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

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)

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 moves this Court to grant Complainant’s Motion to recognize the failure by Respondents to produce in full the financial information that they were ordered to submit by the Court’s May 27, 2010 Order on Complainant’s Motion for Other Discovery Pursuant to 40 C.F.R. § 22.19(e) and to infer that the information withheld would be adverse to Respondents’ claims of inability to pay the penalties proposed in the above-captioned actions, and to exclude as evidence from any hearing in this matter any and all documents, exhibits and testimony relating to the financial condition of the Respondents offered by Respondents to support any claim, or potential claim, on the part of Respondents FRM Chem, Inc., Advanced Products

Technology, Inc., Synisys, Inc., and/or Custom Compounders, Inc., of their inability to pay the proposed penalties or that the proposed penalty will have an adverse effect on their ability to continue in business. As grounds for this motion, Complainant refers to Section 22.19(g) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, which provides that “[w]here a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in [her] discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence....”

In the alternative, Complainant moves: to compel immediate production of all relevant financial records required to have been provided by Respondents to Complainant pursuant to the Court’s May 27, 2010 Order; for an extension of time to allow Complainant to review such submissions and procure the services of an expert witness to analyze such submissions; for permission to supplement Complainant’s Prehearing Exchange accordingly; and for such other relief as this Court deems just and proper.

In support of these motions, Complainant states as follows:

1. By Order dated May 27, 2010, the Court granted in part Complainant’s Motion for Other Discovery pursuant to 40 C.F.R. § 22.19(e), directing Respondents to provide a broad range of financial documents pertaining to the four named corporate Respondents, and to five other companies run by the same principals and operating out of the same location as the named corporate Respondents – Industrial Specialties, Inc.; V.L. Clark Chemical Company, Inc.; Chemicals, Pharmaceuticals, and Intermediates, Inc.; Pool Solutions Midwest, Inc; and

KLARK Holdings, LLC. In addition, with respect to Keith G. Kastendieck and Karlan C. Kastendieck, two corporate shareholders of the four corporate Respondents (and whom are named as individual Respondents in each of the above-captioned matters), Respondents were ordered to provide the complete Federal and state income tax returns for January 2003 through present, and completed Financial Data Request forms, including data for January 2003 through present, which forms were included with the discovery motion served on Respondents.

2. On July 12, 2010, the date by which the discovery materials were due, Complaint received an envelope containing two documents, styled the "Advanced Products Technology, Inc. Corporate Book" and the "Synisys, Inc. Corporate Book," accompanied by a cover letter from Respondents' counsel¹ dated July 8, 2010, stating "I hope to have a significant additional package of responsive materials to send to you tomorrow." These two documents appear to contain the articles of incorporation and bylaws of those two entities.
3. On or about July 16, 2010, Complainant received a second envelope containing four stacks of promissory notes detailing loans made by several corporate shareholders and by the corporation V.L. Clark Chemical Co., Inc., to the four named corporate Respondents.

¹ By email dated July 16, 2010, Ronald E. Jenkins, counsel of record for the four corporate respondents, informed Complainant that he had not been hired to represent the two individual defendant corporate officers, Keith G. Kastendieck and Karlan C. Kastendieck. Those individuals have not yet filed answers to the amended Complaints.

4. On or about July 19, 2010, Complainant received a third envelope containing copies of payroll checks for Keith, Raymond, and Ann Kastendieck, a list of payments due Synisys, Inc. that were applied to loans from V.L. Clark, Inc., and the 2005-2009 Federal tax returns for Keith and Ann Kastendieck.
5. In a telephone call on Wednesday, July 21, 2010, counsel for the corporate Respondents stated that the remaining discovery information would be provided by the following Wednesday, July 28, 2010.
6. On Wednesday, July 28, 2010, counsel for the corporate Respondents informed Complainant by email that he did not yet have the discovery information, and stated that he would need until the following Friday, August 6, to produce the balance of the documents required pursuant to the discovery Order.
7. Pursuant to the Court's May 27, 2010, Order, Respondents were to provide the information requested by Complainant "as to Keith G. Kastendieck and Karlan C. Kastendieck for the items one (1) and two (2) requested for all individuals, and for the corporate respondents and the identified companies for the items 1-7, 9-11, and 14-17, inclusive," within 45 days of the Order. The 45 days expired July 12, 2010.
8. 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 Compounders, 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.

9. By Order dated May 18, 2010, the Court set a hearing date of September 28, 2010, and ordered the parties to file a joint set of stipulated facts, exhibits, and testimony on or before August 27, 2010.
10. Complainant herein asserts that, given the proximity of the scheduled hearing date and the due date for the joint set of stipulated facts, exhibits, and testimony, coupled with the complexity of issues regarding Respondents' claims of inability to pay the penalty sought, the ambiguity as to the financial status of the various Respondents and the related corporate entities, and the contested nature of Respondents' size of business, further delay in the submission of the required discovery by Respondents would greatly prejudice Complainant for the following reasons:

- a. Complainant will have insufficient opportunity to review Respondents' financial evidence in advance of hearing for accuracy, relevance and completeness;
- b. Complainant effectively will be precluded from further independent inquiry into Respondents' financial condition in advance of hearing (via further formal discovery, informal discovery or otherwise) in order to verify or refute any financial evidence and testimony put forth by Respondents;
- c. Complainant will be unable to engage its own expert witness sufficiently in advance of hearing to perform a critical analysis of Respondents' financial condition, to formulate his or her own expert opinion as to Respondents' ability to pay the proposed penalty and to continue in business thereafter, and to prepare rebuttal testimony to be presented at hearing; and
- d. Complainant will be unable to prepare adequately for the trial scheduled in September, since Complainant does not have the documents, evidence, or information in its possession, which pursuant to the Court's discovery Order, it was to have by no later than July 12, 2010.

The Environmental Appeals Board has expressly stated 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. In re New Waterbury, Ltd., TSCA Appeal No. 93-2, 5 E.A.D. 529, 542 (EAB 1994). The purpose for this requirement is to prevent surprises to the Complainant, to permit adequate preparation for hearing and to reduce inefficiencies during the hearing. In the Matter of Cello-Foll Products, 1998 EPA App. Lexis 23 (Feb. 18, 1998).

The EAB stated further in New Waterbury that the Region should "examine whether the respondent is part of a complex arrangement of interrelated small companies" and that it should "examine those corporate relationships to establish the respondent's cash flow and likely future course, including the respondent's ability to obtain resources or borrow funds from those related companies." 5 E.A.D. at 547. Given the complex nature of the relationships between the four corporate Respondents and the several related entities and individuals subject to the May 27,

2010 discovery Order, Complainant anticipates that adequate analysis of the information Respondents are required to produce will require significant time for review by a financial expert.

As noted above, Respondents did not provide the financial documents by July 12, 2010, as they were ordered to do by this Court, and, as of July 30, 2010, 64 days after the discovery Order was issued and within two months of the scheduled hearing date of September 28, 2010, Respondents have still not provided a considerable and significant portion of the ordered discovery. Since Respondents have not cooperated by timely providing the required financial documentation, Complainant does not have the requisite information to fully assess Respondents' ability to pay or size of business, or to resolve the ambiguities regarding the financial and business relationships between Respondents, their shareholders/officers, and the various other corporate and business entities operated by the same principals out of the same physical location. See Memorandum in Support of Complainant's Motion to Amend Complaints and for Other Discovery Pursuant to 40 C.F.R. § 22.19(e), filed March 15, 2010.

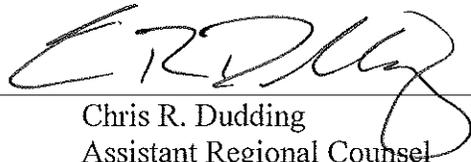
Complainant respectfully moves that this Court infer that the information withheld would be adverse to Respondents' claims of inability to pay the penalties proposed in the above-captioned actions and that the Court issue an order precluding the Respondents from introducing any evidence offered to support any claim, or potential claim, on the part of Respondents FRM Chem, Inc., Advanced Products Technology, Inc., Synisys, Inc., and/or Custom Compounders, Inc. of their inability to pay the proposed penalties or that the proposed penalties will have an adverse effect on their ability to continue in business, in accordance with 40 C.F.R. § 22.19(g)(1) and (2). Complainant further moves that the Court preclude the four corporate Respondents

from introducing the limited and incomplete financial information that they have produced in piecemeal fashion pursuant to the Court's May 27, 2010 discovery Order, on the grounds that the submission is incomplete and inadequate, and thereby fails to grant an accurate picture of the financial situation of the Respondents. See Taylor-McIlhenny Operating Co., Inc., Docket No. OPA-09-95-01 (February 18, 1997)(J.Pearlstein) (finding that Respondent will be precluded from claiming inability to pay a penalty and will be precluded from offering into evidence financial information if the Respondent fails to provide such financial information pre-hearing). See also, Harrisburg Hospital and First Capital Insulation, Inc., Docket No. CAA-III-076 (June 20, 1997) (J. Charneski) (finding that 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 alternative, Complainant moves to compel immediate production of the information required to be produced by the May 27, 2010 discovery Order and, in the event that Respondents produce such information, that Complainant be granted: a reasonable opportunity to review such new evidence; the opportunity to name an expert witness(es) who Complainant would expect to testify at hearing concerning any such financial documents submitted by, and inability to claims made on behalf of the Respondents; the opportunity to engage in such further discovery as may be necessary and appropriate in light of any such financial submission(s) and inability to pay claims made on behalf of the Respondents; for an extension of the scheduled hearing date in this matter as may be necessary to allow for the above; and, for such additional relief as this Tribunal may deem appropriate. Complainant also moves that, should the Court grant Respondents another opportunity to produce the information in full, that Respondents clearly indicate in the submitted information which numbered item in the discovery request

(items one (1) and two (2) for the individuals, and items 1 - 7, 9 - 11, and 14 - 17, inclusive, for the corporate Respondents and identified companies) each parcel of submitted information is intended to satisfy. Complainant further moves that failure to produce the required information as ordered preclude Respondents from litigating the ability to pay the proposed penalties in the above-captioned matters.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "CR Dudding", is written over a horizontal line.

Chris R. Dudding
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 7
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Kansas City, Kansas 66101
(913) 551-7524

CERTIFICATE OF SERVICE

I hereby certify that on this 30th day of July, 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:

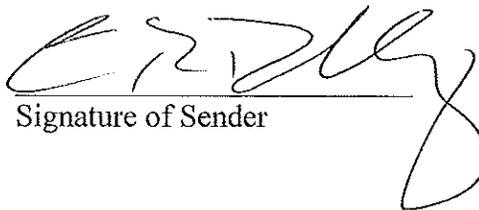
Keith Kastendieck
P.O. Box 1656
Washington, MO 63090

Karlan Kastendieck
3636 Chervil Drive
St. Charles, MO 63303

via UPS, to:

Judge Barbara Gunning
U.S. Environmental Protection Agency
Office of Administrative Law Judges
1099 14th Street, Suite 350
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Signature of Sender