

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)	
)	
Aylin, Inc.; Rt. 58 Food Mart, Inc.;)	Docket No. RCRA-0302-13-0039
Franklin Eagle Mart Corp.;)	
Adnan Kiriscioglu; 5703 Holland)	
Road Realty Corp.; 8917 South)	Proceeding under Section 9006
Quay Road Realty Corp.; and,)	of the Resource Conservation an
1397 Carrsville Highway Realty)	and Recovery Act, as amended,
Corp.,)	42 U.S.C. Section 6991e
)	
Respondents.)	

**RESPONDENTS' OPPOSITION TO COMPLAINANT'S MOTION FOR LEAVE TO
FILE SUR-REPLY**

In accordance with the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits*, 40 C.F.R. Part 22 (“Rules of Practice”), Respondents Aylin, Inc., Rt. 58 Food Mart, Inc., Franklin Eagle Mart Corp., Adnan Kiriscioglu, 5703 Holland Road Realty Corp., 8917 South Quay Road Realty Corp., and 1397 Carrsville Highway Realty Corp. (collectively, the “Respondents”), through their attorney, respectfully submit this opposition to the Director of the Land and Chemicals Division of the U.S. Environmental Protection Agency – Region III’s (“Complainant”) Motion for Leave to File Sur-Reply to Respondents’ Reply to Complainant’s Response to Respondents’ Motion for Leave to Conduct Additional Discovery (“Motion”). For the reasons set forth herein, Respondents respectfully request that the Presiding Officer issue and Order denying Complainant’s Motion.

I. STANDARD OF REVIEW

Sur-replies are governed by the Rules of Practice. Section 22.16 states:

Motions shall be served as provided in § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate.

40 C.F.R. § 22.16

In a *Federal Register* Notice, the Environmental Protection Agency (“EPA”) noted the intended policy consideration in the motion-reply structure dictated by the above-cited Rules of Practice. “EPA believes that this motion-response-reply structure is both necessary and sufficient to present the issues fully for the Presiding Officer. 63 Fed. Reg. 9464, at 9470 (1998). However, the Agency also notes, “[f]or those instances where this motion-response-reply format may not be appropriate, the Presiding Officer may order an alternative approach.” *Id.* Therefore, the Complainant must seek leave from the Tribunal in order to file a Sur-Reply.

Sur-Replies are discouraged, and are not allowed as a matter of right, under both the Rules of Practice and the Federal Rules of Civil Procedure. However, “Generally, the nonmoving party should be given an opportunity to respond to new material raised for the first time in the movant’s reply.” *Green v. New Mexico*, 420 F.3d 1189, 1196 (10th Cir. 2005), citing *Beird v. Seagate Technology, Inc.*, 145 F.3d 1159, 1164 (10th Cir. 1998). *See also Stanford v. Potomac Electric Power Co.*, 394 F.Supp.2d 81, 86-87 (D.D.C. 2005) (to be entitled to file a sur-reply, the party requesting to file the sur-reply “must show that the reply filed by the moving party raised new arguments that were not included in the original motion”).

II. ARGUMENT

The Respondents oppose the Complainant's Motion because it unduly attempts to influence the Tribunal and deny the Respondents a meaningful opportunity to prepare for the hearing. Complainant argues that another filing is necessary because:

As stated in the accompanying Sur-Reply, much of the information sought by Respondents was provided by Complainant in its Motion for Partial Accelerated Decision and Memorandum of Law in support and the accompanying affidavit of Andrew Ma and Leslie Beckwith filed on November 20, 2015. Because this was a day after Complainant filed its Response to Respondents' Discovery Motion, such Response was necessarily not as comprehensive as possible regarding the information requested and only addressed generally the information Respondents sought from Andrew Ma.

Motion, at 1. Complainant should not be permitted to prolong these proceedings and burden the Tribunal and the Respondents by being granted yet another opportunity to advance arguments that previously have been submitted and are before the Presiding Officer.

As noted in the attached declaration from Respondents' counsel, Jeffrey L. Leiter, Respondents' counsel had a telephone conference with Complainant's counsel, Janet E. Sharke, on Monday, December 14, 2015. At no time during that conversation did Complainant's counsel discuss the instant Motion or seek Respondents' consent to the Motion. Complainant electronically served the Motion on Respondents' counsel at 9:13 p.m. on December 14, 2015, knowing that Respondents' counsel was undergoing surgery the next day.

The Complainants are jumping through every conceivable hoop to avoid the Respondents taking the requested oral examinations of EPA's Andrew Ma and the Virginia Department of Environmental Quality's Leslie Beckwith. What is inconceivable is how, after the Complainant voluntarily agreed on November 2, 2015, to make Mr. Ma available for deposition (which the Complainant concedes in its Motion), the Complainant was totally unaware of the contents of Mr. Ma and Ms. Beckwith's affidavits the day before they were submitted to the Tribunal as part

of the Complainant's Motion for Partial Accelerated Decision and Memorandum of Law. The Complainant had to have known what was being said in these two affidavits when it filed the previous day its Response to Respondents' Motion for Leave to Conduct Additional Discovery. The Complainant is using this one day to plead ignorance and to obtain another "bite of the apple."

Complainant's proposed sur-reply repeats the same arguments it made in its Response. In an effort to breathe new life into its previous arguments, Complainant in its Motion attempts to restate its arguments by disputing examples provided by Respondents in their Reply as to why the additional discovery they seek is appropriate. The Complainant has not identified any new arguments in its Motion that it wanted to, but could not, make in its Response. Nor could it.

Significantly, and noticeably absent from the Motion, the Complainant has not provided any substantive reason why this Tribunal should depart from the Rules of Practice and allow it to file a sur-reply. The Complainant merely goes from the standard of review to its arguing against or distinguishing the examples Respondents intended as clarifications in its Reply. The Complainant does not claim that there are any new issues that require a response, and if there were, Respondents should then be afforded the opportunity for a further reply.

For the foregoing reasons, Complainant's request to file a sur-reply should be denied. The Presiding Officer is under no obligation to give the Complainant another chance to make its arguments.

WHEREFORE, the Respondents respectfully request the Presiding Office to issue an Order denying Complainant's Motion for Leave to File Complainant's Sur-reply to Respondents' Reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery.

Dated: December 18, 2015

Respectfully submitted,



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Attorney for Respondents

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on this 18th day of December, 2015, the foregoing Respondents' Opposition to Complainant's Motion for Leave to File Sur-reply was sent electronically and by U.S. regular mail, postage prepaid to:

Louis Ramalho, Esq.
Janet E. Sharke, Esq.
U.S. EPA, Region III (Mail Code 3RC50)
1650 Arch Street
Philadelphia, PA 19103-2029

Attorneys for Complainant

A handwritten signature in black ink, appearing to read "Jeffrey L. Leiter", is positioned above a horizontal line.

Jeffrey L. Leiter

DECLARATION OF JEFFREY L. LEITER

I, Jeffrey L. Leiter, swear and affirm that:

1. I am counsel to the Respondents in *In the Matter of Aylin, Inc., et al.*, Docket No. RCRA-0302-13-0039.

2. I had a telephone conversation with Complainant's counsel, Janet E. Sharke, on Monday, December 14, 2015. At no time during this conversation with Ms. Sharke did she mention that the Complainant was filing a motion for leave to file a sur-reply to Respondents' reply to Complainant's response to Respondents' motion for leave to conduct additional discovery. Further, Ms. Sharke did not seek or ask for Respondents' consent to this motion.

3. I was electronically served Complainant's Motion for Leave to File Complainant's Sur-reply to Complainant's Response to Respondents' Motion for Leave to Conduct Additional Discovery ("Motion") at 9:13 p.m. on Monday, December 14, 2015. At this time, Complainant's counsel was well aware that I was going into the hospital the next morning for hip replacement surgery.

4. My surgery took place as scheduled on Tuesday, December 15, 2015, and I was discharged from the hospital the following afternoon. I am recuperating from my home, where I prepared the Respondents' opposition to the Motion. I do not anticipate returning to my office until January 4, 2016.

I declare under penalty of perjury that the foregoing is true and correct.



Date: December 18, 2015

Jeffrey L. Leiter