

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
Creative Liquid Coatings, Inc.)
(formerly d/b/a Creative Coatings, Inc.))
2701 S. Coliseum Blvd., Suite 1284)
Fort Wayne, IN 46803)
)
U.S. EPA ID No. INR 000 109 322)
)
Elite Enterprises, Inc.)
)
AND)
)
Randall Geist)
)
)
Respondents.)

Docket No. RCRA-05-2009-0012

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REGION 5

**COMPLAINANT'S REDACTED¹ MOTION TO
COMPEL DISCOVERY AND TO CORRECT
DEFICIENCIES IN RESPONDENTS' PREHEARING EXCHANGE**

Comes now the United States Environmental Protection Agency, Region 5
("Complainant" or "EPA"), pursuant to 40 C.F.R. §§ 22.16 and 22.19(a) and (e) of the
*Consolidated Rules of Practice Governing the Administrative Assessment of Civil
Penalties and the Revocation/Termination or Suspension of Permits* ("Consolidated
Rules"), and moves the Presiding Officer to enter an order directing that:

1. Respondents submit to Complainant within seven days of the Presiding Officer's order directing discovery:
 - a. The information and documents requested in **Exhibit 1**;

¹ Because certain information contained in Exhibits 1 and 2 to this Motion and the accompanying Memorandum In Support contain information designated by Respondents as Confidential Business Information pursuant to 40 CFR Part 2 Subpart B, Complainant submits two separate versions of this Motion and the accompanying Memorandum in Support: a redacted and an unredacted version. The redacted version is identical in substance to the unredacted version, but Exhibits 1 and 2 are omitted.

- b. A curriculum vitae and/or resume for Sabrina Byer; and
 - c. A more detailed narrative of the proposed testimony of Ms. Byer, Mr. Adam Decker, Mr. Randall Geist, Mr. Jerome Henry, and Mr. Walter Fuller.
2. In the event Respondents assert that specific information relevant to any request identified in 1. above has been destroyed pursuant to a record retention policy or otherwise, Respondents shall so specify, provide the substance of the document destroyed, and provide a detailed explanation of the specific reasons for the document's destruction and/or the provisions of Respondents' record retention policy and a copy of the version of any such record retention policy in effect at the time of the destruction.

In support of this Motion, Complainant relies on the Consolidated Rules, the pleadings and documents on file with the Court, and the facts and law set forth in the accompanying Memorandum.

On March 12, 2010, the undersigned contacted counsel for Respondents Creative Liquid Coatings, Inc. and Randall Geist requesting that they voluntarily provide the information and documents in the Additional Information request. Complainant also advised them of Complainant's intention to file this motion if they did not agree, by March 19, 2010, to voluntarily provide such information. To date, the additional information has not been provided.

Respectfully submitted,

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**MEMORANDUM IN SUPPORT OF COMPLAINANT'S *REDACTED*
MOTION TO COMPEL DISCOVERY AND TO CORRECT
DEFICIENCIES IN RESPONDENTS' PREHEARING EXCHANGE**

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I. INTRODUCTION

While Respondents Creative Liquid Coatings, Inc. (“Creative”) and Mr. Randall Geist raise a multitude of defenses and summarily set forth a wide-range of topics upon which they propose to offer expert and lay witness testimony, they have provided a mere fifteen (15) exhibits in their prehearing exchange. Creative and Mr. Geist have failed to provide relevant and required information on their alleged inability to pay a penalty and have failed to submit documents needed to ascertain the validity of this affirmative defense. In addition, Creative and Mr. Geist have failed to provide (or selectively provided a few) documents substantiating their theories of “corporate separateness” and their contention that Elite and Creative dealt with one another at “arms-length.”

Through this Motion, Complainant seeks additional discovery of documents and information that Respondents have not provided in their prehearing exchange and are necessary for this Court and Complainant to conduct a complete assessment of Creative’s and Mr. Geist’s alleged inability to pay a penalty. In addition, Complainant seeks discovery of documents and information that are relevant to the derivative liability of Creative, the derivative and direct liability of Mr. Geist, and Respondents’ “corporate separateness” defense.² As demonstrated below, Complainant has satisfied all of the requirements for “additional discovery” set forth in Consolidated Rule 22.19(e). Furthermore, based on the Presiding Officer’s Prehearing Order and the spirit and letter of Consolidated Rule 22.19(a), it is clear that Respondents’ prehearing exchange runs afoul of the Consolidated Rules.

² For an explanation of the distinction between direct and derivative liability in the context of environmental cases, see *United States v. Bestfoods*, 541 U.S. 51, 65 (1998).

For the reasons set forth in detail below, Complainant respectfully requests that this Court enter an order compelling Respondents to produce the requested documents and provide the requested information within seven (7) days of the Presiding Officer's order compelling this discovery. Complainant also respectfully requests that Creative and Mr. Geist be ordered to correct the deficiencies in their joint prehearing exchange. More specifically, Complainant respectfully requests that Creative and Mr. Geist be ordered to submit a resume or curriculum vitae for Sabrina Byer and provide more detailed narratives of the proposed testimony of Ms. Byer, Mr. Adam Decker, Mr. Randall Geist, Mr. Jerome Henry, and Mr. Walter Fuller within seven (7) days of any order issued by the Presiding Officer.

II. RELEVANT BACKGROUND

A. Brief Description of Respondents

Creative and Mr. Geist have answered the Complaints in these matters,³ denying liability for, and often times knowledge of, the operations giving rise to the alleged violations. Creative and Mr. Geist suggest that Elite is responsible and that they should not be held derivatively liable for Elite's violations, based on their defense of "corporate separateness."⁴ Creative and Mr. Geist also contend that they are unable to pay a penalty. A brief description of Respondents is warranted.

³ These civil administrative penalty cases are brought pursuant to Section 3008(a) of the Resource Conservation and Recovery Act, as amended (RCRA), 42 U.S.C. § 6928(a), and its implementing state and federal regulations. Complainant has named Creative; Elite Enterprises, Inc. ("Elite"); and Randall Geist as Respondents (hereinafter, when referred to collectively, Creative, Elite, and Mr. Geist will be referred to as "Respondents").

⁴ Elite, despite being properly served with the Complaints, has failed to answer or otherwise respond to Complainant's allegations.

1. Elite Enterprises, Inc.

Since approximately 1993, Elite⁵, an Indiana corporation, has conducted painting operations within the International Park Commerce and Industrial Business Center (“International Park”).⁶ Elite operated in space located in Building 13 of International Park until approximately 2003.⁷ (Compl. ¶¶ 49-51).⁸ For a short period of time in 2003, the space in Building 13 was not used, by either Creative or Elite. (CPHX 149⁹, CX-0001542). From early 2004 until mid-2004, Elite was operating in both Buildings 13 (now Suite 1284) and 26 (now Suite 1158).¹⁰ (CPHX 149, CX-0001568-1569). Elite ceased painting operations in Building 13 (now Suite 1284) in 2004 and in Building 26 (now Suite 1158) in early 2006. (See CPHX 149, CX-0001570, 1646).

⁵ When it began its painting operations in International Park, Elite was known as Elite Enterprises, Inc. (Compl. ¶ 49). Elite Enterprises, Inc. changed its name to Elite Enterprises, Inc. in 1993. (*Id.*)

⁶ International Park is a 103-acre industrial complex that includes approximately 3 million square feet of various buildings and structures. (Compl. ¶¶ 43-44). International Park is located at 2701 S. Coliseum Boulevard in Fort Wayne, Indiana. (*Id.*) Wayne Coliseum Limited Partnership (“Wayne Coliseum”) owns International Park and leases the various buildings and structures to commercial tenants, including Elite and Creative. (*Id.*)

⁷ This space has been referred to as Suite 1158 before 2003 and Suite 1284 after 2003. (Compl. ¶ 49). Respondents refer to this space as Plant 2. (*Id.* ¶ 48).

⁸ Unless otherwise specified, references to the Complaint (“Compl.”) in this Memorandum are to the Complaint in the matter captioned *In re Creative Liquid Coatings, Inc.*, EPA Docket No. RCRA-05-2009-0012.

⁹ Complainant uses “CPHX” to refer to the exhibits submitted in its prehearing exchanges. Some of the exhibits referred to in this Memorandum were submitted with and are the subject of Complainant’s First Motion To Supplement Prehearing Exchange, which was filed on March 19, 2010 and is pending.

¹⁰ This space is also known as Plant 1. (Compl. ¶ 47).

2. Creative Liquid Coatings, Inc.

Creative Coatings, Inc. (“Creative Coatings”), predecessor of Creative, was founded in approximately 1995 and, at that time, did business at 7505 Freedom Way, Fort Wayne, Indiana. (Compl. ¶ 32). In or about 2003, Creative Coatings ceased doing business at its Freedom Way location and began operating at Suite 1284 (Building 13) in International Park. (*Id.* ¶ 33).

In June 2003, Creative took over the lease for Suite 1284, Building 13. (CPHX 149, CX-0001560-1563). On or about January 3, 2004, Creative entered into a series of agreements with Elite, one of which included a sublease of Suite 1284 from January 3, 2004 to December 31, 2004. (Compl. ¶ 45). In addition to subleasing Suite 1284 from Elite in January 2004, Creative purchased certain painting equipment located within International Park from Elite for \$135,000. (CPHX 151, CX-0001826). Creative started painting operations in Building 13 (now Suite 1284) in mid- to late-2004 when it started producing parts every day. (CPHX 149, CX-0001570). Creative assumed the painting orders of Elite in early 2006. (CPHX 149, CX-0001644-1645).

3. Randall Geist and the Other Common Officers and Directors of Creative and Elite

Randall Geist, an individual residing in Fort Wayne, Indiana, has owned 80% of the outstanding shares of Elite since approximately 1994.¹¹ (Compl. ¶ 38). Mr. Geist has served as a director on Elite’s board since approximately 2002. (CPHX 157, CX-

¹¹ Mr. Geist obtained an 80% interest in Elite from Mr. Michael Kreps and Mr. Richard Lain in exchange for his personally indemnifying Messrs. Kreps and Lain in about \$140,000 in personal liabilities incurred related to Elite. (CPHX 149, CX-0001511).

0001973). He currently is designated as the registered agent of Elite, authorized to accept service of process on the company's behalf. (CPHX 154, CX-0001939). Mr. Geist acted as personal guarantor for Elite's leases of Suites 1158 and 1284. (CPHX 3, 6).

Mr. Geist owns or owned 100% of the stock of Creative. (CPHX 149, CX-0001518). In addition to his status as majority shareholder, Mr. Geist originally was named as the sole director of Creative and currently serves as the President of Creative. (Compl. ¶ 39). As he has for Elite, Mr. Geist acted as personal guarantor for Creative's lease of Suite 1284. (CPHX 17, CX-0000274-275).

In addition to Mr. Geist, two other individuals are familiar faces on both Elite's and Creative's boards of directors: Richard Lain and Michael Kreps. Together, Messrs. Geist, Lain, and Kreps constitute the entire boards for both Creative and Elite. (CPHX 156, CX-0001957; CPHX 157, CX-0001973). Messrs. Lain and Kreps' involvement with Creative and Elite did not end with their service on the corporations' boards; they also have held various positions as officers for both Creative and Elite over the years.¹² (CPHX 156, CX-0001956; CPHX 157, CX-0001965-1971).

B. Creative and Mr. Geist's Deficient Joint Prehearing Exchange

Creative and Mr. Geist's Joint Prehearing Exchange ("JPHE") lists ten individual witnesses. Included among these proposed witnesses are individuals that Creative and Mr. Geist have designated to testify on, among other things, such topics as: (1) "the financial status of Creative Liquid and/or Randall Geist"; (2) "the following of corporate formalities"; (3) "histories of the separate entities of Elite and Creative Liquid"; (4) "the

¹² Mr. Lain "was the Vice-President of Finance and Chief Financial Officer (CFO) of Creative Coatings, Inc., Creative Liquid Coatings, Inc., and Elite Enterprises, Inc." (Compl. ¶ 40).

arms-length business dealings between the two companies relating to the suites at International Park”; (5) Creative’s “separateness from Elite”; and (6) “Creative Liquid’s and/or Randall Geist’s inability to pay a civil penalty.” (JPHE, pp. 2-4). Furthermore, Creative and Mr. Geist’s JPHE lists two individuals that are allegedly shareholders of Creative: Jerome Henry and Walter Fuller. (*Id.* at 4). Despite the lack of any connection of Messrs. Fuller and Henry to the alleged violations or the operations of Creative, Creative and Mr. Geist propose to call these individuals to testify on, among other things, Creative’s alleged “separateness from Elite, and the arms-length business dealings between the two companies relating to the suites at International Park.”¹³ (*Id.*)

Notwithstanding the broad range of topics upon which Creative and Mr. Geist’s witnesses may be offered to testify, their JPHE included a scant fifteen exhibits. Five of these exhibits are certain leases and agreements related to Suite 1284 between Creative and Elite and Creative or Elite and Wayne Coliseum, and an agreement dated January 3, 2004 in which Creative agreed to purchase “Elite’s paint equipment and related equipment located at Suite 1284” for \$135,000. (JPHE, Exhibits 2-6). Creative and Mr. Geist have also submitted certain payroll vouchers, a certificate of amendment changing Creative Coatings’ name to Creative Liquid Coatings, Inc., and the resume or curriculum vitae of Creative and Mr. Geist’s proposed expert, Mr. Adam Decker, who apparently has been retained to testify on “the financial status of Creative Liquid and/or Randall Geist, the following of corporate formalities, and Creative Liquid’s and/or Randall Geist’s

¹³ Interestingly, Creative and Mr. Geist do not identify Messrs. Lain or Kreps as witnesses. They were directors or officers of both Elite and Creative. In addition, Mr. Lain operates Creative Powder Coatings, the company that allegedly purchased some of the assets of Creative and/or Elite. Mr. Lain also is one of the individuals Complainant attempted to serve with the Complaints in these matters.

inability to pay a civil penalty.” (JPHE, pp. 2-3; *see also* JPHE, Exhibits 1 and 7).

Finally, Creative and Mr. Geist have submitted certain financial information they claim bears on their ability to pay a penalty. (JPHE, Exhibits 9-15).

Noticeably absent from Creative and Mr. Geist’s JPHE is any document that relates to “the [alleged] following of corporate formalities,” the “histories of the separate entities of Elite and Creative Liquid,” “the [alleged] arms-length business dealings between the two companies relating to the suites at International Park,” and Creative’s alleged “separateness from Elite,” other than the leases and agreements, dated January 3, 2004, that Respondents included as Exhibits 2-6 of their JPHE. Apparently, Creative and Mr. Geist intend to rely on the testimony of their identified witnesses to demonstrate “corporate separateness” and/or rebut any claim that Creative was a mere alter ego of Elite and Mr. Geist was an operator at Suites 1158 and 1284 and/or controlled Creative and Elite to such a degree that subjects Mr. Geist to personal liability for any penalty assessed against Creative and Elite.

Even more egregious is Creative and Mr. Geist’s wholesale designation of broad categories of documents that they intend to rely on as exhibits, without producing a single document that falls within these sweeping categories. For example, Creative and Mr. Geist list “[a]ll documents reviewed and/or prepared by testifying experts during their work on this litigation,” “[r]eports, affidavits and curriculum vitae of all testifying experts,” and “[a]ny exhibit for the purpose of impeachment or rebuttal.” (JPHE, p. 5). Yet, Creative and Mr. Geist have not provided any “reports” prepared by their proposed testifying experts. Furthermore, it is unclear whether the 15 exhibits submitted by Creative and Mr. Geist constitute the entire universe of documents reviewed by their proposed testifying experts. Finally, it is not clear whether Creative and Mr. Geist have

submitted all of the exhibits they intend to use “for the purpose of impeachment and rebuttal.” Unless Creative and Mr. Geist correct these deficiencies, they are in violation of Consolidated Rule 22.19(a) (“Except as provided in § 22.22(a), a document or exhibit that has not been included in prehearing information exchange shall not be admitted into evidence . . .”).

C. Complainant’s Proposed Financial Expert’s Preliminary Review Of Financial Information Submitted By Creative And Mr. Geist And Complainant’s Request For “Additional Discovery”

Complainant has retained Mark D. Ewen to conduct “a review concerning the financial status of respondents, including their ability to pay a civil penalty for alleged violations” of RCRA. (**Exhibit 2**, Declaration of Mark Ewen (“Ewen Decl.”), ¶ 4). Mr. Ewen states that his review of the “financial and operations information” submitted by Creative and Mr. Geist provides only “a limited picture of certain aspects of their financial status.” (*Id.* ¶ 8). The limited information provided by Creative and Mr. Geist, however, “do[es] not provide a sufficient basis for fully assessing their operations and financial history and accurately identifying potential sources of funds.” (*Id.*) To provide a full and complete assessment of Creative and Mr. Geist’s ability to pay any penalty, Mr. Ewen has requested that EPA seek certain additional information that “should serve to fill in these gaps and allow for a more robust assessment.” (*Id.*)

In addition to missing financial information, Mr. Ewen also has indicated that “the available information suggests a substantial degree of overlapping business ownership, exchange of goods and services, and other interactions among and between [Creative], Elite, and Mr. Geist (along with other related business entities).” (Ewen Decl. ¶ 5). From the limited information available, Mr. Ewen observes that Creative, Elite, and Mr. Geist “appear to have a complex ownership and operating history, engaging in significant

asset sales to business partners, leasing or subleasing operating space with affiliates, partnering with affiliates to service customers, and adding shareholders, as examples.” (*Id.* ¶ 12). “Understanding and disentangling this history is critical to appropriately assigning liability in this case and reasonably assessing respondents’ current financial circumstances.” (*Id.* ¶ 12).

D. Complainant Requests That Creative And Mr. Geist Voluntarily Produce The Requested “Additional Discovery”

The additional information requested by Mr. Ewen and Complainant is contained in the document attached hereto as **Exhibit 1**. In a letter, dated March 12, 2010, sent to counsel for Creative and Mr. Geist, Complainant requested that these Respondents voluntarily submit this information within seven days of his receipt of the letter. (*See Exhibit 3*). Complainant received interim responses from counsel for Creative and Mr. Geist on March 17 and 29, 2010, respectively. Aside from making a blanket objection to the scope of Complainant’s requests, Creative and Mr. Geist have failed to indicate when any of the requested documents would be forthcoming and the specific request they believe warrants an objection. Given that these cases are scheduled for hearing on May 18, 2010, Complainant filed this motion.¹⁴

III. RESPONDENTS SHOULD BE COMPELLED TO PRODUCE THE DISCOVERY REQUESTED BY COMPLAINANT

Complainant seeks “additional discovery” to further evaluate Creative and Mr. Geist’s ability to pay defenses. In addition, Complainant seeks additional discovery related to its claims against Mr. Geist on grounds of direct operator liability, its claims against Mr. Geist and Creative on grounds of derivative liability under a piercing the

¹⁴ Should Creative and Mr. Geist voluntarily produce the requested additional information before this Court rules on this Motion, Complainant will withdraw this Motion.

corporate veil theory, and Respondents' "corporate separateness" defense. This additional information is required to properly evaluate and prepare for Respondents' defenses to liability. As explained below, all of the requirements for additional discovery set forth in Consolidated Rule 22.19(e) are satisfied.

A. Applicable Legal Standard

Consolidated Rule 22.19(e) provides for motions for discovery. This Consolidated Rule permits a party to move for "additional discovery" after the parties have exchanged the information as provided in Consolidated Rule 22.19(a), which sets forth the requirements for a prehearing information exchange. 40 C.F.R. §§ 22.19(a), (e). A motion for "additional discovery" must "specify the method of discovery sought, provide the proposed discovery instruments, and describe in detail the nature of the information and/or documents sought (and, where relevant, the proposed time and place where discovery would be conducted)." 40 C.F.R. § 22.19(e).

Consolidated Rule 22.19(e) authorizes the Presiding Officer to order "additional discovery" provided that such discovery:

- (i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party;
- (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and
- (iii) Seeks information that has significant probative value on a disputed issue of material fact relevant to liability or the relief sought.

40 C.F.R. § 22.19(e).

B. The “Additional Discovery” Is Significantly Probative On The Disputed Issues Relating To Creative and Mr. Geist’s Ability To Pay Defenses

As set forth in Mr. Ewen’s declaration, the proposed “additional discovery” is necessary for Mr. Ewen to further evaluate Creative’s and Mr. Geist’s ability to pay defenses. (Ewen Decl. ¶ 5). In RCRA cases such as these, ability to pay is treated as an affirmative defense that must be pleaded and proven by the respondent. *See, e.g., In re Carroll Oil Company*, 10 E.A.D. 635, 663 (EAB 2002). “The defense as to ability to pay, or more precisely, the defense of inability to pay the proposed penalty, is a factor that may be considered in mitigation of the penalty, not as a bar to the assessment of a penalty.” *In re Zaclon, Indus.*, EPA Docket No. RCRA-05-2004-0019, 2006 EPA ALJ LEXIS 23, at *14-15 (Biro, J., May 23, 2006) (**Exhibit 4**). The Environmental Appeals Board (“Board”) has held that “in any case where ability to pay is put in issue, the Region *must* be given access to the respondent’s financial records before the start of [the] hearing.” *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 542 (EAB 1994) (emphasis added).

The Board has held that it is proper to “look at the financial condition of a related company to determine whether the related company may be a legitimate source of funds affecting the respondent’s ability to pay or the economic impact of the penalty.” *Carroll Oil*, 10 E.A.D. at 665. The Board has further instructed that it is proper to consider a “respondent’s interwoven financial relationship with another enterprise” to determine whether “the respondent could obtain the necessary resources to pay the proposed penalty amount.” *Id.*

In this case, the majority of the requests set forth in Complainant's proposed "additional discovery" relate to Creative's and Mr. Geist's ability to pay defenses.¹⁵ For example, Complainant has requested that Creative provide, among other documents and items: year-end financial statements and other related documents for 2009; federal income tax returns and related documents for 2009; an itemization of fixed assets currently owned by Creative Liquid; general ledgers from January 1, 2004 to present; and a list of all customers, including sales by customer from 2004 to present. (**Exhibit 1**). All of these items were requested by Complainant's proposed expert witness, Mark Ewen, to assess Creative's ability to pay defense. (Ewen Decl. ¶¶ 9-14). Mr. Ewen states that this "[c]urrent financial information is important for development of any accurate financial assessment, but is even more critical in this case, given the economic volatility experienced in 2009." (*Id.* ¶ 9).

Similarly, Mr. Ewen, after thoroughly reviewing documents previously submitted to EPA by Mr. Geist, has informed EPA that additional documentation is needed to assess Mr. Geist's ability to pay defense. To fully evaluate Mr. Geist's ability to pay a penalty, Mr. Ewen has indicated that the following information and associated documentation are necessary for a complete financial assessment: (1) a copy of the decree for Mr. Geist's recent divorce, in which he apparently was ordered to pay spousal support; (2) copies of documents regarding an agreement for a loan from Mr. Walter Fuller to Mr. Geist; (3) copies of account statements for accounts listed by Mr. Geist in a

¹⁵ As Mr. Ewen has stated, "[i]n order to perform a useful and accurate analysis [on Creative's and Mr. Geist's ability to pay defenses], [he] need[s] up-to-date information on each Respondent's assets, liabilities, income and expenses." (Ewen Decl. ¶ 5). Mr. Ewen also has indicated that he needs "to understand any uncertainties that might affect a party's future financial status." (*Id.*)

Financial Data Request Form he submitted to EPA; (4) information and documents related to actual cash amounts received by Mr. Geist as a result of the sale of certain assets of Creative Coatings to Creative Powder Coatings, LLC in 2005; (5) complete year-end financial statements for 2009 and related documents for certain entities Complainant believes include at least some of Mr. Geist's business holdings; and (6) the wages, salaries, dividends, or other distributions Mr. Geist received from Elite, Creative, and his other business holdings since January 1, 2005. (*See* Ewen Decl. ¶ 15).

These additional requests for information and documentation are critical to a full and complete evaluation of Creative and Mr. Geist's financial status as it bears on their ability to pay a penalty. (*See* Ewen Decl. ¶¶ 8-16). This Court has held that EPA is entitled to a complete financial picture, including an analysis of a related company's financial status, in assessing a respondent's ability to pay any assessed penalty. *See In re Century Oil Acquisition Corp.*, Docket No. RCRA-03-2006-0088, 2007 EPA ALJ LEXIS 22, at *37-40 (Gunning, J., Sept. 17, 2007) (**Exhibit 5**). Analyzing a respondent's ability to pay is not a game of cat and mouse and the selective presentation of favorable financial information should not suffice. *See Zaclon, Inc.*, 2006 EPA ALJ LEXIS 23, at *21 (holding that "self-serving testimony of corporate officers, uncorroborated by documentation, is generally given little weight regarding inability to pay") (citing cases). Furthermore, any contention by Creative or Mr. Geist that they are not obligated to produce the documents in their possession bearing on Elite's financial status is contrary to a recent decision by this Court in *In re Century Oil Acquisition Corp.*, *supra*.¹⁶ As this Court held in *Century Oil*, "[e]ven if an entity is financially defunct, it may still have

¹⁶ Mr. Geist cannot claim that he does not have access to the financial information of Elite. On January 4, 2008, as President of Elite, he provided the tax returns of Elite for 2002-2006. (CPHX 113).

reaped ill-gotten gains from previous malfeasance that may enable it, or its successors, to obtain unfair market advantages at a later point.” *In re Century Oil*, 2007 EPA ALJ LEXIS 22, at *40 (citing *In re B.J. Carney Indus.*, 7 E.A.D. 171, 208 (EAB 1997)).

In sum, the Additional Information Request is significantly probative on Respondents’ alleged inability to pay a penalty.

C. The “Additional Discovery” Is Significantly Probative On Creative and Mr. Geist’s Defenses Of “Corporate Separateness” And “Following Of Corporate Formalities”

Mr. Geist’s control and day-to-day involvement with Creative and Elite, and Creative and Elite’s relationship with one another, are significant issues in these cases. Complainant alleges that Mr. Geist is directly liable for any penalty assessed against Creative and Elite for operations at Suites 1158 and 1284. In addition, Complainant alleges that Creative and Elite can each be held derivatively liable for any penalty assessed against the other on grounds of piercing the corporate veil. In response, Mr. Geist contends that he “should not face any liability as an individual given his lack of day-to-day involvement in the operations at the time period relevant to this matter and the well-founded principles of shareholder liability limitations.” (JPHE, p. 6). Similarly, Creative and Mr. Geist assert that “Complainant’s allegations are more properly directed toward Elite and that Respondents should not have any liability for the acts or omissions of another entity.” (*Id.*) While Creative and Mr. Geist may contend otherwise, the additional information is critical to evaluate Respondents’ defenses and is relevant to Complainant’s allegations that the corporate veils of Creative and Elite should be pierced to hold Creative liable for any penalty assessed against Elite and Mr. Geist liable for any penalty assessed against Creative and/or Elite.

“Generally, courts are reluctant to disregard the corporate entity, but will do so to prevent fraud or unfairness to innocent third parties.” *Nat’l Soffit & Escutcheons, Inc. v. Superior Sys., Inc.*, 98 F.2d 262, 265 (7th Cir. 1996) (citing *Winkler v. V.G. Reed & Sons, Inc.*, 638 N.E.2d 1228, 1232 (Ind. 1994)). “The doctrine of piercing the corporate veil may be used to hold individual shareholders, officers and related corporations liable for the acts of the corporation.” *Id.* “When a court employs its equitable power to pierce the corporate veil, it engages in a highly fact-sensitive inquiry.” *Id.* (citing *Winkler*, 638 N.E.2d at 1232).

In determining whether to pierce a corporation’s veil, Indiana courts¹⁷ consider eight factors as set forth by the Indiana Supreme Court in *Aronson v. Price*, 644 N.E.2d 864, 867 (Ind. 1994). These eight factors include:

- (1) undercapitalization;
- (2) absence of corporate records;
- (3) fraudulent representation by corporate shareholders or directors;
- (4) use of corporation to promote fraud, injustice, or illegal activities;
- (5) payment by corporation of individual obligations;
- (6) commingling of assets and affairs;

¹⁷ While Complainant refers to Indiana law, the law under which Creative and Elite were incorporated, on piercing the corporate veil for purposes this Motion, it reserves the right to further brief the issue of whether federal common law or state law applies in determining whether a corporation’s veil should be pierced to hold a shareholder or another related corporation liable for a penalty assessed for violations of RCRA. Complainant notes, however, that a recent opinion by this Tribunal held that the law of the corporation’s state of incorporation governs in determining whether a corporation’s veil should be pierced in a RCRA administrative penalty action. *In re John A. Biewer*, EPA Docket No. RCRA-05-2008-0007, 2009 EPA ALJ LEXIS 15, at *18 (Moran, J., Oct. 5, 2009) (**Exhibit 6**). The Supreme Court did not decide this issue in *Bestfoods*. 524 U.S. 51, 64 n. 9 (1998).

- (7) failure to observe required corporate formalities; and
- (8) other shareholder acts or conduct ignoring, controlling, or manipulating the corporate form.

Id.; see also *Nat'l Soffit*, 98 F.3d at 265-66 (citing *Aronson*).

The corporate veil may also “be disregarded where one corporation is so organized and controlled and its affairs so conducted that it is a mere instrumentality or adjunct of another corporation.” *Smith v. McLeod Distrib., Inc.*, 744 N.E.2d 459, 462 (Ind. Ct. App. 2000) (citations omitted). In other words, “Indiana courts refuse to recognize corporations as separate entities where the facts establish several corporations are acting as the same entity.” *Gen. Fin. Corp. v. Skinner*, 426 N.E.2d 77, 84 (Ind. Ct. App. 1981). In such cases, Indiana courts have held that the eight *Aronson* factors are not exclusive and the following additional factors must be considered:

- (1) similar corporate names;
- (2) common principal officers, directors, and employees;
- (3) similar business purposes; and
- (4) the same offices, telephone numbers, and business cards.

Smith, 744 N.E.2d at 463.

The discovery that Complainant seeks from Respondents relates to one or more of the factors that Indiana courts consider in deciding whether to pierce the corporate veil. As Mr. Ewen states, “the available information suggests a substantial degree of overlapping business ownership, exchange of goods and services, and other interactions among and between [Creative], Elite, and Mr. Geist (along with other related business entities). Untangling and understanding these interactions may be important to the proper assessment of liability in this case” (Ewen Decl. ¶ 5). To dissect the complex

relationships among Creative, Elite, and Mr. Geist, Complainant seeks information related to what appears to be Creative's sharing or receipt of certain business assets from Elite (*id.* ¶ 10); information related to the historical interactions between Creative and its "sister corporation, Elite, its predecessor corporation Creative Coatings, and shareholders (*id.* ¶ 11); information related to "significant asset sales to business partners, leasing or subleasing operating space with affiliates, partnering with affiliates to service customers, and adding shareholders" by Creative, Elite, and Mr. Geist (*id.* ¶ 12); details relating to certain loans that Creative secured from an external lender and a receivable Creative continues to carry as a receivable from Elite (*id.* ¶ 13); and information related to "myriad of business entities" in which Mr. Geist has an interest and with whom he "has historically engaged in numerous business or investment transactions involving significant sums" (*id.* ¶ 15).

Complainant believes that this additional information will further illustrate that Creative and Elite are mere alter egos of one another, and that they were mere instrumentalities controlled and operated by Mr. Geist. Requiring Respondents to produce the documents and information in the Additional Information Request is also necessary for Complainant to prepare its rebuttal to Respondents' "corporate separateness" and "following of corporate formalities" defenses. The Board recently has held that where a defense, such as "corporate separateness," is fact-intensive, EPA is entitled to a full and fair opportunity to develop properly and prepare its response to such a defense. *In re J. Phillip Adams*, CWA Appeal No. 06-06, ___ E.A.D. ___, slip op. at 24-25 (EAB 2005) (reversing an ALJ's initial decision for, *inter alia*, failing to provide EPA with adequate opportunity to "develop properly and prepare its response to [a fact-

intensive] defense”) (**Exhibit 7**). Thus, Complainant is entitled to this additional information.

D. The “Additional Discovery” Is Most Reasonably Obtained From Creative And Mr. Geist And They Have Refused To Provide The “Additional Discovery” Voluntarily

In addition to being probative of one or more disputed issues of material fact relevant to the liability of Respondents and the relief sought by Complainant, the requested additional information undoubtedly is most reasonably obtained from Respondents. A cursory review of the requested information leads to one conclusion: the majority, if not all, of the requested information and documentation is in the exclusive possession and control of Respondents and not available to the general public. Complainant has requested that Respondents voluntarily produce the requested information. (**Exhibit 3**). To date, Creative and Mr. Geist have not voluntarily submitted the requested information, requiring Complainant to file this Motion.

E. Compelling The “Additional Discovery” Will Neither Unreasonably Delay These Proceedings Nor Unduly Burden Creative And Mr. Geist

As set forth in Consolidated Rule 22.19(e), the Presiding Officer may grant “additional discovery” only if it will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party. 40 C.F.R. § 22.19(e). The discovery Complainant seeks is timely because it filed this Motion after submission of the parties’ prehearing exchanges, as ordered by the Presiding Officer.¹⁸ In addition, Complainant has submitted this request over a month and a half before the hearing date.¹⁹

¹⁸ According to Consolidated Rule 22.19(e), the earliest that a request for “other discovery” can be filed is after completion of the prehearing exchange. 40 C.F.R. § 22.19(e).

¹⁹ Assuming Respondents oppose this Motion, approximately 25 days could be consumed with briefing. This would leave approximately 20 days for a decision,

Furthermore, the information sought is not unreasonably burdensome on Respondents. Although a request for documentation and information outside the normal course of business has the potential to place a burden on Respondents, a request for “additional discovery” under Consolidated Rule 22.19(e) should not be denied if the request merely burdens a respondent, however slight. Rather, to deny a request for “additional discovery,” such a request must impose an “unreasonable burden” on the respondent. 40 C.F.R. § 22.19(e).

As explained above, *see supra* Section IV.A., the information requested relates to Creative’s and Mr. Geist’s alleged inability to pay a penalty. Respondents bear the burden of proving their alleged inability to pay. *In re Carroll Oil Company*, 10 E.A.D. at 663. Having raised this defense, Respondents must provide information justifying their contentions. It is in Creative’s and Mr. Geist’s best interests to provide the requested information so that both the Court and Complainant may accurately assess their alleged inability to pay a penalty. Furthermore, some, if not all, of the information and documents requested by Complainant should be readily available to Respondents. (*See Ewen Decl.* ¶¶ 10-11). Consequently, the minimal administrative burden imposed on Respondents in gathering and producing the requested information is outweighed by the significant impact the requested information could have on the material issues in dispute.

IV. RESPONDENTS SHOULD BE ORDERED TO CORRECT THE DEFICIENCIES IN THEIR JOINT PREHEARING EXCHANGE

As indicated above, Creative and Mr. Geist’s JPHE is deficient. Consolidated Rule 22.19(a) and the Presiding Officer’s October 21, 2009, Prehearing Order require

Respondents’ release of the information, and Complainant’s review of the information. Although this time frame is aggressive, Complainant believes it is possible to accomplish, without delaying the current hearing date.

that each party's prehearing exchange include a "brief narrative summary of each witness' expected testimony" and "copies of all documents and exhibits which each party intends to introduce into evidence at the hearing." 40 C.F.R. § 22.19(a); (10/21/09 Prehearing Order, p. 3). In addition, the Prehearing Order expressly requires that the parties' "exhibits should include a curriculum vitae or resume for each proposed expert witness." (10/21/09 Prehearing Order, p. 3).

Creative and Mr. Geist have failed to include in their prehearing exchange a copy of the curriculum vitae or resume for Sabrina Byer. Creative and Mr. Geist's JPHE provides that Ms. Byer may be offered as an expert witness on such topics as: "the financial status of Creative Liquid, the following of corporate formalities, and Creative Liquid's inability to pay a civil penalty." (JPHE, p. 2). Creative and Mr. Geist's failure to provide a curriculum vitae or resume for Ms. Byer runs afoul of the Consolidated Rules and the Presiding Officer's October 21, 2009 Prehearing Order. Furthermore, without such information, Complainant is unable to prepare for and examine Ms. Byer on her alleged qualifications. *See, e.g., Jones v. Lincoln Elec. Co.*, 188 F.3d 709, 723 (7th Cir. 1999) ("Whether a witness is qualified as an expert can be determined by comparing the area in which the witness has superior knowledge, skill, experience, or education with the subject matter of the witness's testimony.") (quoting *Carroll v. Otis Elevator Co.*, 896 F.2d 210, 212 (7th Cir. 1990)). Therefore, Creative and Mr. Geist should be ordered to produce a curriculum vitae or resume for Ms. Byer.

In addition to failing to submit a curriculum vitae or resume for Ms. Byer, Creative and Mr. Geist also have failed to adequately describe in narrative format the proposed testimony of several of their witnesses. Creative and Mr. Geist have listed several witnesses to testify on a broad range of topics, including: (1) "the financial status

of Creative Liquid and/or Randall Geist”; (2) “the following of corporate formalities”; (3) “histories of the separate entities of Elite and Creative Liquid”; (4) “the arms-length business dealings between the two companies relating to the suites at International Park”; (5) Creative’s “separateness from Elite”; and (6) “Creative Liquid’s and/or Randall Geist’s inability to pay a civil penalty.” The witnesses Creative and Mr. Geist have listed that may testify on these topics are Ms. Byer, Mr. Adam Decker, Mr. Geist, Mr. Jerome Henry, and Mr. Walter Fuller.

The Consolidated Rules and the Presiding Officer’s October 21, 2009, Prehearing Order required Creative and Mr. Geist to include a brief narrative summary of each witness’ expected testimony. 40 C.F.R. § 22.19(a)(2)(i); (10/21/09 Prehearing Order, p. 3). Listing general, amorphous topics clearly does not satisfy this mandate, particularly where, as here, Creative and Mr. Geist have failed to submit more than a shred of documentation upon which these witnesses will presumably rely on or refer to when testifying. This deprives Complainant of any meaningful opportunity to prepare to cross-examine these witnesses, including Respondents’ proposed expert witnesses. *See Daubert v. Merrell Dow Pharms.*, 509 U.S. 579, 596 (1993) (“Vigorous cross examination . . . [is] the traditional and appropriate means of attacking shaky but admissible evidence”). In addition, it undoubtedly will amount to Creative and Mr. Geist presenting self-serving testimony of several witnesses on complex topics. *Cf. Zaclon, Inc.*, 2006 EPA ALJ LEXIS 23, at *21 (holding that “self-serving testimony of corporate officers, uncorroborated by documentation, is generally given little weight regarding inability to pay”). Therefore, Creative and Mr. Geist should be ordered to provide more detailed narratives for the proposed testimony of Ms. Byer and Messrs. Decker, Geist, Henry, and Fuller.

V. CONCLUSION

For all of the foregoing reasons, Complainant respectfully requests that this Court enter an Order compelling Respondents to provide complete and accurate responses and produce documents requested in the Additional Information Request submitted herewith as **Exhibit 1**. Complainant also respectfully requests that Creative and Mr. Geist be ordered to submit a resume or curriculum vitae for Sabrina Byer and provide more detailed narratives of the proposed testimony of Ms. Byer, Mr. Adam Decker, Mr. Randall Geist, Mr. Jerome Henry, and Mr. Walter Fuller. Complainant respectfully requests that Respondents be ordered to complete these tasks within seven (7) days of any order issued by the Presiding Officer.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that the foregoing Complainant's Redacted Motion to Compel Discovery And To Correct Deficiencies In Respondents' Prehearing Exchange and the Memorandum in Support of Complainant's Redacted Motion to Compel Discovery And To Correct Deficiencies In Respondents' Prehearing Exchange, dated March 31st, 2010, were sent this day in the following manner to the addresses listed below:

Original by and one Copy by
Hand-Delivery to:

La Dawn Whitehead
Regional Hearing Clerk
United States EPA – ORC Region 5
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Chicago, IL 60604-3590

Copy by FedEx to:

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Copy by Pouch Mail to:

The Honorable Barbara A. Gunning
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Ave., NW
Washington, D.C. 20460-2001

DATE: March 31st, 2010

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