



UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

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

On July 30, 2010, Complainant submitted a Motion for Adverse Inference and to Exclude Evidence or, in the Alternative, Motion to Compel and Motion for Extension of Time ("Motion"). The Corporate Respondents, FRM Chem, Inc., Advanced Products Technology, Inc., Synisys, Inc., and Custom Compounders, Inc., (collectively "Corporate Respondents") submitted a Reply to Complainant's Motion (more appropriately called a "Response") on August 4, 2010. The Response included six exhibits. Shortly thereafter, on August 6, 2010, Complainant submitted a Response to Corporate Respondents' Reply to Complainant's Motion (more appropriately called a "Reply"). On the same day, Corporate Respondents submitted a Supplemental Reply of Corporate Respondents' to Complainant's Motion (more appropriately called a "Supplemental Response"). The filings continued with Complainant's Correction to its Reply, submitted on August 6, 2010, and Corporate Respondents' Surreply to Complainant's Response Regarding Motion ("Surreply"). This, to date, marks the end of the briefing on the Motion.

In its Motion, Complainant argues that Corporate Respondents have failed to "produce in full the financial information" required by this Tribunal's Order on Complainant's Motion for Other Discovery Pursuant to 40 C.F.R. § 22.19(e)" ("May 27<sup>th</sup> Order") and seeks relief in two alternative forms, either:

1. that the undersigned "infer that the information withheld would be adverse to Respondents' claims of inability to pay" and to exclude from evidence "any and all documents,

exhibits and testimony relating to the financial condition of the Respondents" and their ability pay or the effect of the penalty on their ability to continue in business; or

2. that the undersigned "compel immediate production of all relevant financial records required" under the May 27<sup>th</sup> Order, "an extension of time to allow Complainant to review such submissions and procure the services of an expert witness," and permission to supplement its prehearing exchange accordingly.

Motion at 1-2. For the reasons outlined below, at this time Complainant's Motion for an adverse inference and exclusion of documents is **DENIED**, as is Complainant's Motion to compel immediate production and for an extension of time.<sup>1/</sup> Complainant's qualified right to supplement its prehearing exchange and name additional witnesses remains unaffected by this Order.

Complainant argues that Corporate Respondents' piecemeal and tardy production of documents to date has prevented Complainant from conducting a full assessment of the financial data and further delay would be unduly prejudicial. Motion at 7. Consequently, Complainant seeks a complete bar to Respondents' raising the claim of inability to pay, or, alternatively, requests an order compelling immediate production of the undisclosed documents.

First, I observe that it is not clear what documents or information have been produced by Corporate Respondents. In its Motion, Complainant states that it "has not conducted an in depth review of the material submitted to date." Motion at 5. Thus, Complainant does not produce a clear list of what is considered outstanding. What mention it does make of particular documents is affected by the August 4<sup>th</sup> submission by Corporate Respondents, which post-dates the original Motion.<sup>2/</sup> This Tribunal has no access to the submissions, and in any event it is not the undersigned's responsibility to determine what is

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<sup>1/</sup> This does not affect the validity and force of the existing May 27<sup>th</sup> Order for additional discovery.

<sup>2/</sup> Corporate Respondents' Surreply identifies an August 4, 2010, submission of evidence termed "the balance of this discovery." Corporate Respondents assert in their Response that they "believe they have, as of August 4, 2010, fully complied with the [May 27<sup>th</sup>] order." Response at 6.

missing. When and if it is decided what, precisely, is missing, the Rules clearly state that the ALJ may draw an adverse inference at hearing and exclude evidence. 40 C.F.R. § 22.19(g).<sup>3/</sup> In the meantime, I am unable to consider Complainant's request for an order compelling immediate production of the undisclosed documents because I do not know what documents are missing or are unavailable.

With respect to Complainant's request for a complete bar to Respondents' raising the claim of inability to pay, I find such a remedy is not appropriate. As contemplated by Complainant, this bar would apply to all evidence, in whatever form, and independent of whether it has been produced to date or not. It may be that an adverse inference is drawn if evidence at the hearing is incomplete. But this does not apply to other evidence already exchanged and timely offered.<sup>4/</sup> Simply because the evidence demanded by Complainant may not be as complete as it would prefer does not entitle it to have all evidence on an entire issue rejected in advance of hearing.

Corporate Respondents assert that "[t]he 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." Response at 5. Corporate Respondents are overly generous with their own deadlines. Specifically, the 15-day requirement imposed by Section 22.22(a)(1) "does not exempt a party from complying with a prehearing order deadline in the first instance," *In re JHNY, Inc.*, 12 E.A.D. 372, 387 (EAB 2005), nor does it override an existing Discovery Order such as the May 27<sup>th</sup> Order. Respondents are reminded that supplementing prior exchanges must be done "promptly . . . when the party learns that the . . . response

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<sup>3/</sup> Respondents are reminded that the non-producing party bears the risk that failure to timely submit responsive documents in its possession may lead to adverse consequences at hearing. Respondents are also reminded that any evidence they seek to use at hearing must be exchanged with Complainant well in advance of that hearing. 40 C.F.R. § 22.22(a)(1).

<sup>4/</sup> Under the alleged circumstances, and considering Corporate Respondents' counsel's health and the length of the remaining time before hearing, there is no demonstration of significant prejudice to Complainant from the August 4<sup>th</sup> submission.

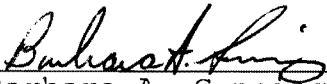
provided is incomplete, inaccurate or outdated." 40 C.F.R. § 22.19(f).<sup>5/</sup>

With respect to Complainant's request for an extension of time, it is not clear what date Complainant seeks to have extended given that the parties have been specifically advised that the hearing date cannot be moved. Complainant is, of course, free to use whatever time it requires between now and the hearing to review documents and prepare its case.

This Order does not affect Complainant's rights or duties under § 22.19(f) to supplement its prehearing exchange at a later date. Given the delays by Corporate Respondents, if Complainant needs to alter its witness list based on recently submitted evidence, Complainant will be given latitude to do so.

Finally, I note that Corporate Respondents' counsel makes it clear that he does not represent Keith and Karlan Kastendieck individually. Respondents Keith and Karlan Kastendieck are hereby advised that the May 27<sup>th</sup> Order applies equally to them and that if they fail to comply they also run the risk of an adverse inference against them as individuals.

So **ORDERED**.

  
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Barbara A. Gunning  
Administrative Law Judge

Dated: August 13, 2010  
Washington, DC


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<sup>5/</sup> Both parties are reminded that any party is prohibited from attempting to unfairly disadvantage its opponent by holding back significant information until a couple of weeks prior to the hearing, when opposing counsel may not have sufficient opportunity to review it, respond, and prepare rebuttal testimony and exhibits. See *99 Cents Only Stores*, (Order on Motions to Supplement Prehearing Exchanges) EPA Docket No. FIFRA-9-2008-0027, 2009 EPA ALJ LEXIS 9, (EPA ALJ June 18, 2009).

**In the Consolidated Matters of *FRM Chem, Inc.; Advanced Products Technology, Inc.; Synisys, Inc.; and Custom Compounders, Inc.*, Respondents.  
Docket Nos. FIFRA-07-2008-0035; FIFRA-07-2008-0036; FIFRA-07-2009-0041 & FIFRA-07-2009-0042**

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order On Complainant's Motion For Adverse Inference And To Exclude Evidence Or, In The Alternative, Motion To Compel And Motion For Extension Of Time**, dated August 13, 2010, was sent this 13<sup>th</sup> day of August 2010, in the following manner to the addressees listed below.

  
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**Dated: August 13, 2010  
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