondents Keith G. Kastendieck and Karlan C. Kastendieck were just served with the First Amended Complaint within the past week. They have not yet had an opportunity to consult counsel or respond to the Complaints much less provide discovery pursuant to an Order when they were not named as a party.

11. A hearing date is presently set for September 28, 2010 and a joint set of stipulated facts is required by August 27, 2010. Complainant has had the federal corporate tax returns and the Business Financial Data Forms since they were requested in February, 2010.

12. While many of the statements made by Complainant are true, Complainant had agreed to accept the balance of Corporate Respondents' documents without involving the Court by transmittal as of July 28, 2010. In fact, these documents were transmitted on August 4, 2010 (seven days later including the weekend).<sup>1</sup>

13. Corporate Respondents disagree with the Complainant's assessment of the "complexity" of the four companies' financial status. The Business Organization Ability to Pay Claim Forms executed under oath for each company produced in February, 2010 to the EPA show large negative cash positions and very large loans from principals to the companies. The tax returns for each corporation produced in February, 2010 show in great detail large losses for virtually every year for each corporation.

The promissory notes (previously produced) verify the shareholders' loans to the companies. The uncashed payroll checks to principals verify the promissory notes, etc.

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<sup>1</sup> The reference to August 28<sup>th</sup> in the email was in error. Respondent's counsel assumed Mr. Dudding meant July 28<sup>th</sup>.

14. The parties have the right to move to supplement their Prehearing Exchange no later than 15 days before the hearing. As presently set, any such motion would be due on September 13, 2010. This gives Complainant over a month to review the balance of discovery which should be received by Complainant by August 5, 2010.

15. While Corporate Respondents were making a good faith effort to comply with the discovery order, they were also attempting to dispose of the case by settlement. In that regard, two offers were made by the Corporate Respondents to Complainant, both of which were rejected by Complainant. These offers included legal retainer monies to be refunded to the Corporate Respondents to enable them to make the offers.

16. Corporate Respondents, while admittedly tardy with some document production, have not attempted to obfuscate the issue of inability to pay. The Financial Disclosure Forms for each corporation and the tax returns (2005 - 2009 Federal 1120S) were given to Complainant in February, 2010 and, in fact, included as exhibits in Complainant's attachments to its Motion to Amend the Complaint.

Subsequent timely disclosures by Corporate Respondents in response to the discovery order verify and corroborate the corporate tax returns previously submitted.

Complainant will have had seven months to review five years of corporate returns for the four corporations.

17. The opinions and orders cited in Complainant's motion do not specifically address this issue. The Cello-Foil matter involves inadequate narrative summaries of witnesses' anticipated testimony. Moreover, Cello-Foil was to furnish supporting documentation, such as financial

statements and tax returns and allowed Cello-Foil to submit its financial situation when the hearing was set “scarcely more than two weeks away.”

18. The Harrisburg Hospital order references an objection by EPA to a Federal Tax Return which complainant was not provided a copy of. The order states that the respondent will not be allowed to introduce the tax return into evidence if it does not timely provide it to EPA in advance of the hearing.

19. Corporate Respondents’ Prehearing Exchange was filed February 25, 2010 and listed Ann P. Kastendieck as a witness. It clearly stated Ms. Kastendieck would testify concerning the financial condition of the Respondents as it relates to the proposed penalty. The index to Respondents’ Prehearing Exchange (Items 27 - 48) provided 20 tax returns and two summaries of these returns both by year and by company.

20. Allowing an adverse inference under these circumstances would not be warranted. Also excluding this testimony and documentation would be highly prejudicial to Corporate Respondents when they have demonstrated a good faith effort to comply with the discovery order under some difficult circumstances.

21. Corporate Respondents do not believe Complainant will be prejudiced as a result of this late discovery production as to the items ordered and recently produced. Nevertheless, they have no objection to Complainant’s Motion for an Extension of Time to review the new evidence or the opportunity to name an expert.

Corporate Respondents believe they have, as of August 4, 2010, fully complied with the discovery order. See Index of Documents which is attached hereto as Exhibit “F” and incorporated by reference herein. See also Exhibit “E”, Affidavit of Ann P. Kastendieck.

Again, Corporate Respondents also offered to make Ann P. Kastendieck available for her deposition on financial matters. This offer was made during the period of time ordered by this tribunal for discovery and even though she is not a party to this action.

22. Finally, Corporate Respondents note that Complainant's Motion refers to the fact that Individual Respondents Keith G. Kastendieck and Karlan C. Kastendieck had not filed answers as of July 16, 2010. To update the Court in this regard, it is Corporate Respondents' counsel's best information that these Individual Respondents were served with the Complaints on or about July 29, 2010 and August 2, 2010 respectively. They have contacted undersigned counsel to represent them, but the possibility of a conflict of interest would have to be resolved before this representation could occur. Also, both individuals have been advised that they should seek independent legal advice in this regard.

WHEREFORE, Corporate Respondents respectfully request that this Court deny Complainant's Motion for an adverse inference and to exclude evidence. Moreover, Corporate Respondents believe that no Order compelling discovery is necessary since it has now been accomplished and Corporate Respondents do not object to an extension of time for Complainant to act as it requests in the last paragraph of Page 8 of its Motion.

Respectfully submitted,

JENKINS & KLING, P.C.

By: \_\_\_\_\_

Ronald E. Jenkins, #23850  
Sarah J. Swoboda, #56769  
10 S. Brentwood Blvd., Ste. 200  
St. Louis, MO 63105  
(314) 721-2525 ph.  
(314) 721-5525 fax  
[rjenkins@jenkinsklings.com](mailto:rjenkins@jenkinsklings.com)  
[sswoboda@jenkinsklings.com](mailto:sswoboda@jenkinsklings.com)

Attorneys for Respondents

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a copy of the foregoing was served via Federal Express upon:

Sybil Anderson  
Headquarters Hearing Clerk  
U.S. Environmental Protection Agency  
1099 14<sup>th</sup> Street NW  
Suite 350, Franklin Court  
Washington, DC 20005

Honorable Barbara A. Gunning  
Office of Administrative Law Judges  
U.S. Environmental Protection Agency  
1099 14<sup>th</sup> Street NW  
Washington, DC 20005

Kathy Robinson  
Regional Hearing Clerk  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

Chris R. Dudding  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

this 4<sup>th</sup> day of August, 2010.





**JENKINS & KLING, P.C.**  
ATTORNEYS AT LAW

COPY

Ronald E. Jenkins  
Email - rjenkins@jenkinskling.com

Admitted to Practice in  
Missouri and Illinois

July 8, 2010

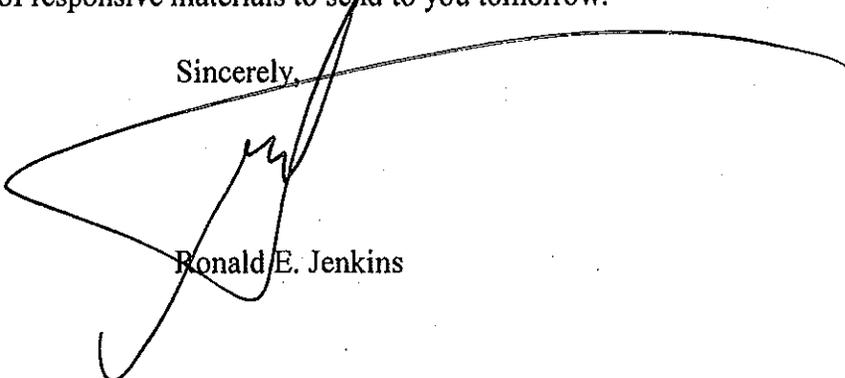
Chris R. Dudding  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

Re: Requested Discovery

Dear Chris:

Enclosed is the first installment of the discovery you requested. I hope to have a significant additional package of responsive materials to send to you tomorrow.

Sincerely,

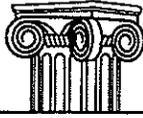


Ronald E. Jenkins

REJ/vhs

EXHIBIT A





JENKINS & KLING, P.C.  
ATTORNEYS AT LAW

COPY

Ronald E. Jenkins  
Email - rjenkins@jenkinskling.com

Admitted to Practice in  
Missouri and Illinois

July 13, 2010

Chris R. Dudding  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

Re: Requested Discovery

Dear Chris:

I enclose the following in response to your request for discovery:

- 1) Loans from Ann P. Kastendieck to APT, SYN and FRM during the relevant period;
- 2) Loans from Raymond E. Kastendieck to APT, SYN, FRM and CCI during the relevant period;
- 3) Loans from Keith G. Kastendieck to APT, SYN and FRM during the relevant period; and
- 4) Loans from V. L. Clark to SYN during the relevant period.

You already have the corporate returns that were requested. I will send you Keith and Ann's personal returns as soon as possible. I do not represent the individuals and have very little, if any, contact with Ray or Karlan Kastendieck.

My clients can not locate the corporate books for CCI and FRM. They were prepared by the same law firm as SYN and APT so they would be virtually identical.

As you might imagine, these clients do not keep the best corporate records.

In response to Item 6, all equipment for all corporations is fully depreciated and has been for over 10 years.

In response to Item 11, there are no loans by any of the corporations to any shareholders, directors or officers.

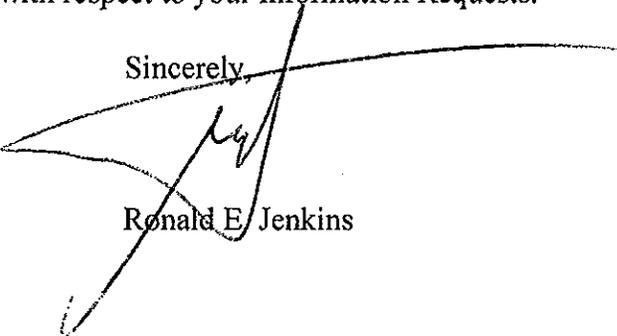
EXHIBIT B

Chris R. Dudding  
July 13, 2010  
Page 2

In response to Item 17, SYN manufactures for CCI and APT. There are thousands of invoices from SYN to CCI and APT (as many as 3 or 4 a day). These are all small and you are welcome to look at them. Copying them would mean shutting the doors of the existing business.

The answer to number 16 is Ann P. Kastendieck. In lieu of your requests for discovery and my clients' inability to produce some of these documents, I would agree if you would like to take Ms. Kastendieck's deposition with respect to your Information Requests.

Sincerely,



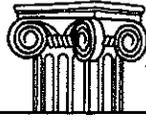
Ronald E. Jenkins

REJ/dmb  
Enclosures

1

2

3



**JENKINS & KLING, P.C.**  
ATTORNEYS AT LAW

COPY

Ronald E. Jenkins  
Email - rjenkins@jenkinskling.com

Admitted to Practice in  
Missouri and Illinois

July 16, 2010

Chris R. Dudding  
Assistant Regional Counsel  
EPA - Region 7  
901 North 5<sup>th</sup> Street  
Kansas City, KS 66101

Re: Requested Discovery

Dear Chris:

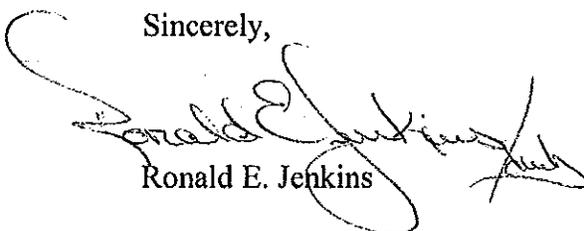
Enclosed please find the third "installment" of my clients' production. I apologize for the piecemeal and tardy production. I am doing everything I can to get you everything I can as quickly as I can. It is not easy.

The enclosed documents are:

1. Payments due Synisys which were applied to loans from VL Clark;
2. Keith Kastendieck's uncashed payroll checks;
3. Ray Kastendieck's uncashed payroll checks;
4. Ann Kastendieck's uncashed payroll checks;
5. Keith Kastendieck's tax returns for 2005 - 2009; and
6. Ann Kastendieck's tax returns for 2005 - 2009.

As I said in my email to you, I had a dear friend die last night. He will be buried with full military honors on Monday. I am a pall bearer. Let's talk Wednesday at 10:00 a.m. about discovery, answers, who I represent, and do our best to settle this case.

Sincerely,

  
Ronald E. Jenkins

REJ/dmb  
Enclosures

EXHIBIT C



## Ron Jenkins

---

**From:** Dudding.Chris@epamail.epa.gov  
**Sent:** Wednesday, July 21, 2010 4:01 PM  
**To:** Ron Jenkins  
**Subject:** RE: Discovery response in FRM, et al.

Ron,

Per our phone conversation today, I'll expect the remainder of the discovery materials pursuant to the order by a week from today, August 28, and I understand that you will also be filing answers to the amended complaints by that date.

Also, you said that you would talk with Keith Kastendieck and confirm for me whether he has accepted service of the Complaints in these matters. Since you are not representing him personally, you may suggest that he send me a written note stating that he has received the four amended Complaints in lieu of us sending a process server to serve him in person.

Best regards,

Chris R. Dudding  
Attorney  
Office of Regional Counsel  
U.S. Environmental Protection Agency, Region VII  
901 North 5th Street  
Kansas City, Kansas 66101  
913-551-7524  
Facsimile 913-551-9524 or 7925  
[dudding.chris@epa.gov](mailto:dudding.chris@epa.gov)

EXHIBIT D



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
FRM CHEM, INC.,	)	DOCKET NO. FIFRA-07-2008-0035
ADVANCED PRODUCTS TECHNOLOGY, INC.,	)	DOCKET NO. FIFRA-07-2008-0036
SYNISYS, INC.,	)	DOCKET NO. FIFRA-07-2009-0041
CUSTOM COMPOUNDERS, INC.,	)	DOCKET NO. FIFRA-07-2009-0042
	)	
RESPONDENTS.	)	

AFFIDAVIT OF ANN P. KASTENDIECK

COMES NOW Ann P. Kastendieck, Affiant herein and, being duly sworn, upon her oath, states as follows:

1. I am of sound mind, am over the age of eighteen (18) years and otherwise competent to make this Affidavit.
2. I have personal knowledge of the facts herein stated.
3. I am the corporate secretary for FRM Chem, Inc., Advanced Products Technology, Inc., Synisys, Inc. and Custom Compounders, Inc. which are the corporate respondents in this case.
4. As requested in Paragraph 16 of Complainant's Additional Information Request, the companies have produced everything in their possession responsive to the requests to the best of my information, knowledge and belief.
5. Custom Compounders, Inc. was incorporated in Georgia by an attorney by the name of Robert S. Sichel. Mr. Sichel's office was at 5491 Roswell Road, Suite 200, Atlanta, Georgia 30342. We do not have any copies or originals of any of these corporate documents. To the best of my knowledge, these documents were always retained by Mr. Sichel.

EXHIBIT E

6. The business of V.L. Clark Chemical Company, Inc. and Chemicals, Pharmaceuticals, and Intermediates, Inc. has nothing to do with any of the four corporate respondents in this case. I am the registered agent for these companies. My brother Keith and I own stock in V.L. Clark Chemical Company, Inc. We do not own stock in Chemicals, Pharmaceuticals, and Intermediates, Inc.

The corporate records of these two companies are under the care, custody and control of Jim McQuie, who resides in the 1300 block of Grandview in Kirkwood, Missouri.

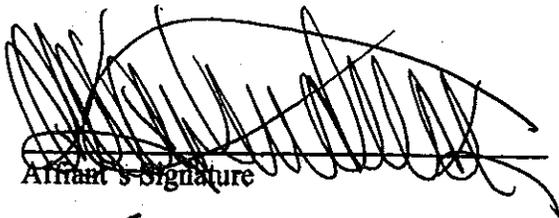
7. We do not retain any copies of our corporate state tax returns. These are one page informational returns for S corporations. No financial data is included in these returns.

8. My father, Ray Kastendieck, is a shareholder in the corporate respondents in this case. His percentage ownership is listed on the tax returns previously provided. My father is 87 years old. My father is physically and mentally infirm. He lost his wife in January, 2010.

He lives on his social security benefits. To the best of my knowledge, his only assets are his home which has a value of approximately \$175,000, and his automobile which is a 2001 Ford Focus.

9. We have previously provided documentation requested on three (3) occasions. The documents which are provided today are the remainder of the documents we have been able to locate which are responsive to the Additional Information Request.

FURTHER, AFFIANT SAYETH NAUGHT.

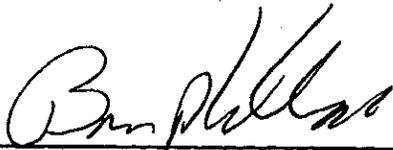
  
Affiant's Signature

Title: SECRETARY

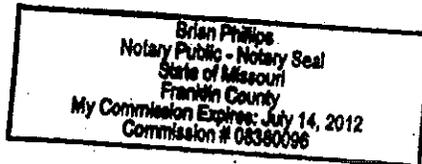
STATE OF MISSOURI )  
COUNTY OF FRANKLIN ) SS

On this 3<sup>rd</sup> day of August, 2010, before me, Brian Phillips, a Notary Public in and for said state, personally appeared Ann P. Kastendieck, whose title is SECRETARY of APT, known to me to be the person who executed the foregoing document and acknowledge to me that she executed the same for the purposes therein stated.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed my official seal in the County and State aforesaid, the day and year first written above.

  
\_\_\_\_\_  
Notary Public

My Commission Expires:





## DISCOVERY EXHIBIT INDEX

1. Stock Certificates & Corporate Records:
  - A. Corporate Records for FRM CHEM, INC.
  - B. Stock Certificates for FRM CHEM, INC.
  - C. Stock Certificates for FRM CHEM, INC. (Class A)
  - D. Stock Certificates for FRM CHEM, INC. (Class B)
2. Pool Solutions Midwest, Inc. Company Book (Exhibits A - G)
3. Industrial Specialties, Inc. (ISI) Company Book (Exhibits A - G)
4. Klark Holdings, LLC Company Book (Exhibits A - G)
5. Pool Solutions Midwest, Inc. (2005 - 2009) Federal Returns
6. Industrial Specialties, Inc. (ISI) (2005 - 2009) Federal Returns
7. Klark, LLC (2005 - 2009) Federal Returns
8. Synisys Depreciation Register (fully depreciated as of 12/31/05)
9. Advanced Products Tech (APT) Depreciation Register (fully depreciated as of 12/31/05)
10. Industrial Specialties, Inc. (ISI) Depreciation Register (fully depreciated as of 12/31/05)
11. Klark, LLC Depreciation Register (fully depreciated as of 2005 - 2009)
12. Advanced Products Tech (APT) Statement of Assets & Liabilities (2005, 2006, 2008 and 2009)  
\* Refer to schedule "L" Tax Return for 2007
13. Custom Compounders, Inc. Statement of Assets & Liabilities (2005 - 2009)
14. Pool Solutions Midwest Inc. Statement of Assets & Liabilities (2005, 2006, 2008 and 2009)  
\* Refer to schedule "L" Tax Return for 2007
15. FRM CHEM INC Statement of Assets & Liabilities (2005 - 2009)
16. Klark, LLC Statement of Assets & Liabilities (2005 - 2009)
17. Financial Data Request Forms:
  - A. Keith G. Kastendiek's Financial Data Request Form
  - B. Ann P. Kastendiek's Financial Data Request Form
18. State Tax Returns for 2004 - 2008:
  - A. Keith G. Kastendiek's State Tax Return (2004 - 2008)
  - B. Ann P. Kastendiek's State Tax Return (2004 - 2008)
19. Federal Tax Returns for 2004:
  - A. Keith G. Kastendiek's Federal Tax Return (2004)
  - B. Ann P. Kastendiek's Federal Tax Return (2004)

EXHIBIT F