UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:	)	
	)	
Isochem North America, LLC,	)	**Docket No. TSCA-02-2006-9143**
	)	
Respondent.	)	
	)	

ORDER DENYING RESPONDENT'S EMERGENCY MOTION TO CANCEL DEPOSITION

I. Background

By Order dated March 6, 2008 ("March 6 Order"), this Tribunal granted Complainant's motion to propound interrogatories and requests for production of documents, and to take the deposition of Daniel L. Slick, Respondent's President and Chief Executive Officer. A time period was set for taking the deposition, which was to focus on the disputed issue of whether at the relevant time Respondent owned, operated or controlled the facility located in LaPorte, Texas (the "Texas Facility") at issue in five counts of the Complaint. Thereafter, the date for the deposition was reset for April 17, 2008. On April 16, 2008, the day before the deposition was scheduled to occur, an "Emergency Motion of Respondent Isochem North America LLC, to Cancel the Deposition of Daniel M. Slick" ("Motion") was filed on grounds that the issue upon which the deposition was intended to focus had been fully addressed by Respondent and that therefore holding the deposition at this point would merely constitute Complainant engaging in an unnecessary fishing expedition. Attached to the Motion were approximately 200 pages of documents. A few hours later, Complainant submitted a Response in Opposition to the Motion ("Opposition").

II. Arguments of the Parties

Respondent argues in the Motion that, given the two Declarations of Mr. Slick provided in connection with other motions it previously filed in this proceeding, and Respondent's Responses to Interrogatories and Requests for Production submitted on April 1, 2008 ("April 1 Responses"), there is no reasonable basis for Complainant to still believe that Respondent owned, operated or controlled the Texas Facility at the relevant time. Respondent suggests that the deposition "likely is a witch hunt provoked . . . by unwarranted suspicions and irrational beliefs." Motion at 1. However, at the same time Respondent acknowledges that Complainant's belief that it owned, operated or controlled the Texas Facility is based upon two allegedly inadvertent and innocent mistakes it previously made which were: (1) Mr. Slick reporting on a "Form U" chemicals imported or manufactured at the Texas Facility and in the space marked "company name," writing the name of Respondent rather than SNPE Chemical, which it now alleges is the actual owner of the Texas Facility; and (2) that in the Answer and Amended

Answer to the Complaint filed in this matter, Respondent admitted owned, operated or controlled the Texas Facility, an admission, which Respondent asserts, was merely an editing error. The documents subsequently submitted with its April 1 Responses, Respondent claims, demonstrate "irrefutably that [it] did not own, operate and/or control the Texas Facility; that said facility was owned and/or controlled by SNPE Chemicals, Inc. and operated by The Dow Chemical Company ("Dow"); and that Isochem was a company separate and apart from both SNPE Chemicals, Inc. and Dow." Respondent asserts further that additional documents it supplied to Complainant on April 14, 2008 demonstrate that it had no control over the parties that owned, operated and controlled the Texas Facility. These documents, responding to four of Complainant's Requests for Production, include invoices concerning the Texas Facility and a Settlement Agreement among Dow, SNPE Chemical and "SNPE." Therefore, Respondent argues, citing to 40 C.F.R. § 22.19(e)(3)(i), that the information sought by the deposition has already been obtained by Complainant though alternate methods of discovery. Finally, Respondent represents that Complainant will not be prejudiced by the cancelling of the deposition at this point because it will have an opportunity to cross examine Mr. Slick at the hearing, and that holding the deposition at this point imposes an unreasonable burden upon Respondent.

In its opposition to the Motion, Complainant asserts that Respondent forfeited its right to object to the deposition when it failed to respond to Complainant's motion for discovery, dated February 8, 2008. Complainant reiterates its arguments in support of its need for deposition as set forth in its February 8th motion for discovery, and asserts that, under the circumstances of this case, the taking of the deposition "is critical for EPA to understand and put together an accurate picture of the circumstances concerning ownership and control of the Texas facility in 2001," and that there is no certainty that the information recently submitted provides all of the information EPA could obtain through a deposition, especially given "the gaps, inconsistencies and ambiguities in Isochem's prior litigation submissions." Opposition at 5-6.

III. Discussion and Conclusion

The criteria for granting a motion to take a deposition include a finding that the information sought "cannot reasonably be obtained by alternative means of discovery." 40 C.F.R. § 22.19(e)(3)(i). This finding was made in the March 6 Order. Now, Respondent wishes this finding to be reversed on the basis of its eleventh hour bald assertion that the documents it submitted to Complainant on April 1 and April 14 demonstrate with absolute certainty that it had no control over the Texas Facility nor over the parties which owned, operated and controlled the Texas Facility at the relevant time. However, Respondent's Motion does not point to or discuss any particular document or any text, page number, or section within any document in support of its assertion. Rather, Respondent apparently expects this Tribunal to reallocate its resources and schedule to carefully review immediately upon receipt the 200 pages of documents it first submitted to it the day before the deposition is scheduled to occur and decide that they include the information sought by Complainant on this critical disputed issue and that there is no further question as to whether Respondent owned, operated or controlled the Texas Facility.

It is noted here that Respondent has not offered any persuasive explanation for its failure to previously submit these documents to this Tribunal in support of its Motion to Dismiss the

Complaint and Cross Motion to Amend Answer, or for its failure four months ago to include in its Supplemental Prehearing Exchange information in support of its denial that it owned, operated or controlled the Texas Facility, or for its failure to submit these documents in response to Complainant's request for voluntary discovery.

Furthermore, as pointed out by Complainant, Respondent had the opportunity to object to the deposition and to any Interrogatories and Requests for Production of Documents when they were submitted with Complainant's motion on February 8, 2008, but Respondent did not submit any response to that motion, and instead stated objections to particular Requests for Production and Interrogatories in its April 1 Responses. Respondent's repeated failures to assert and defend its position that it did not own, operate or control the Texas Facility, from the period starting two years ago when the Complaint was filed, to just a month before the hearing is to commence, support Complainant's request to take the deposition of Mr. Slick.

Accordingly, the Emergency Motion of Respondent Isochem North America LLC, to Cancel the Deposition of Daniel M. Slick is **DENIED.** The deposition shall proceed as scheduled. With the exception of those made upon the basis of privilege, the parties are advised to put their objections to inquiries made at the deposition on the record as they are preserved for hearing and proceed to provide a response.[1] Such objections will be ruled upon if and when a party indicates that it intends to offer the deposition testimony into evidence at hearing.

Susan L. Biro
Chief Administrative Law Judge

Dated: April 17, 2008
Washington, D.C.

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[1] The parties are reminded that *federal privilege law* governs this proceeding in that federal law supplies the rule of decision. *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1512-1515 (D.C. Cir. 1993). Such federal law recognizes, for example, the right to assert a privilege protecting "confidential communications" between an attorney and client without the presence of strangers for the purpose of obtaining legal advice. *Cox v. Administrator United States Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994). Such privilege does not however protect a client's knowledge, *i.e.* disclosure of the underlying facts by those who communicated with the attorney. *Upjohn Co. v. United States*, 449 U.S. 383, 395-396 (U.S. 1981)("[The] protection of the privilege extends only to communications and not to facts. A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, 'What did you say or write to the attorney?' but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney."). In addition, the counsel for the parties are also reminded of this Tribunal's March 31, 2008 Order on Deposition, fn 1, that they have a professional obligation to assure that their conduct is characterized at all times by personal courtesy and professional integrity in the fullest sense of those terms.

In the Matter of ISOCHEM North America LLC, Respondent
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CERTIFICATE OF SERVICE

I certify that the foregoing **Order Denying Respondent's Emergency Motion To Cancel Deposition**, dated April 17, 2008 was sent this day in the following manner to the addressees listed below.

Maria Whiting-Beale
Staff Assistant

Dated: April 17, 2008

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