

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 7  
901 NORTH 5<sup>th</sup> STREET  
KANSAS CITY, KANSAS 66101

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ENVIRONMENTAL PROTECTION  
AGENCY-REGION VII  
REGIONAL HEARING CLERK

BEFORE THE ADMINISTRATOR

IN THE MATTERS OF )  
)  
FRM Chem, Inc., *et al.* ) Docket Nos. FIFRA-07-2008-0035  
Advanced Products Technology, Inc., *et al.* ) FIFRA-07-2008-0036  
Synisys, Inc., *et al.* ) FIFRA-07-2009-0041  
Custom Compounders, Inc., *et al.* ) FIFRA-07-2009-0042  
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Respondents )

RESPONSE TO 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  
BY  
COMPLAINANT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Complainant, United States Environmental Protection Agency, Region 7 ("Complainant" or "EPA"), hereby responds to the Reply filed on or about August 5, 2010 by Respondents FRM Chem, Inc., Advanced Products Technology, Inc., Synisys, Inc, and Custom Compounders, Inc. (Collectively, "Corporate Respondents").

As Complainant notes in its Motion under consideration, the Court granted discovery pursuant to Rule 22.19(e) of the Consolidated Rules (CROP) by Order issued May 27, 2010. That Order granted 45 days in which to complete discovery, which period ended on July 12, 2010. For ease of reference, Complainant will respond to Corporate Respondents' Reply to its Motion *seriatim*, as follows:

1. As noted in Complainant's Memorandum in Support of its motion for discovery, filed May 15, 2010, it was in part apparent discrepancies between the information in the Business Organization Ability to Pay Forms and other financial and business information pertaining to Corporate Respondents in Complainant's possession that gave rise to the Motion for 22.19(e) discovery that resulted in the Court's May 27, 2010 Order.

2. As noted in Complainant's Memorandum in Support of its motion for discovery, filed May 15, 2010, it was in part the apparent discrepancies between the tax returns provided and other financial and business information pertaining to Corporate Respondents in Complainant's possession that gave rise to the Motion for 22.19(e) discovery that resulted in the Court's May 27, 2010 Order.

3. See Paragraph 2 above.

4. As noted in Complainant's July 30, 2010, Motion currently under consideration:  
*As of July 30, 2010, 64 days after the discovery Order, Respondents have failed to provide the required information for Karlan C. Kastendieck; Industrial Specialties, Inc.; V.L. Clark Chemical Company, Inc.; Chemicals, Pharmaceuticals, and Intermediates, Inc.; Pool Solutions Midwest, Inc; or KLARK Holdings, LLC. As to Keith Kastendieck, Respondents have not provided the state income tax returns for January 2003 through present, the Federal income tax returns for 2003 or 2004, or the completed Financial Data Request Form. Preliminary review of the information submitted for the four named corporate Respondents indicates that it is incomplete, in that it lacks at a minimum the required Federal and state tax returns from 1997 through present, complete year-end financial statements from 1997 through present, and required corporate information for Respondents FRM Chem, Inc. and Custom Compounds,*

*Inc. Since Respondents have yet to complete the discovery response, and since what has been submitted has been done so in piecemeal fashion, Complainant has not conducted an in-depth review of the material submitted to date.*

5. Complainant notes that the offer to produce Ms. Kastendieck for deposition was conveyed in conjunction with a late, piecemeal, and incomplete submission of the required information, received by Complainant on or after July 14, 2010, after the July 12, 2010 date the complete discovery submission was due.

6. In their Reply, Corporate Respondents allude several times to “difficulties in producing discovery,” and, in Paragraph 6, list four instances of such alleged difficulties, which Complainant will address *seriatim*:

- a. “Counsel does not represent [...] Karlan Kastendieck” As noted in Complainant’s Memorandum in Support of its motion for discovery, filed May 15, 2010, and supported by documentation attached thereto, Raymond, Ann, Keith, and Karlan Kastendieck are the principal stockholders, corporate officers, and members of the board of directors of the four Corporate Respondents. As such, Complainant submits that it is irrelevant that Counsel for the Corporate Respondents does not represent Karlan Kastendieck in his personal capacity.
- b. “Corporate Respondents are not readily adept at keeping records” As Complainant notes that Section 22.19(e)(ii) of the CROP recognizes that the sorts of records that may be sought in discovery under this rule are those that are “most reasonably obtained from the non-moving party.” Complainant submits that Corporate Respondents’ alleged poor recordkeeping practices does not excuse

them from their responsibility to comply with the Court's May 27, 2010 order requiring the production of documents by July 12, 2010. Indeed, as evidenced by the Corporate Respondents' swift, albeit incomplete, response to Complainant's Motion for Adverse inference filed July 30, 2010, resulting in a fourth package of documents delivered to Complainant on August 5, 2010, Complainant submits that the Corporate Respondents are able to overcome their alleged poor recordkeeping practices when necessary.

- c. "Counsel experienced the death of a dear friend" According to email received by Complainant from counsel for Corporate Respondents, the friend's death occurred the evening of July 15, 2010. While Complainant sought to accommodate counsel's limited availability during the bereavement period, including counsel's pallbearer duties on July 19, 2010, Complainant submits that the passing of counsel's friend on or about July 15, 2010, does not constitute good cause for Corporate Respondents' failure to comply with discovery due July 12, 2010.
- d. "Counsel had to have an unanticipated MRI brain scan [...] the week of July 26" The May 27, 2010 Order specified the documents were due 45 days from the date of the Order, which date is July 12, 2010. Complainant submits that medical issues affecting counsel for Corporate Respondents the week of July 26, 2010 does not constitute good cause for Corporate Respondents' failure to meet the Court's deadline that had passed two weeks prior to that date.

7. In a telephone conversation on Wednesday, July 21, counsel for Corporate Respondents cited difficulties with his clients, and stated that he could get the remainder of the

required discovery to Complainant and would file answers out of time to the several amended complaints by the following Wednesday, July 28. In the interest of being accommodating, Complainant agreed to hold off filing any requesting assistance of the Court to compel production of the documents until that date. On Wednesday, July 28, Complainant received an email requesting yet another week's delay. Complainant accordingly filed the Motion currently under consideration on July 30, 2010.

8. Correct. Moreover, Complainant submits that, if counsel for the Corporate Respondents desired an extension of time in which to file the discovery response, his petition should have been directed to the Court, prior to the July 12, 2010 date on which discovery was to have been completed.

9. Complainant received a package from Corporate Respondents purporting to be the required discovery materials on Thursday, July 5, 2010. Since Complainant's financial expert has not yet had an opportunity to peruse the materials, Complainant has yet not assessed the contents of the submittal. However, as evidenced by counsel for the Corporate Respondents' letter and by affidavit of Ann Kastendick attached thereto, the submittal appears to lack the information required by the Order to be submitted by the two companies V.L. Clark Chemical Company, Inc. and Chemicals, Pharmaceuticals, and Intermediates, Inc., and the information required to be submitted by corporate officer/shareholder/director Karlan Kastendieck.

10. The date service was completed on the individual respondents in this matter is irrelevant to Corporate Respondents' responsibility to comply with the Court's May 27, 2010 discovery Order.

11. See Paragraphs 1-3 above. Furthermore, the Order requires the submittal of corporate tax returns for 9 companies for 2003-present. The tax returns supplied to Complainant prior to Complainant's March 15, 2010 motion for discovery covered only the previous 5 years, and also only addressed the 4 Corporate Respondents. As the Court stated in the May 27, 2010, Order granting 22.19(e) discovery, "Complainant must be allowed broader latitude for discovery, such as it requests in its Motion."

12. See Paragraph 7 above.

13. Complainant recognizes that the Corporate Respondents disagree with Complainant's assessment of the Corporate Respondents' financial status. Complainant's position is explained at some length in Complainant's memorandum in support of its discovery motion, filed on March 15, 2010.

14. Complainant recognizes its right to supplement its Prehearing Exchange, in accordance with the CROP. However, such right does not excuse Corporate Respondents from timely compliance with the Court's May 27, 2010 discovery Order.

15. Complainant disagrees that the Corporate Respondents have shown a "good faith effort" to comply with the discovery Order. Complaint further submits that settlement talks between the parties are irrelevant to Corporate Respondents' responsibility to timely comply with the Court's May 27, 2010, discovery Order. Furthermore, Complainant requests that all discussion in Respondent's Reply referring to statements made during settlement conferences and/or referring to the substance of the parties' settlement discussions be stricken from the record, consistent with Section 22.22(a) of the CROP.

16. Complainant agrees that the Corporate Respondents have consistently claimed inability to pay the penalty. However, as the Court notes in its May 27, 2010, discovery order, citing *In re New Waterbury, Ltd.*, “in any case when ability to pay is put in issue, the Region [Complainant] must be given access to the respondent’s financial records before the start of such hearing.” Complainant submits that timely compliance with the Court’s discovery order is needed in order for it to have adequate opportunity to review in full the information sought, particularly given the complex and confusing nature of the information. Complainant also recognizes, as it did in Paragraphs 1-3 above, that it had access to several of the Corporate Respondents’ tax returns and also the Corporate Respondents’ Financial Disclosure prior to making its discovery motion, and, as noted in its memorandum in support of that motion, it was in part discrepancies between those documents and other available information that gave rise to the discovery motion granted by the Court in its Order of May 27, 2010.

17. Complainant cited In the Matter of Cello-Foil Products, 1998 EPA App. Lexis 23, for the proposition that the purpose for the requirement that, in any case where ability to pay is put in issue, the Complainant must be given access to the respondent’s financial records before the start of such hearing, is to prevent surprises to the Complainant, to permit adequate preparation for hearing, and to reduce inefficiencies during the hearing. This is a near verbatim restatement of the Presiding Officer’s language in that matter, in which he stated that “[t]he purpose of the requirement for a narrative summary is to prevent surprises to the parties, to permit adequate preparation for the hearing and to reduce inefficiencies during the hearing. The truth is better served if both sides understand their opponent's evidence and theories.”

18. Complainant cited the Harrisburg Hospital matter for the rule that a Respondent will be precluded from offering into evidence at hearing any exhibits which it does not timely provide to EPA prior to hearing. In the motion currently before the Court, Complainant submits that Corporate Respondents' failure to comply in timely and comprehensive fashion with the submittal of the information as required by the Court's Order of May 27, 2010, should preclude Corporate Respondents from introducing said information at hearing in support of a claim of inability to pay the penalty.

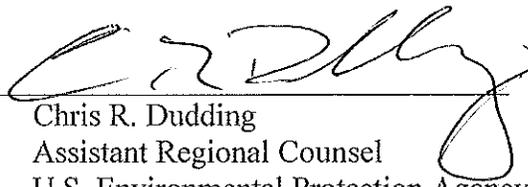
19. Complainant admits that Corporate Respondents filed a Prehearing Exchange in February of 2010 and list therein Ann P. Kastendieck as a witness, but submits that this contention is irrelevant to Corporate Respondents' responsibility to comply with the Court's Order of May 27, 2010. Furthermore, as referenced in Paragraphs 1-3 above, Complainant took into consideration the tax returns and financial information provided by the Corporate Respondents in their Prehearing Exchange in the Memorandum in Support of its motion for discovery. Moreover, Complainant recognizes in its Motion that it is in possession of several of the required tax returns, but, as referenced in Paragraph 4 above (quoting from the Motion under consideration). Corporate Respondents have failed to timely supply a significant amount of the ordered discovery.

20. Complainant disagrees that Corporate Respondents have demonstrated a good faith effort to comply with the discovery order, and, as noted in Paragraph 6 above, disagrees that the "difficult circumstances" cited by Corporate Respondents constitute good cause for failure to comply with the discovery order.

21. As argued in its Motion for Adverse Inference, filed July 30, 2010, Complainant disagrees with Corporate Respondents' position that the late and incomplete discovery production will not prejudice Complainant. Furthermore, as noted in Paragraph 9 above, as of today, August 6, 2010, Complainant has yet not assessed the contents of the latest piecemeal and overdue submittal by Corporate Respondents, received yesterday, August 5, 2010. However, as evidenced by counsel for the Corporate Respondents' letter and by affidavit of Ann Kastendick attached thereto, the submittal appears to lack the information required by the Order to be submitted by the two companies V.L. Clark Chemical Company, Inc. and Chemicals, Pharmaceuticals, and Intermediates, Inc., and the information required to be submitted by corporate officer/shareholder/director Karlan Kastendieck.

22. Complainant submits that the status of the individual respondents Keith and Karlan Kastendieck is irrelevant to Corporate Respondents' obligation to comply with the Court's Order of May 27, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on this 6<sup>th</sup> day of Aug, 2010, I hand-delivered the original and one true copy of this Motion to the Regional Hearing Clerk, and sent one true and correct copy:

via UPS, to:

Ronald E. Jenkins  
Jenkins & Kling, PC  
10 S. Brentwood Blvd., Ste. 200  
St. Louis, MO 63105

via First Class ~~and Certified Mail~~ CRD

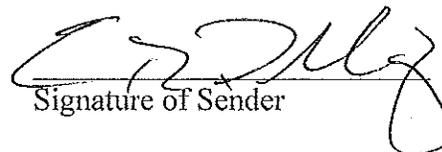
Keith Kastendieck  
P.O. Box 1656  
Washington, MO 63090

Karlan Kastendieck  
3636 Chervil Drive  
St. Charles, MO 63303

via UPS, to:

Judge Barbara Gunning  
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Office of Administrative Law Judges  
1099 14<sup>th</sup> Street, Suite 350  
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Signature of Sender