8/29/91

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF<br><br>MICHAEL C. SADD, d/b/a SADD LAUNDRY AND DRY CLEANING SERVICES,<br><br>Respondent | )<br>)<br>)<br>)<br>)<br>)<br>) | Docket No. RCRA-09-90-0002 |

ORDER

I. Background

This proceeding was initiated by a complaint issued by the United States Environmental Protection Agency (EPA), Region IX, pursuant to Section 3008(a)(1) of the Resource Conservation and Recovery Act (RCRA), as amended, 42 U.S.C. Section 6928(a)(1). The complaint alleges two counts. First, Respondent violated Section 3003 of RCRA, 42 U.S.C. § 6923 and 40 C.F.R. § 263.30(a)(b)(c), by failure to comply with RCRA manifest requirements with respect to hazardous waste transported from dry cleaning facilities. In the second count, the complaint alleges that the Respondent failed to obtain a permit to store hazardous wastes or to meet the requirements for interim status facilities in violation of Section 3005 of RCRA, 42 U.S.C. § 6925, and 40 C.F.R. Part 270. It also alleges that the Respondent failed to comply with the standards in 40 C.F.R. Parts 264 and 265 for owners and operators of facilities which treat, store or dispose of hazardous

waste. For the alleged violations, Complainant proposed civil penalties totaling $34,698.[1]

Respondent filed a timely answer to the complaint, denying the substantive allegations contained therein, and requested a hearing pursuant to Section 22.21(b) of the Consolidated Rules of Practice (Rules), 40 C.F.R. Part 22. Thereafter, by letter dated September 10, 1990, the undersigned Presiding Officer ordered the parties to submit prehearing exchange documents by November 19, 1990. Complainant filed its prehearing exchange on November 19, 1990. Respondent, however, failed to meet this deadline, and submitted by facsimile a Motion for Extension of Time to Perform Prehearing Exchange which was received by the Hearing Clerk on November 21, 1990. That motion, dated November 20, 1990, requested an extension to December 19, 1990.

Thereafter, the procedural history of this matter becomes exceedingly complex. To simplify, I will address the various motions in the logical order for disposition and not necessarily chronologically.

I. Complainant's Motion for Default Order

On November 28, 1990, the Complainant filed a Motion for a Default Order on grounds that Respondent failed to file a motion for an extension of time to file the prehearing exchange on or

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[1]According to the complaint, the proposed civil penalty was computed by EPA utilizing the Final RCRA Civil Penalty Policy issued by the EPA on May 8, 1984 and the Guidance for Calculating the Economic Benefit of Noncompliance for a Civil Penalty Assessment issued by EPA on November 5, 1984.

before November 19, 1990 and thereby violated my prehearing order. Complainant seeks an order for default pursuant to Section 22.17(a) of the Rules.

Section 22.17(a) of the Rules provides, in pertinent part:

> A party may be found to be in default . . . after motion or sua sponte, upon failure to comply with a prehearing . . . order of the Presiding Officer . . . .

This provision is analogous to Rule 55 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.). While the Fed. R. Civ. P. do not govern the procedure of administrative agencies, consideration of those rules and the federal court precedent addressing them is often useful as guidance in deciding issues raised in administrative proceedings. It has been held under Rule 55 of the Fed. R. Civ. P. that "the default judgement must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights."[2]

However, a diligent party is not entitled to a default order as a matter of right even when the unresponsive party is technically in default. In view of their harshness, default orders are not favored by the law as a general rule and cases should be decided on their merits whenever reasonably possible.[3]

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[2]H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam).

[3]Eitel v. McCool, 782 F.2d 1470, 1471-71 (9th Cir. 1986); Wilson v. Winstead, 84 F.R.D. 218, 219 (E.D. Tenn. 1979). See generally, Wright, Miller & Kane, Federal Practice and Procedure:

Under Rule 55 of the Fed. R. Civ. P., disposition of a request for default judgement lies within the court's sound discretion. Consideration is given to whether the party seeking the default judgement has suffered any prejudice and:

> Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is a reason to believe that defendant's default resulted from bad faith in his dealings with the court or opposing party, the district court may properly enter default and judgment against defendant as a sanction.[4]

As observed by a fellow Judge in a ruling on a Motion for Default Order in an EPA administrative proceeding:

> Administrative decisions under the environmental statutes are generally consistent with Federal court precedent on the issue of default judgments. Several administrative default judgments have been granted, where, in contrast to this proceeding, there was either no response to a motion for default, no response to either the complaint or the motion for default, or Respondent willfully failed to comply with prehearing exchange orders. On the other hand, a motion for default order was denied where a respondent submitted a prehearing exchange fourteen days after it was due, and there was "no contumacy, bad faith, or supine indifference shown by respondent," In re Cavedon Chemical Co., Inc., Docket No. TSCA 89-H-20, Order issued February 16, 1990.[5]

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Civil 2d Sections 2681-2685, pp. 398-429.

[4] 6 Moore's Federal Practice, Section 55.05[2], p. 55-24 (1991).

[5] In re Testor Corporation, Docket No. V-W-90-R-16, (Order Denying Motion for Default and Setting Further Procedures, January 16, 1991) at 3 [footnotes omitted].

Indications of Respondent's responsiveness or diligence, in attempting to settle the case or meet the November 19, 1990 deadline for the prehearing exchange, can be gleaned from the various memoranda in the record of this proceeding. In Respondent's Memorandum in Opposition to Complainant's Motion for Default Order, Respondent alleges that it agreed to send Complainant financial documents supporting the defense of inability to pay but that it took several weeks to obtain those documents because Respondent was out of the state. Respondent also alleges that while its Counsel was on maternity leave, settlement negotiations were held by telephone conference. Based on these and other actions delineated in the memoranda, I do not find bad faith, contumacy, or unresponsiveness on the part of the Respondent. While the Respondent's belated action in filing the motion for an extension of time failed to meet the specific requirements of my prehearing letter, the de minimis nature of the failure, along with the absence of bad faith, does not warrant the harsh penalty imposed by an order of default.

Complainant asserts that it will be prejudiced as a result of: (1) a delay in receipt of a penalty payment; (2) a delay in Respondent's implementing the proposed compliance actions; and (3) permitting Respondent more time to review and respond to Complainant's prehearing exchange than Complainant would have to do the same with Respondent's. Respondent served its prehearing exchange on December 18, 1990. In the circumstances of this case, the delay does not unduly prejudice the Complainant. Should

Complainant require time to file an additional reply to Respondent's prehearing exchange, it may file motion therefor. Absent any untoward conduct clearly prejudicial to Complainant's case, in the interest of equity and fairness, the Complainant's Motion for Default should be and hereby is denied.

II. Respondent's Motion for an Extension of Time to Perform Prehearing Exchange

As noted previously, on November 21, 1990, two days after the date the prehearing exchange was due, Respondent filed a Motion for Extension of Time to Perform Prehearing Exchange. Respondent cited as reasons for the extension that, (1) "Respondent was confident that the matter could be settled prior to that date of the prehearing exchange, after Respondent's financial documents were submitted to Complainant," and (2) Respondent's trial counsel was out of the office on maternity leave.[6]

Section 22.07(b) of the Rules, in pertinent part, provides:

> Extensions of time. The . . . Presiding Officer . . . may grant an extension of time for the filing of any . . . document . . . upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties . . . . The motion shall be filed in advance of the date on which the . . . document . . . is due to be filed, unless the failure of a party to make timely motion for extension of time was the result of excusable neglect.

The question here is whether Respondent's failure to file a timely motion for extension of time was the result of excusable

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[6]Motion for Extension of Time to Perform Prehearing Exchange, November 20, 1990.

neglect. In St. Agnes Hospital, Inc., the Complainant submitted a motion to respond out of time to the Respondent's partial motion to dismiss, but such submission occurred seven days after the deadline prescribed by 40 C.F.R. Section 22.16(b) for responding to motions, as extended by the provision in 40 C.F.R. Section 22.07(c) for filings which are mailed. Complainant explained that through inadvertence caused by its efforts to settle, that is, to discuss and arrange a settlement conference, it missed the deadline. I held in that case that Complainant did not demonstrate an adequate basis for finding excusable neglect.[7]

Excusable neglect was also not found in a case in which counsel for EPA made a bare assertion, without additional explanation, that he was "out of the office and unavailable to respond" to the initial decision by filing an appeal.[8] In Detroit Plastic Molding Company,[9] Respondent was six days late in filing its prehearing exchange. Respondent cited that the "press of business" caused it to overlook the deadline for filing.[10] Applying the standard of "good cause" under 40 C.F.R. Section 22.17(d), the "press of business" was held to be insufficient

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[7]In re St. Agnes Hospital, Inc., TSCA-III-464 (Order Denying Complainant's Motion for Leave to Respond Out of Time to Respondent's Partial Motion to Dismiss and for Remittitur, Feburary 21, 1990).

[8]In re Robert Ross & Sons, Inc., TSCA Appeal No. 82-4 (Order Denying Appeal; Election Not to Review Sua Sponte, January 28, 1985) at 3.

[9]In re Detroit Plastic Molding Company, TSCA Appeal No. 87-7 (Final Decision, March 1, 1990).

[10]Id. at 4.

justification to overturn the entry of a Default Order.[11] While the "good cause" standard is not identical to the "excusable neglect" standard, it may be instructive in determining what constitutes excusable neglect.

Applying the Rules and relevant caselaw to the situation at hand, I conclude that Respondent's expectation of settling the case prior to the date of the prehearing exchange does not constitute a basis for finding excusable neglect.

With respect to Respondent's assertion that Counsel's maternity leave necessitated additional time for trial counsel to prepare the prehearing exchange, again, I do not find excusable neglect. Respondent's assertion does not explain why the motion could not have been timely filed by one of the two co-counsel who have been listed on Respondent's filings. Furthermore, Respondent's assertion does not explain why trial counsel's maternity leave, initiated well before the date set for the prehearing exchange, should hinder filing a timely motion to extend the prehearing exchange prior to such leave.

As a result of Respondent's failure to file the motion in advance of the date on which the prehearing exchange was due to be filed, viz., November 19, 1990, or to establish that such failure was the result of excusable neglect, I find that Respondent was not in compliance with the requirements of Section 22.07(b). While Respondent's motion for extension of time should be denied on the basis of failure to demonstrate excusable neglect, the consequence

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[11] Id. at 5, 6.

of such a denial would be a rejection of Respondent's prehearing exchange documents.

The importance of the prehearing exchange cannot be overestimated, because "the primary purpose of the prehearing exchange, or discovery, is to expose evidence which proves or disproves allegations in the complaint."[12] Furthermore, the Supreme Court has stated:

> Modern instruments of discovery serve a useful purpose . . . . They together with pretrial procedures make a trial less a game of blind man's buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.[13]

While discovery provisions contained in the Fed. R. Civ. P. are different from those governing prehearing exchange and discovery in the Rules, nevertheless, the purposes of discovery provisions under the Fed. R. Civ. P. and of the requirements under § 22.19(b) for a prehearing exchange are quite similar. Both facilitate adjudication; the issues for adjudication can be developed by the information garnered through the prehearing exchange under the Rules (as with discovery under the Fed. R. Civ. P.). In contrast to the importance of a prehearing exchange, the document in St. Agnes was a response to a partial motion to dismiss.

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[12]Carol Cable Company, Inc., Docket No. TSCA-I-89-1031, (Order Denying in Part and Granting in Part Respondent's Motions to Dismiss and for Partial Relief from Prehearing Order, April 27, 1990).

[13]United States v. Proctor & Gamble Co., 356 U.S. 677, 682 (1958). Commentary on the purpose and function of the Fed. R. Civ. P. governing discovery echo similar sentiment. See also, 4 Moore's Federal Practice, Section 26.02[1], pp. 26-58.1 - 26-60 (1991).

Furthermore, acceptance of the prehearing exchange is in keeping with the venerated policy to resolve a case on its merits.[14] To deprive the parties and the Presiding Officer of the benefit of the Respondent's prehearing exchange, in all probability, would have a deleterious effect on any ultimate resolution which I might make of this matter. Such an outcome, as a practical matter, would be analogous to my granting a motion for default and runs counter with the above-stated policy to resolve a case on its merits. Accordingly, while I do not condone tardiness in filing prehearing exchange documents, in the exercise of my discretion and pursuant to my authority under 40 C.F.R. § 22.04(c), Respondent's Motion for Extension of Time to Perform Prehearing Exchange is granted. The Respondent's prehearing exchange documents will be made a part of the record.

III. Respondent's Motion to Strike Complainant's Prehearing Exchange

Complainant filed a timely prehearing exchange on November 19, 1990. In my prehearing letter I had directed Complainant to

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[14] Davis v. Parkhill - Goodloe Co., 302 F.2d 489, 495 (5th Cir. 1962) ("Where there are no intervening equities any doubt should, as a general proposition, be resolved in favor of the movant to the end of securing a trial upon the merits., quoting 6 Moore, Federal Practice, Section 55.10(1) at 1829"); Tevelson v. Life and Health Insurance Co. of America, 643 F. Supp. 779, 781 (E.D. Pa. 1986). See also, Poulis v. State Farm Fire and Casuality Co., 747 F.2d 863, 867 (1984) (the court stated in reference to literature exhorting judges to move litigation expeditiously that "Although sanctions are a necessary part of any court system, we are concerned that the recent preoccupation with sanctions and the use of dismissal as a necessary "weapon" in this trial court's arsenal may be contributing to or effecting an atmosphere in which meritorious claims of defenses of innocent parties are no longer the central issue.")

"[s]how how the proposed penalty is reasonable taking into account the seriousness of the alleged violation and the Respondent's good faith efforts to comply with the applicable requirements pursuant to 42 U.S.C. § 6928(a)(3) and is consistent with the Final RCRA Civil Penalty Policy (May 8, 1984)." In response, Complainant filed, as an attachment to its prehearing exchange, a copy of a memorandum prepared by an EPA Compliance Officer and dated July 26, 1990, which contained an explanation of how the proposed civil penalty of $34,698.00 "was calculated according to the 1984 RCRA Civil Penalty Policy." In addition, the attachment included a second memorandum prepared by the same EPA Compliance Officer and dated November 13, 1990. This second memorandum was denominated "Sadd 3008(a) order penalty-Addendum" and stated, in part:

> EPA's RCRA Civil Penalty Policy was revised in October, 1990. Among other changes, the new policy emphasizes the use of multi-day penalties as authorized in the RCRA statute, and requires the calculation of a multi-day component in the penalty for most cases . . . . The penalty has been recalculated here for comparison using the multi-day component . . . the multi-day penalty would be $484,300, for a total penalty of $639,590 for Count II.

Respondent contends that the recomputation in the Addendum constitutes a new proposed civil penalty.[15] The Respondent argues that a proposed new civil penalty constitutes an amendment to the complaint which requires Complainant to file a motion to request leave to amend the Complaint under Section 22.14(d) of the Rules.

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[15]Motion to Strike Complainant's Prehearing Exchange, December 18, 1990, at 2.

Because Complainant failed to seek amendment, Respondent has moved to strike the Complainant's prehearing exchange in its entirety.

Section 22.14(a)(4) of the Rules requires that:

> Each complaint for the assessment of a civil penalty shall include: . . . (4) The amount of the civil penalty which is proposed to be assessed; . . . .

Under Section 22.14(d):

> The complainant may amend the complaint once as a matter of right at any time before the answer is filed. Otherwise the complainant may amend the complaint only upon motion granted by the Presiding Officer . . . .

In response to the motion to strike, Complainant states that it "has not sought the higher penalty required" under the new RCRA Penalty Policy.[16] Complainant also states that it "has not sought and does not seek to amend the complaint to reflect the penalty applicable to Respondent under the new Policy.[17] In explanation for the addendum, Complainant points to the new policy which states that "[t]o the maximum extent practicable, the policy shall also apply to the settlement of administrative and judicial enforcement actions instituted prior to but not yet resolved as of the date the policy is issued."[18]

As of the date of this order, the EPA's proposed civil penalty in this matter is set forth in the complaint as follows:

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[16]Complainant's Response to Motion to Strike Prehearing Exchange, January 3, 1991.

[17]Id.

[18]Id.

Count I: $10,399

Count II: $24,299

Total Penalty: $34,698

Should the Complainant seek to change these amounts, a motion to amend the complaint would be required. It is unnecessary for me to rule upon such a hypothetical motion at this juncture in the proceedings.

Should this matter proceed to a hearing, and should I, as Presiding Officer, determine that a violation has occurred, the Rules require that I consider "any civil penalty guidelines issued under the Act"[19] in assessing the penalty. Therefore, during the hearing and in post-hearing briefs, I will entertain arguments regarding the appropriate "civil penalty guidelines" which I should consider in assessing any penalty in this matter. Accordingly, an Order to Strike Complainant's Prehearing Exchange clearly is not warranted. The Respondent's motion will be and hereby is denied.

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[19]Section 22.27(b) of the Rules provides:

> If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

IV. Complainant's Motion to Strike Answer

Allegations set forth in paragraph 23 of the complaint state that no hazardous waste manifests accompanied the residues and cartridges transported by the Respondent on certain occasions. Respondent in its answer denied those allegations. In my letter directing a prehearing exchange, I directed that Respondent to "state the factual basis for Respondent's denial of the allegations set forth in paragraph 23 of the complaint." Complainant alleges that the Respondent has failed to comply with this directive and requests that Respondent's denial be stricken and that Respondent be required to file an amended answer reflecting Respondent's admission of paragraph 23.[20] Respondent alleges that the factual basis for denial in paragraph 23 is set forth in Respondent's Prehearing Exchange in its entirety and will be directly addressed by the testimony of Michael Sadd.[21]

The Rules do not contain a provision which deals specifically with motions to strike, so I will consider federal court procedure

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[20]Complainant argues that failure to state the factual basis for the Respondent's denial of the allegations set forth in paragraph 23 of the complaint warrants the granting of a Motion of Default. In the alternative, if a Motion for Default is not granted, Complainant urges the Presiding Officer to grant its Motion to Strike the Respondent's Answer based on that argument. Complainant's Reply to Respondent's Prehearing Exchange, Motion to Strike Answer and Supplement to Complainant's Prehearing Exchange, dated January 28, 1991, at 1-2. Such argument does not warrant entry of a default order in this proceeding, for reasons stated above, supra at 2-6.

[21]Respondent's Response to Complainant's Motion to Strike Answer and Complainant's Reply to Respondent's Prehearing Exchange and Supplement to Complainant's Prehearing Exchange, February 15, 1991, at 2.

and precedent on this issue as guidance. Under Rule 12(f) of the Fed. R. Civ. P., a court may order stricken from the pleadings any insufficient defense.[22] The standard for determining the legal sufficiency of a defense under Rule 12(f) is narrow.[23] A motion to strike will be granted only where the legal insufficiency of the defense is "clearly apparent,"[24] i.e., if the defense is clearly insufficient as a matter of law.[25]

Thus, motions to strike are not viewed favorably,[26] and are infrequently granted,[27] the general policy being against denying a party the opportunity to support his contentions in more depth at trial.[28] A motion to strike will be denied "unless the legal insufficiency of the defense is 'clearly apparent' . . . . The underpinning of this principle rests on a concern that a court should restrain from evaluating the merits of a defense where . . .

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[22]See generally: Wright and Miller Federal Practice and Procedure: Civil §§ 1380-1381, pp. 782-805 (1969); 2A Moore's Federal Practice, 12.21, pp. 12-164-12-185 (2d ed. 1978).

[23]Mohegan Tribe v. Connecticut, 528 F. Supp. 1359, 1362 (D. Conn. 1982).

[24]May Dept. Stores v. First Hartford Corp., 435 F. Supp. 849, 855 (D. Conn. 1977); Cipollone v. Liggett Group, Inc., 789 F.2d 181, 188 (3rd Cir. 1986), on remand, 644 F. Supp. 283, motion denied, 802 F.2d 658; on remand, 649 F. Supp. 664, cert. denied, 107 S. Ct. 907.

[25]Index Fund, Inc. v. Hogapian, 107 F.R.D. 95, 100 (S.D.N.Y. 1985).

[26]Id. at 100; Krauss v. Keibler Thompson Corp., 72 F.R.D. 615, 618 (D. Del. 1976).

[27]Lunsford v. United States, 570 F.2d 221, 229 (8th Cir. 1977).

[28]Wohl v. Blair, 50 F.R.D. 89, 91 (S.D.N.Y. 1970).

the factual background for a case is largely undeveloped.[29] If the sufficiency of the defense depends upon disputed questions of law or fact, then a motion to strike will be denied.[30]

Generally, motions to strike are filed with respect to affirmative defenses. In this case, however, the motion is filed with respect to denial of an allegation in the complaint, and the alleged subsequent failure of the Respondent to state the factual basis for denying the allegation pursuant to my prehearing order. If Complainant's motion were granted, whether or not Respondent amends its answer to reflect an admission of that allegation,[31] Respondent could not present any evidence to contest liability on that issue. Such a result is not consistent with the policy of judicial restraint where the factual background for a case is largely undeveloped. The legal insufficiency of the denial is not clearly apparent; indeed, there are no merits of the defense presented yet for evaluation. The Motion to Strike the Answer, should be and hereby is denied. Nevertheless, I find Respondent's prehearing exchange unresponsive to my prehearing order and totally

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[29]Cipollone, 789 F.2d at 188. See also, In the Matter of 3M Company (Minnesota Mining and Manufacturing), Docket No. TSCA-88-H-06 (Interlocutory Order Granting Complainant's Motion for Partial Accelerated Decision, August 7, 1989) at 6-7.

[30]Oliner v. McBride's Industries, Inc., 106 F.R.D. 14 (1985) (citing, inter alia, Linker v. Custom-Bilt Machine, Inc., 594 F. Supp. 894, 898 (E.D. Pa. 1984), Ciminelli v. Cablevision, 583 F. Supp. 144, 162 (E.D. N.Y. 1984)).

[31]The Rules provide that "Failure of respondent to admit, deny or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." 40 C.F.R. § 22.15(d).

inadequate when reviewed in light of my specific direction as to paragraph 23 of the answer. I direct Respondent to provide a detailed explanation of the factual basis for denying allegations in paragraph 23 of the Complaint within seven days of the date of service of this Order.

V. Motion for Discovery

Complainant filed a motion for discovery for the following information:

> (1) A copy of Respondent's federal and State of Hawaii income tax returns for the most recent three years stamped with indication of receipt by the Internal Revenue Service and the Hawaii tax authority, respectively. Alternatively, Respondent may provide to Complainant signed written waivers addressed to the Internal Revenue Service and the Hawaii tax authority granting permission for such agencies to send to Complainant copies of such returns as received by such agencies.
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> (2) The financial information in the form attached as Attachment A. The assets disclosed must include all owned or held by Michael C. Sadd, by "Sadd Laundry and Dry Cleaning Supplies," by any company or other entity controlled by Michael C. Sadd, by any person on behalf of Michael C. Sadd, and by any member of Respondent's immediate family. The information must be accompanied by a written statement signed by Michael C. Sadd that it is true and complete in all respects.
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> (3) Copies of statements for each bank account, money-market fund and mutual fund owned or held by Michael C. Sadd, by "Sadd Laundry and Dry Cleaning Supplies," by any company or other entity controlled by Michael C. Sadd, by any person on behalf of Michael C. Sadd, or (if in excess of $1,000) by any member of Respondent's immediate family. Such statements must be provided as of the most

recent month-end as well as the months ended December 31, 1988 and May 31, 1990.[32]

Complainant contends that Respondent has raised inability to pay the proposed civil penalty as his primary defense in this matter. Complainant maintains that each of the requested documents is necessary for a proper evaluation of Respondent's claim of inability to pay and hence has significant probative value; that these documents are not otherwise available; and that their production would not unreasonably delay this proceeding.

A question which arises in considering whether to grant Complainant's Motion for Discovery is which party has the burden to go forward with evidence regarding the inability to pay. This issue has been addressed extensively in opinions by the Chief Judicial Officer who has determined consistently that Respondent has the burden to raise and establish its inability to pay proposed penalties.[33] Such a holding is consistent with the provision in the Rules which places the burden on the Respondent to go forward with a defense following the establishment of a prima facie case,

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[32] Complainant's Motion for Discovery, January 28, 1991.

[33] In re Helena Chemical Company, FIFRA Appeal No. 87-3 (Final Decision, November 11, 1989); In re Central Paint and Body Shop, Inc., RCRA Appeal No. 86-3 (Final Decision, January 7, 1987); In re F & K Plating Company, RCRA Appeal No. 86-1A (Final Decision, October 8, 1987); In re Edward Pivirotto and Josephine Pivirotto d/b/a E & J Used Tool Co., TSCA Appeal No. 88-1 (Final Decision, February 15, 1990).

which would include supporting any position in opposition to the appropriateness of the proposed penalty.[34]

In Helena Chemical Company, the Chief Judicial Officer stated, "Determining what is an affirmative defense depends on the purpose of the proceeding and also on 'practical considerations present in resolving factual issues through administrative adjudication.' Based on these criteria, evidence regarding a respondent's financial viability is properly regarded by the Agency as an affirmative defense."[35]

Both the 1984 and 1990 RCRA Penalty Policies include ability to pay as one of the factors in calculating penalties. In Central Paint and Body Shop,[36] and F & K Plating,[37] the Chief Judicial Officer relied on the 1984 RCRA Penalty Policy to determine that respondent had the burden of persuasion regarding its alleged inability to pay.[38] Because Section 22.27(b) of the Rules provides

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[34]Section 22.24 of the Rules states that "The Complainant has the burden of going forward with and of proving that the violation occurred as set forth in the complaint and that the proposed civil penalty . . . is appropriate. Following the establishment of a prima facie case, respondent shall have the burden of presenting and going forward with any defense to the allegations set forth in the complaint."

[35]Helena Chemical Company, supra, at 18, Citying NRLB v. Mastro Plastics Corp., 354 F.2d 170 (2nd Cir. 1965), cert. denied, 384 U.S. 972 (1966).

[36]Central Paint and Body Shop, supra. at 8-11.

[37]F&K Plating, supra. at 9.

[38]See also, Central Paint and Body Shop, Inc., supra., at 9-11. Citing the 1984 RCRA Civil Penalty Policy, Chief Judicial Officer McCallum stated that "Although the Penalty Policy does state that the Agency 'generally will not request penalties that are clearly beyond the means of the violator' and therefore 'EPA should

that in calculating a civil penalty, the Presiding Officer "[m]ust consider any civil penalty guidelines issued under the Act," I am required to consider the RCRA Penalty Policies which include consideration of the ability to pay. Consequently, if Respondent provides testimony or documentary evidence at the hearing regarding its ability to pay, it will be considered along with any evidence offered by Complainant as to Respondent's ability to pay, and the question of Respondent's ability or inability to pay a civil penalty will be determined upon a preponderance of the evidence which is admitted into the record. With that general analysis of the manner in which inability/ability to pay is to be established at the hearing, I turn now to Complainant's requests for discovery.

Pursuant to Section 22.19(b) of the Rules, I directed the parties in my prehearing letter of September 10, 1990, to engage in the prehearing exchange of certain information. This included direction to the Respondent to:

> State whether Respondent intends to defend against the proposed penalty on the grounds of inability to pay penalty. If it does intend to raise this defense, state the factual basis

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consider the ability of the violator to pay,' it also clearly provides that 'the burden to demonstrate inability to pay rests on the respondent, as it does with any mitigating circumstances.' at 20. This requirement is reasonable, for it is only fair that Respondent, as proponent of a reduction in the penalty based on its financial condition, have the burden of persuasion on its alleged inability to pay. In the absence of a statutory allocation of the burden of proof, the general rule is that the burden of providing a fact should be on the party whose means of knowledge about that fact are peculiarly within its control. J. Wigmore, 9 Evidence Section 2486 (3rd ed. 1940). Therefore, it is logical for Respondent to bear the burden of proving inability to pay, because it has control over information on its financial condition, not EPA."

> therefor and submit copies of any documents (e.g., an audited financial statement) in support thereof.

In its prehearing exchange Respondent stated that "Mr. Sadd will testify that SADD is financially unable to pay the proposed civil penalty and the reasons therefore [sic]." Included among Respondent's proposed exhibits in the prehearing exchange are "Federal income tax returns for Michael C. Sadd, for the years 1988 and 1989" and "a financial statement dated January 1, 1990 for Sadd Laundry and Dry Cleaning Supplies."

Regarding further discovery, Section 22.19(f) of the Rules provides in pertinent part:

> (f) Other discovery. (1) . . . [F]urther discovery, under this section, shall be permitted only upon determination by the Presiding Officer:
> (i) That such discovery will not in any way unreasonably delay the proceeding;
> (ii) That the information to be obtained is not otherwise obtainable; and
> (iii) That such information has significant probative value.

Complainant has made three requests for discovery which I now will consider in order.

Request 1: Certified Income Tax Returns for the most Recent Three Years. Complainant points out that the 1988 and 1989 Federal tax returns which Respondent has submitted as proposed exhibits were signed by Mr. Sadd on the "Paid Preparer's Use Only" line and that only a copy of Respondent's actual filed returns will provide reliable information regarding his income. Further, Complainant argues that the Hawaii returns are required because the Hawaii tax form "asks for different financial information and is subject to

different compliance obligations and practices from those of federal returns."[39]

In opposition to the motion, Respondent states that it has already submitted copies of the Federal income tax returns with its prehearing exchange and will supplement them with more current income tax returns as they are completed. Further, Respondent states that he will testify at the hearing and state under oath that these income tax returns are true and correct copies of the returns which were submitted to the IRS.[40]

The burden is on Respondent to establish inability to pay a penalty, and it is Respondent's responsibility to establish the authenticity of documents and the most current status of its financial condition. Therefore, while the requested federal income tax returns may be helpful in attacking authenticity of Respondent's documents, they are not of significant probative value, considering Respondent's burden of proof. Furthermore, the process of obtaining them may unreasonably delay this proceeding. Therefore, Complainant's motion for discovery of certified or authenticated federal income tax returns is denied. Complainant's motion for discovery of the state tax returns is denied because Complainant has not demonstrated that such information has a significant probative value or that the information which might be obtained will not otherwise be available in connection with the

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[39]Complainant's Motion for Discovery, January 28, 1991.

[40]Respondent's Supplemental Response to Complainant's Motion for Discovery, March 19, 1991.

discovery which has otherwise been requested and which I will direct.

Request 2: Financial Information Reflected in Attachment A. As for the request to compel Respondent to complete and submit Attachment A, Respondent contends that RCRA does not provide statutory authority for Complainant to request such financial information as reflected in Attachment A which is utilized under the statutory authority of the Comprehensive Environmental Response, Compensation and Liability Act, Section 104(e)(2)(C).[41]

In response, Complainant states that it has no objection if the requested information is provided in writing without use of the form. Complainant also points out that the financial information provided by Respondent to date is for Sadd Laundry and Dry Cleaning Supplies and not for Michael C. Sadd, who is the Respondent in this matter.[42]

I hereby determine that the information requested in Sections III and IV of Attachment A has significant probative value in determining the financial ability of Michael C. Sadd to pay a civil penalty in this matter. The information listed in Sections III and IV of the form would relate to the Respondent itself, and would characterize the Respondent's financial condition, and not merely that of any businesses Respondent is involved in. This discovery

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[41] Id.

[42] Complainant's Reply to Respondent's Response to Complainant's Motion for Discovery, February 28, 1991, referring to Respondent's Exhibit 4 which purports to be an unaudited financial statement for "Sadd Supplies" signed by Michael C. Sadd as of January 1, 1990.

will not in any way unreasonably delay the proceeding and indeed, may assist in an expeditious resolution of the question of Mr. Sadd's ability to pay a civil penalty. Further, such information is not otherwise obtainable. As for Respondent's objection to the use of the form, the information listed in Sections III and IV thereof may be provided in writing without the use of the form. In directing this discovery I rely upon Section 22.19(f) of the Rules and not upon any provision of CERCLA.

Request 3: Statements from Financial Institutions. Respondent contends that the request is "abusive" and "an invasion of privacy" and that the documents "do not have significant probative value."[43] However, Respondent cites no statute or case law to support its contentions. Moreover, as Complainant points out, Respondent has raised the issue of his inability to pay. Complainant also notes that the Dun and Bradstreet report on Sadd Laundry and Dry Cleaning which Complainant will offer as an exhibit reflects some differences with the financial information Respondent will seek to introduce.[44] The financial statements which are sought should help to resolve those differences.

I hereby determine that the financial information sought in Request 3 has significant probative value. Financial statements concerning bank accounts and mutual funds owned or held by Respondent, by any entity owned by Respondent, by any person on

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[43]Respondent's Supplemental Response to Complainant's Motion for Discovery, March 19, 1991.

[44]Complainant's Motion for Discovery, January 28, 1991.

behalf of Respondent or by any member of Respondent's immediate family would greatly assist in determining Michael Sadd's ability to pay a penalty in this matter. Such discovery will not unreasonably delay the proceeding and I conclude that the information is otherwise unobtainable. Complainant's motion for discovery for these financial statements is granted.

VI. Objections to Witnesses and to Certain Testimony

Complainant objects to admission of certain testimony at the hearing by several of Respondent's witnesses as well as to the admission of several exhibits.[45] It is premature to make a ruling concerning the admissibility of any evidence which may be offered at a hearing in this matter. Indeed, it is not yet certain that a hearing will be required. Accordingly, the question of whether evidence such as testimony or exhibits will be admitted will be determined at the hearing. If either party wishes to raise objections to evidence, that party should raise them at the hearing pursuant to 40 C.F.R. § 22.23 whereupon I will rule on any objections at that time.

VII. Permission to Testify by Affidavit

Complainant seeks to have its witness, Mr. Ray Corey, testify by affidavit in order to avoid the expense to the United States of paying for the witness to travel from San Francisco to the hearing

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[45]Complainant's Reply to Respondent's Prehearing Exchange, Motion to Strike Answer and Supplement to Complainant's Prehearing Exchange, January 28, 1991.

if it is held in Hawaii.[46] Respondent objects to the use of an affidavit since testimony in the form of an affidavit prevents the Respondent from cross-examining a witness to ensure reliability.[47]

Section 22.22(d) of the Rules provides that:

> The Presiding Officer may admit into evidence affidavits of witnesses who are unavailable. The term "unavailable" shall have the meaning accorded to it by Rule 804(a) of the Federal Rules of Evidence.

Section 804(a) of the Federal Rules of Evidence identifies the parameters which determine whether a witness will be deemed unavailable and includes situations in which the declarant -

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance . . . by process or other reasonable means.
>
> A declarant is not unavailable as a witness if exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of

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[46] Id. at 3.

[47] Respondent's Response to Complainant's Motion to Strike Answer and Complainant's Reply to Respondent's Prehearing Exchange and Supplement to Complainant's Prehearing Exchange, February 15, 1991, at 3.

> a statement for the purpose of preventing the witness from attending or testifying.

If the declarant is available, then his personal testimony in court, subject to the safeguards of an oath and cross-examination, is preferred.[48] Cross-examination sheds light on the witness' perception, memory and narration in addition to exposing inconsistencies or incompleteness in the testimony.[49]

Travel expenses which may be incurred by Complainant in flying the witness from San Francisco to Hawaii do not fall within the categories of Section 804(a). Complainant's witness, therefore, is not unavailable within the meaning of section 804(a) and is therefore not permitted to testify by affidavit. If Complainant wishes to introduce testimony by Ray Corey, Mr. Corey must testify at the hearing in person and be subject to cross-examination by Respondent.

ORDER

(1) Complainant's Motions for Default Order and to Strike Answer are denied.

(2) Respondent's Motion for an Extension of Time to Perform Prehearing Exchange is granted.

(3) Complainant's Motion for Discovery is granted in part as follows. Respondent is ordered to submit within 30 days of the date of service of this Order:

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[48]4 J. Weinstein & M. Berger, Weinstein's Evidence, Section 804(a)[01], p. 804-35 (1990).

[49]Id., Section 800[01], at 800-11.

(a) The financial information listed in Sections III and IV of Attachment A in writing but not necessarily as reflected in the Form A to Complainant's Motion for Discovery. The assets disclosed must include all owned or held by Michael C. Sadd, by "Sadd Laundry and Dry Cleaning Supplies," by any company or other entity controlled by Michael C. Sadd, by any person on behalf of Michael C. Sadd, and by any member of Respondent's immediate family. The information must be accompanied by a written statement signed by Michael C. Sadd that it is true and complete in all respects.

(b) Copies of statements for each bank account, money-market fund and mutual fund owned or held by Michael C. Sadd, by "Sadd Laundry and Dry Cleaning Supplies," by any company or other entity controlled by Michael C. Sadd, by any person on behalf of Michael C. Sadd, or (if in excess of $1000) by any member of Respondent's immediate family. Such statements must be provided as of the most recent month's end as well as the months ended December 31, 1988 and May 31, 1990.

(4) Respondent's Motion to Strike Complainant's Prehearing Exchange is denied.

(5) Complainant's request for permission for Mr. Corey to testify by affidavit is denied.

The rather extraordinary number of motions, cross-motions, responses and other documents which have been filed in this case raises serious questions about the willingness of counsel for the respective parties to approach the resolution of this matter in a

professional, civil and mature manner. Indeed, while I acknowledge that the enthusiasm and creativity of counsel in pursuing legal or factual theories should not be impeded, some of the positions taken by the parties in these documents could be said to border on the frivolous. This is especially true where a position advocated by counsel is unaccompanied by citation to any supporting case law, statute or regulation. In fact, it appears that some of these documents were drafted without the benefit of serious legal research. Such an approach unduly consumes the time of counsel and the Presiding Officer in relatively unproductive activity.

Counsel for the respective parties should make every possible good faith effort to settle this matter in accordance with the Agency policy of encouraging settlement. (See 40 C.F.R. § 22.18.) Complainant is directed to submit a report on the status of settlement negotiations on October 1, 1991. Upon receipt of such report, I will reevaluate the status of the case and determine whether a hearing in the matter should be scheduled.

So ORDERED.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: August 29, 1991
Washington, DC

IN THE MATTER OF MICHAEL C. SADD, d/b/a SADD LAUNDRY AND DRY CLEANING SERVICES, Respondent, Docket No. RCRA-09-90-0002

## Certificate of Service

I hereby certify that the following Order, dated AUG 29 1991, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Copy by Certified Mail,
Return Receipt Requested, to:

Attorney for Complainant:

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Assistant Regional Counsel
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130 Merchant Street
Honolulu, HI 96813

Doris M. Thompson
Secretary

Dated: AUG 29 1991