

**BEFORE THE UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION III**

In the Matter of:

CHEMSOLV, INC., formerly trading as
Chemicals and Solvents, Inc.

and

AUSTIN HOLDINGS-VA, L.L.C.

Respondents,

Chemsolv, Inc.
1111 Industrial Avenue, S.E
1140 Industrial Avenue, S.E
Roanoke, Virginia 24013

Facility.

COMPLAINANT'S MOTION TO STRIKE
RESPONDENTS' INITIAL
PREHEARING EXCHANGE

EPA Docket No. RCRA-03-2011-0068

Proceeding under Section 3008(a)
of the Resource Conservation and
Recovery Act, as amended, 42 U.S.C.
Section 6928(a)

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Complainant herewith respectfully moves this Court, pursuant to 40 C.F.R. §§ 22.22(a), 22.4(c)(2), 22.4(c)(6), 22.4(c)(10), and 22.16(a), for an order partially striking Respondents' Initial Prehearing Exchange with regard to Respondents' Exhibit 20 (Bates Nos. 220 - 223), and the documents included in Respondents' prehearing exchange with the Bates Stamps Nos. CS 234 – CS 238. The basis for this Motion to Strike Respondents' Initial Prehearing Exchange is that Exhibit 20 is privileged pursuant to Federal Rule of Evidence 408, and the documents bearing Bates Nos. CS 234 - 238 were not identified as Exhibits by

Respondent as required by Court's Order dated May 31, 2011. In support of this Motion, Complainant avers as follows:

This matter was commenced by the filing of an Administrative Complaint, Compliance Order and Notice of Opportunity for a Hearing ("Complaint") on March 31, 2011. The Complaint alleges that the Respondents violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia's federally authorized hazardous waste management program. More specifically, the Complaint alleges: 1) Respondents owned and operated a hazardous waste storage facility without a permit or interim status; 2) Respondent Chemsolv failed to perform Hazardous Waste Determinations; 3) Respondent Chemsolv failed to have secondary containment for a hazardous waste storage tank; 4) Respondent Chemsolv failed to obtain a tank assessment for a hazardous waste storage tank; 5) Respondent Chemsolv failed to conduct and/or document inspection of a hazardous waste storage tank in the facility operating records; 6) Respondent Chemsolv failed to comply with Subpart CC standards for Tanks; and 7) Respondent Chemsolv failed to comply with the closure requirements for a hazardous waste tank. Respondents subsequently filed a timely Answer to the Complaint essentially denying the substantive allegations to the complaint.

Prior to the filing of the complaint, Complainant and Respondents engaged in settlement negotiations. These settlement negotiations commenced when Complainant sent a "show cause" letter to Respondents on December 23, 2008, outlining the information Complaint had obtained during its investigation of Respondents and the potential RCRA violations supported by this information. During the course of settlement negotiations, Complainant supplied information to Respondents upon the request of Respondents' counsel. In addition, Complainant also sent a revised "show cause" to Respondents' counsel as part of the settlement process. This document,

given to Respondents by Complainant during settlement negotiations. appears as Respondents' Exhibit 20 in Respondents' Pre-Hearing Exchange.

This Court issued a Prehearing Order on Jun 1, 2011. The Prehearing Order specifies the manner in which proposed exhibits are to be marked and identified:

The documents and exhibits shall be identified as "Complaint's" or "Respondents' " exhibits, as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1)

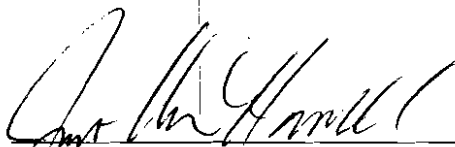
Prehearing Order at page 2, (1)(b)(footnote not included).

WHEREFORE, Complainant requests that the Court issue an Order against Respondents striking Respondents' Initial Prehearing Exchange with regard to Respondents' Exhibit 20 (Bates Nos. 220 - 223), and the documents included in Respondents' prehearing exchange with the Bates Stamps Nos. CS 234 – CS 238, impose any such further relief to which this Court determines that Complainant is entitled, via execution of the proposed Order that is annexed hereto.

Respectfully submitted,

Dated:

Sept. 23, 2011



Joyce A. Howell
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency,
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

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**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINANT'S MOTION TO
PARTIALLY STRIKE RESPONDENTS' PREHEARING EXCHANGE**

The United States Environmental Protection Agency, Region III ("Complainant"), respectfully submits this Memorandum of Law in support of its Motion for the issuance of an Order partially striking Respondents' Prehearing Exchange as to Respondents' Exhibit 20 (Bates Nos. CS 220 - 223), and the documents included in Respondents' Prehearing Exchange with the Bates Stamps Nos. CS 234 – CS 238 against Respondents, Chemsolv, Inc. and Austin Holdings-VA, L.L.C. (collectively, the "Respondents"), The basis for this Motion to Partially Strike

Respondents' Initial Prehearing Exchange is that Respondents' Exhibit 20 is privileged pursuant to Federal Rule of Evidence 408 and the documents bearing Bates Nos. CS 234 - 238 were not identified as Exhibits by Respondent as required by Courts Order dated May 31, 2011.

I. STATEMENT OF FACTS

This matter was commenced by the filing of an Administrative Complaint, Compliance Order and Notice of Opportunity for a Hearing ("Complaint") on March 31, 2011. The Complaint alleges that the Respondents violated Subtitle C of RCRA, 42 U.S.C. §§ 6921-6939e, and the Commonwealth of Virginia's federally authorized hazardous waste management program. More specifically, the Complaint alleges: 1) Respondents owned and operated a hazardous waste storage facility without a permit or interim status; 2) Respondent Chemsolv failed to perform Hazardous Waste Determinations; 3) Respondent Chemsolv failed to have secondary containment for a hazardous waste storage tank; 4) Respondent Chemsolv failed to obtain a tank assessment for a hazardous waste storage tank; 5) Respondent Chemsolv failed to conduct and/or document inspection of a hazardous waste storage tank in the facility operating records; 6) Respondent Chemsolv failed to comply with Subpart CC standards for Tanks; and 7) Respondent Chemsolv failed to comply with the closure requirements for a hazardous waste tank. Respondents subsequently filed a timely Answer to the Complaint essentially denying the substantive allegations to the complaint.

Prior to the filing of the Complaint, Complainant and Respondents engaged in settlement negotiations. These settlement negotiations commenced when Complainant sent a "show cause" letter to Respondents on December 23, 2008, outlining the information Complainant had obtained during its investigation of Respondents and the potential RCRA violations supported by

this information. A potential penalty Complainant had calculated for each violation was also included in the show cause letter. Complainant also sent a revised show cause to Respondents' counsel as part of the settlement process. This document is now appears as Respondents' Exhibit 20 in Respondents' Pre-Hearing Exchange.

This Court issued a Prehearing Order on June 1, 2011. The Prehearing Order specifies the manner in which proposed exhibits are to be marked and identified:

* * * The documents and exhibits shall be identified as "Complaint's" or "Respondents'" exhibits, as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1) * * *

Prehearing Order at page 2, (1)(b)(footnote not included). Documents included in Respondents' Pre-Hearing Exchange bearing Bates Nos. CS 234 – CS 238 do not relate to any of document titles listed in Respondents' Initial Prehearing Exchange Index.

II. ARGUMENT

A. Respondents' Exhibit 20 are excluded under the Federal Rules of Evidence

Federal Rule of Evidence 408 provides:

(a) Prohibited uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish or accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise the claim ;
and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations related to a claim by a public office or agency in the exercise of regulatory, investigative, or enforcement authority.

Permitted uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a

witness's bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution.

FRE 408.

There are no reasons that could conceivably be tagged as “permitted uses” under FRE 408 that would render Respondents’ Exhibit 20 admissible. There can be no doubt that Exhibit 20 is a settlement document and as such should be stricken from Respondents’ Pre-Hearing Exchange. In the first instance, the document itself claims the FRE 408 settlement privilege in its very heading. Moreover, the document discusses the amount of the claim, which is expressly inadmissible under FRE 408(a)([e]vidence of the following is not admissible on behalf of any party....., when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount).

The inclusion of this document in Respondents’ Prehearing Exchange crosses the line between aggressive advocacy and disregard for the rules of evidence. The document unambiguously contains settlement information as to penalty amount and the parties’ positions. It is respectfully submitted that Exhibit 20 be stricken from the Respondents’ Prehearing Exchange.

B. Respondents’ Exhibit 20 is excluded under the Consolidated Rules

Federal Rule of Evidence is expressly adopted by the Consolidated Rules, which provide in pertinent part:

(a) General. (1) The Presiding Officer shall admit all evidence which is not irrelevant, immaterial, unduly repetitious, unreliable, or of little probative value, except that evidence relating to settlement which would be excluded in the federal courts under Rule 408 of the Federal Rules of Evidence (28 U.S.C.) is not admissible.

40 C.F.R. §22.22(a).

This sentiment was echoed in *IMO Hanson Window and Construction, Inc.*, TSCA-5-

2010 (2010WL5093890) where the Court indicated a document which discusses the terms of settlement would be excluded under FRE 408. As noted above, there can be no doubt that Exhibit 20 is a document which discusses settlement and should be stricken from Respondents' Prehearing Exchange.¹

C. The documents identified with Bates Nos. CS 234 - 238 are not identified as Exhibits as required by the Court's June 1, 2011 Order.

40 C.F.R. § 22.19(a)(1) requires documents and exhibits to be marked for identification as ordered by the Presiding Officer. The Court's June 1, 2011 Order states, in pertinent part: The documents and exhibits shall be identified as "Complaint's" or "Respondents'" exhibits, as appropriate, and numbered with Arabic numerals (e.g., "Complainant's Exhibit 1). Defendants' Documents CS 234 - 238 are not marked as Exhibits, nor do these documents appear on Respondents' Prehearing Exhibit list. Accordingly, it is respectfully requested that these documents be stricken from Respondents' Prehearing Exchange.

¹ It is noted that other items and information given to Respondents during settlement negotiations are contained in Respondents' Prehearing Exchange, such as Exhibit 19. This document does not discuss terms or amounts, and as such is not part of this Motion to Strike Respondents' Prehearing Exchange.

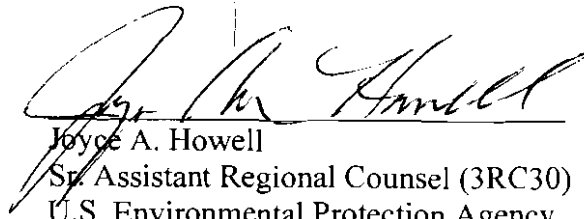
III. CONCLUSION

For the foregoing reasons, it is respectfully requested that the Court issue an Order against Respondents striking Respondents' Initial Prehearing Exchange with regard to Respondents' Exhibit 20 (Bates Nos. CS 220 - 223), and the documents included in Respondents' Prehearing Exchange with Bates Nos. CS 234 – CS 238. A proposed form of Order is enclosed.

Respectfully submitted,

Dated:

9/25/2011



Joyce A. Howell
Sr. Assistant Regional Counsel (3RC30)
U.S. Environmental Protection Agency,
Region III
1650 Arch Street
Philadelphia, PA 19103-2029

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CERTIFICATE OF SERVICE

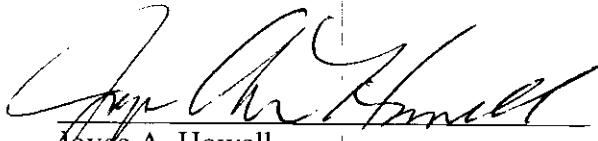
I certify that I sent by UPS, next day delivery, a copy of Complainant's Motion to Strike Respondents' Initial Prehearing Exchange to the addressees listed below. The original and one copy of the Complainant's Motion to Strike Respondents' Initial Prehearing were hand-delivered to the Regional Hearing Clerk, U.S. EPA Region III, 1650 Arch Street, Philadelphia, PA 19103-2029.

Hon. Barbara A. Gunning, A.L.J.
EPA Office of Administrative Law Judges
1099 14th Street, N.W.
Suite 350 Franklin Court
Washington, D.C. 20005

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Max Wiegard, Esq.
Gentry, Locke, Rakes & Moore
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Roanoke, VA 24011

Dated:

9/23/2011



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