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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION IX

IN THE MATTER OF

**VSS INTERNATIONAL, INC.**

3785 Channel Drive  
West Sacramento, CA

Respondent.

DOCKET NO. OPA 09-2018-00002

**RESPONDENT VSS INTERNATIONAL, INC.'S  
MOTION TO CONTINUE HEARING DATE TO  
ON OR AFTER AUGUST 20, 2019;  
MEMORANDUM IN SUPPORT THEREOF**

Proceeding to Assess Class II Civil Penalty Under  
Clean Water Act Section 311

**MOTION TO CONTINUE HEARING DATE**

Comes now Respondent, VSS International, Inc. ("VSSI"), by and through its attorneys of record, pursuant to Rule 22.16 (a) of the Consolidated Rules of Practice (40 C.F.R. § 22.16(a)) and respectfully requests that the hearing date in this matter be continued to a date on or after August 20, 2019, and as grounds therefore states as follows.

**MEMORANDUM IN SUPPORT OF MOTION TO CONTINUE HEARING DATE**

On July 20, 2018, Chief Administrative Law Judge Susan Biro issued a Notice of Hearing Order scheduling the hearing on this matter to commence on January 29, 2019, in San Francisco, California.

On December 28, 2018, Complainant filed a Joint Motion for Conditional Extension of Time requesting an extension of time for prehearing filing deadlines and the hearing dates based on uncertainties associated with the federal government shutdown that occurred during December 2018 through January 2019.

On January 28, 2019, Andrea Priest, Staff Attorney, Office of Administrative Law Judges, solicited availability dates from counsel for Complainant and Respondent for the period of April through July for the purposes of the resetting of the hearing of this matter. Counsel for both parties responded, counsel for Respondent indicating that he was available during that time period for the hearing. Declaration of Richard J. McNeil (“McNeil Decl.”), Par. 2, Ex. A.

On January 30, 2019, counsel for Respondent was advised that a mediation had been set for June 20, 2019 in another matter in which counsel for Respondent is serving as co-lead trial counsel (*Greenwich Ins. Co. v. Argonaut Group, Inc. et al.*, Los Angeles Superior Court Case No. BC439212 (Judge Elizabeth Allen White)). McNeil Decl., Par. 3, Ex. B. This mediation had been scheduled following a December 12, 2018 Trial Setting Conference before Judge White, at which the parties had represented to Judge White that they would attend a second day of mediation (the first day having been unsuccessful at resolving the action) before Judge Charles (Tim) W. McCoy at JAMS in Los Angeles. McNeil Decl., Par. 3.

On February 8, 2019, Chief Administrative Law Judge Susan Biro issued an Order On Joint Motion For Conditional Extension Of Time And Rescheduling Hearing (the “Order”). In

that Order, Chief Judge Biro rescheduled the hearing on the above-captioned matter to June 18 through 28, 2019, in San Francisco.

Also on February 8, 2019, and immediately upon receiving Judge Biro's February 8, 2019 Order, counsel for Respondent reached out to Complainant's counsel and informed them that he would need to request this tribunal's permission to continue the hearing date due to this unexpected and unforeseeable conflict. McNeil Decl., Par. 5, Ex. C. Counsel for Respondent also that same day advised Ms. Priest by telephone of the conflict and consequent need for VSSI to file this motion to continue the hearing date. McNeil Decl., Par. 5.

Counsel for Respondent and counsel for Complainant discussed the possibility of the *Greenwich v. AGI* mediation being rescheduled and serious consideration was given by counsel for Respondent to rescheduling the mediation. However, as explained by counsel for Respondent to counsel for Complainant, "there are multiple parties, counsel and insurers, many coming in from the east coast and elsewhere" in the *Greenwich v. AGI* matter. McNeil Decl. Par. 7, Ex. C.

To elaborate on this scheduling conflict, counsel for Respondent is informed that the *Greenwich v. AGI* mediation will involve client principals traveling to Los Angeles from Texas and Connecticut, as well as insurance company representatives traveling to Los Angeles from the east coast and southeast. Furthermore, the substantive areas of responsibility I have in that matter are separate and apart from those of my co-counsel, and in good faith I believe I would be placing my client relationship and ethical duties in peril were I to be absent from the mediation. McNeil Decl. Par. 8.

Were I to attend the mediation, I would need to be present at least June 19 (the day before the mediation) (in order to meet with my client) and June 20 (the day of the mediation, which I

anticipate will continue at least all day, based on the dynamics involved in the first day of the mediation in that same case). McNeil Decl. Par. 9.

Nor would it be feasible for Ms. Cwiertny to handle the hearing in my absence. Although I have relied on Ms. Cwiertny for assistance during certain periods of the pendency of this matter, she has not been designated as co-counsel and no notice of appearance has been filed formally associating her in as co-counsel. Without divulging attorney-client communications or attorney work product, but for this tribunal's reference, Ms. Cwiertny, though a fine lawyer, has not in this matter as of yet met with the client or any of the witnesses and has been staffed on this matter less than a year, notwithstanding that this matter has been pending, either in an enforcement or a pre-enforcement status, since 2013. McNeil Decl., Par. 10.

In response, Complainant's counsel indicated they would not oppose a motion to continue the hearing date on the understanding that the hearing be reset after mid-August, subject to the discretion of this tribunal, and, having surveyed EPA's witnesses, further indicated EPA would be available between August 20, 2019 and September 6, 2019 and between October 7, 2019 and November 20, 2019. Counsel for Respondent is agreeable to these dates, likewise subject to the discretion of this tribunal.

In view of the foregoing Respondent sincerely requests that Chief Judge Biro continue the hearing date in this above-captioned matter from June 18, 2019, to a date on or after August 20, 2019, as set forth above.

Dated: February 15, 2019

CROWELL & MORING LLP



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Attorneys for Respondent  
VSS INTERNATIONAL, INC.