

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:

**Wisconsin Plating Works of Racine, Inc.
Racine, Wisconsin**

Respondent.

) Docket No. CAA-05-2008-0037
)
) Proceeding to Assess a Civil
) Penalty Under Section 113(d) of
) the Clean Air Act, 42 U.S.C. §
) 7413(d)
)
)

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**RESPONDENT'S RESPONSE TO COMPLAINANT'S MOTION FOR PARTIAL
ACCELERATED DECISION ON THE ISSUE OF ABILITY TO PAY, AND
COMPLAINANT'S ALTERNATIVE MOTION TO COMPEL DISCOVERY RELATED
TO RESPONDENT'S ABILITY TO PAY**

Respondent, by and through its undersigned attorney, responds to Complainant's Motion for Partial Accelerated Decision on the Issue of Ability to Pay, and Complainant's Alternative Motion to Compel Discovery Related to Respondent's Ability to Pay, and in support thereof, states as follows:

Complainant asks the Court to find that Respondent has waived the issue of ability to pay, and that Respondent should be barred from introducing any evidence on its ability to pay. Complainant argues that Respondent, in its Answer, did not raise the issue of ability to pay the proposed penalty or economic impact of the proposed penalty on Respondent's business, and that to date, Respondent has only provided limited information to Complainant pertaining to the issue of ability to pay.

While Respondent admittedly did not raise the issue of ability to pay in its Answer, the American economic landscape has changed significantly since the filing of the Complaint in September 2008 and the filing of Respondent's Answer in October, 2008. Industries such as Respondent's have been particularly hard hit by the economic downturn, and Respondent's financial condition and outlook has changed significantly for the worse since the Fall of 2008.

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For instance, Respondent recently laid off more than 40% of its workforce due to its dire economic state.

Respondent did provide financial statements to Complainant in its Prehearing Exchange submissions on or about February 20, 2009, including tax returns for the years 2005 through 2007. Those financial documents provided in the Prehearing Exchange were not based on contemporaneous and forward looking data, and therefore said financial statements did not accurately capture Respondent's current and foreseeable financial condition, and did not provide a good indication of ability to pay. In fact, even the 2008 tax return will not accurately reflect Respondent's current ability to pay, as Respondent's economic hardships began in the final quarter of 2008 and became progressively more severe throughout the first quarter of 2009.

Complainant's request that the Court determine that Respondent has waived the issue of ability to pay, and that Respondent be barred from introducing any evidence on its ability to pay is draconian to say the least. It is only fair and just that the Court determine Respondent's ability to pay based on the Court's review of financial statements that accurately reflect the Respondent's current financial status. Respondent would be greatly prejudiced should the Court preclude Respondent from introducing current financial statements, and would be likewise prejudiced should the Court assess Respondent's ability to pay based on stale financials that do not reflect the severe economic downturn.

Moreover, Respondent's attorneys advised Complainant that Respondent intends to voluntarily produce the financial documents requested by Complainant well in advance of the trial of this matter. It was explained to Complainant that Respondent's accountant needed sufficient time to file the 2008 tax return and compile contemporaneous financial statements incorporating the Respondent's financial reports from the first quarter of 2009.

As such, the Honorable Court should deny Complainant's Motion for Partial Accelerated Decision on the Issue of Ability to Pay, and should likewise deny Complainant's Alternative

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Motion to Compel Discovery Related to Respondent's Ability to Pay. Should the Honorable Court not deny Complainant's instant Motion, Respondent alternatively requests leave to file an Amended Answer referencing Respondent's ability to pay.

Respectfully submitted,

Wisconsin Plating Works of Racine, Inc.

By: 
One of its attorneys

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CERTIFICATE OF SERVICE

I hereby certify that today I caused to be filed with the Regional Hearing Clerk, Region 5, United States Environmental Protection Agency, 77 West Jackson Boulevard (E-13J), Chicago, Illinois, 60604-3590, the original document Respondent's Response to Complainant's Motion for Partial Accelerated Decision on the Issue of Ability to Pay, and Complainant's Alternative Motion to Compel Discovery Related to Respondent's Ability to Pay, and that I issued to the Court and Complainant's Counsel by first class mail a copy of the original document:

The Honorable Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460

Padmavati G. Bending
Associate Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 5
77 West Jackson Boulevard (C-14J)
Chicago, Illinois 60604-3590


Stuart M. Sheldon

4/24/09
Dated

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