UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5

In the Matter of:	)	Docket No. TSCA-05-2008-0012
	)	
One Management, Inc.,	)	Complainant's Motion to Amend
L&J Investment, Inc., and	)	Prehearing Order
One Management Investment Group,	)	
	)	Honorable William B. Moran
	)	Presiding Administrative Law Judge
	)	
	)	REDACTED INFORMATION
	)	CLAIMED AS CONFIDENTIAL
Respondents	)	BUSINESS INFORMATION

COMPLAINANT'S MOTION TO AMEND PREHEARING ORDER

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COMPLAINANT'S MOTION TO AMEND PREHEARING ORDER

I. Jurisdiction and Introduction

Complainant, through its undersigned attorney, files the instant Complainant's Motion to Amend Prehearing Order ("Motion") pursuant to the authority of Section 22.16 of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits*, ("*Consolidated Rules*" or "*CROP*") 40 C.F.R. § 22.16. By this motion, Complainant respectfully requests this Honorable Court to amend the Prehearing Order issued on February 2, 2009, to require Respondents to provide relevant and probative evidence relating to the statutory penalty factors of ability to pay and the effect of the penalty on Respondents' ability to continue to do business, 15 U.S.C. § 2615(a)(2)(B).[1]

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[1] Complainant is aware that, under 40 C.F.R. § 22.19(e), "other discovery" is available after the prehearing exchange is completed. However, as this matter has proceeded through two statute of limitations' tolling periods and the alternative dispute resolution process, and Complainant has not received the required financial documentation to evaluate Respondents' claims of inability to pay and inability to continue in business should they be required to pay the

On February 2, 2009, this Court issued its Prehearing Order regarding the filing of prehearing exchanges under 40 C.F.R. § 22.19. As indicated below, Complainant requests that this Court amend its Prehearing Order in light of Respondents' statement in their Answer at page 314, in which they identify "Affirmative Defenses," including their inability to pay the proposed penalty, and their statement that imposition of the proposed penalty would result in the Respondents' inability to continue to do business.[2]

Complainant respectfully requests that this Court amend the Prehearing Order to require that, in addition to the information specified by the Court, Respondents, One Management, Inc., L&J Investment, Inc., and One Management Investment Group: (1) submit certain documents identified by Complainant's expert financial analyst as relevant to the issues of Respondents' ability to pay the proposed penalty of $636,482.00 in this case, and the effect of payment of the penalty on Respondents' ability to continue to do business; and (2) submit certain records related to the formation and dissolution of any of the Respondent corporations, which issue was raised in Respondents' Answer to the Complaint, at paragraph 3.

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proposed penalty (despite repeated requests for the production of such information), Complainant respectfully notes that granting the instant motion and requiring Respondents to include this information as part of their prehearing exchange will avoid a delay in the hearing process. Complainant wishes to ensure that the record before the Presiding Administrative Law Judge will contain all relevant and probative evidence concerning each Respondent's ability to pay the penalty proposed in the Complaint and the effect of payment of the proposed penalty on each Respondent's ability to continue in business.

[2] Beginning at page 314 of their Answer, Respondents identify other additional "Affirmative Defenses" that Complainant will address at a later date.

II. Background

On November 26, 2007, Complainant sent three separate letters entitled, "Notice of Intent to File a Civil Administrative Action" ("Notice"), to the registered agents for One Management Inc., L&J Investment, Inc., and One Management Investment Group. In each Notice, Complainant advised each Respondent that "[i]f you [(Respondent)] believe that there are financial facts and information which bear on your ability to pay a penalty, please complete the enclosed form, "Financial Statement for Businesses." Each Notice also stated, "Whether or not you are claiming that you cannot pay a penalty, you must also respond to question 22 in the enclosed form, "Financial Statement for Businesses" for each company in which you have any interest, including but not limited to a role as an officer, principal, or registered agent. This question requires you to provide information regarding ownership of real property, specifically a brief description, type of ownership, and the address for each property." See CX 1, CX 2 and CX 3.

On December 18, 2007, Respondents' counsel submitted a copy of only a single tax return, specifically, One Management, Inc.'s 2006 federal income tax return. Respondents' counsel also claimed that Respondents had not yet had an opportunity to complete the form entitled, "Financial Statement for Businesses."

While engaged in settlement discussions, the three Respondents and Complainant entered into two consecutive tolling agreements that expired in June, 2008. (See CX 4 and CX 5.) Complainant filed the Complaint in this matter on June 23, 2008 against the three Respondents. In the Complaint, Complainant alleges that Respondents failed to provide information required by the Lead Disclosure Rule at 40 C.F.R. Part 745, promulgated under the Residential Lead-

Based Paint Hazard Reduction Act of 1992, 42 U.S.C. § 4852d, at properties owned and/or managed by Respondents at the time of the alleged violating transactions.

On August 13, 2008, Respondents' counsel filed an Answer, stating that One Management, Inc., and L&J Investment, Inc. had been dissolved (see page 1, response to ¶ 3, of Respondents' Answer), but providing no documentation regarding the dissolutions of the corporations. In their Answer, at page 314, Respondents also identify "Affirmative Defenses," including:

> 1. The Respondents are unable to pay the penalties which the U.S. EPA seeks to impose in this matter.
> 2. Imposition of the penalties which the U.S. EPA seeks to impose in this matter shall result in the Respondents' inability to continue to do business.

Complainant notes that Respondents' second affirmative defense, above, seems to contradict the statement Respondents make in ¶ 3 of their Answer about the dissolution of two of the three named parties.

Also on August 13, 2008, Respondents served Complainant's counsel with a copy of their Answer, as well as a copy of One Management, Inc.'s 2007 federal tax return and a copy of its 2007 Michigan Single Business Tax return in an effort to demonstrate One Management, Inc.'s inability to pay the penalty proposed in EPA's Complaint.

On October 13, 2008, Respondents' counsel submitted copies of One Management, Inc.'s 2004 and 2005 U.S. Income Tax Returns for an S Corporation.

Complainant reviewed the tax returns as well as publicly available information on Respondents' real estate holdings to assess the ability to pay of the Respondents and the effect of the proposed penalty on each Respondent's ability to continue to do business. Complainant also

hired Ms. Gail B. Coad, a Principal of Industrial Economics, Incorporated, who has been recognized as an expert in financial analysis and ability to pay determinations[3], to fairly evaluate the ability of Respondents to pay the penalty proposed in this matter, and to evaluate the effect of the penalty on the Respondents' ability to continue in business.

Ms. Coad has reviewed the information provided by Respondents, as well as publicly available information relating to Respondents' financial condition, and has prepared a sworn expert declaration in this matter. (See CX 8). As set forth in greater detail in ¶ 20 of Ms. Coad's declaration, her review of the Wayne and Oakland County records of property transactions revealed inter-woven real estate transactions between One Management, Inc., and its shareholders; specifically, the county real estate records showed that, on a number of occasions, real property has been quit claimed from One Management, Inc., to [redacted] One Management, Inc., or from Mr. or Mrs. Watha to One Management, Inc.

Following Ms. Coad's review of publicly available real estate records and all of the financial information provided by Respondents, Complainant advised Respondents by letter dated October 29, 2008, that Complainant did not have adequate information to evaluate One Management, Inc.'s ability to pay all or a portion of the proposed civil penalty. (See CX 6). In its October 29, 2008 letter, Complainant advised Respondents' counsel that Complainant needed, at a minimum, the following information:

1. A current list of all residential properties owned and/or managed by One Management, Mr. Jerry Watha and/or Mrs. Fattin Watha;

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[3] See, e.g., *In the Matter of Energy Gases, Inc.*, Docket No. EPCRA-02-2000-4002, 2003 EPA ALJ LEXIS 61 (August 13, 2003), Slip. Op. at 8-9 ("The testimony of [Gail] Coad, who was qualified as an expert witness in the area of "ability-to-pay analysis," is critical in resolving the ability-to-pay issue").

2. The most recent tax statement, bill or other documentation that reflects the current assessed value and payment information for each property;
3. Information regarding the balance owed and property secured by all mortgages with third parties. Provide the most recent mortgage bill for each mortgage, which should include a summary of the terms, balance and payment;
4. Mr. and Mrs. Watha, either individually or together, should complete the personal financial information form (enclosed);
5. Identify any other liabilities other than mortgages, including balance outstanding, related collateral or liens; and
6. Identify any properties that are under contract to either sell or buy, and provide a copy of the contract.

Complainant advised Respondents that absent this information, Complainant could not accurately evaluate Respondents' inability to pay claim, but that with this information, Complainant could perform a reasonably accurate assessment of Respondents' ability to pay all or a portion of the proposed civil penalty in this matter.

By letter dated December 8, 2008, One Management, Inc. submitted additional documents in support of its inability to pay claim. Unfortunately, rather than responding to items 1 through 6 in Complainant's October 29, 2008 letter, One Management, Inc. provided an incomplete response. Specifically, One Management, Inc., provided only certain documents related to items 5 and 6 in Complainant's October 29, 2008 letter, such as: a promissory note between L. Fitzpatrick and One Management, Inc.; promissory notes between F. Kouaz and One Management, Inc.; a tax lien; a mortgage foreclosure; information about three lawsuits filed against One Management, Inc., and Mr. and Mrs. Watha; credit card bills; and a loan document, along with representations about other forthcoming information. Complainant's financial analysts reviewed these documents, and concluded that the information was deficient, and that it could not serve as the basis for an accurate ability to pay analysis.

By letter dated January 15, 2009, Complainant advised Respondents that the documents submitted on December 8, 2008, were insufficient to evaluate Respondents' inability to pay claim. (See CX 7). Specifically, Complainant pointed out that One Management, Inc., had provided virtually no information concerning its assets. Further, with respect to the documents provided, Complainant pointed out that the documents were presented without any context, and Complainant's expert, Ms. Coad, reviewed the documentats and concluded that they only served to raise further questions, such as:

A. With respect to the federal lien, what is the value of the assets that the Wathas own that provide some potential for repayment of this debt?
B. If the hotel property at 1 West Nine Mile Road is successfully sold, what will the Wathas financial position then be? For example, it would be helpful to know the total debt due upon sale of this property so that we may have some idea of the potential net recovery.
C. The first promissory note ($120,000 due to Lorraine Fitzpatrick) was due six months after the date of the note, May 28, 2008. Thus, it was due on November 28, 2008, prior to the date of your December 8, 2008 letter. Was some or all of this promissory note paid? If not, what is the status?
D. The second promissory note ($115,000 due to Christopher Kouza), dated June 10, 2008, has indefinite repayment terms. Was some or all of it paid? What is the current balance and status?
E. The Wathas provided seven (7) credit card payment coupons, showing a total outstanding balance of $205,442. One payment coupon per account is provided. The statements are somewhat dated. For example, the statement dates for the American Express cards due on the first page are September 22, 2008 and September 8, 2008. Therefore, there should be at least one to two more statements available for the letter of December 8, 2008. A longer history of the credit card statements would provide better perspective on the level of payments and whether the overdue balances are increasing or shrinking.
F. Why is the credit card statement for Jaqueline W. Karim sufficient evidence of Ms. Karim's loan to the Wathas? Is there some written agreement or promissory note in place for this loan?
G. What is the current posture in the two foreclosure litigations? What assets and asset value will remain assuming the plaintiffs are successful? What steps are the Wathas taking, or do they consider all the properties cited to be "underwater" and not worth saving?

H. The information includes a set of documents regarding the transfer of the servicing of mortgages from Miami Valley Bank to Brown Bark III, L.P., as a result of Miami Valley Bank being in receivership under the FDIC (first page is DHL waybill). This material includes a spreadsheet of the status of the properties with Miami Valley Bank mortgages as of August 9, 2007. In this package is a letter from Mr. Watha dated July 14, 2008. Page 2 of this letter references a number of enclosed documents, including several provided with the package to EPA – the Circuit Court action brought by Michigan Heritage Bank, the Circuit Court action brought by RBS Citizens, N.A., successor to CCO Mortgage, and the federal tax lien. However, One Management did not provide the Bank of America settlement or the letter of negotiations with Chase Bank.

Complainant again advised Respondents that absent responses to items 1 through 6 in EPA's October 29, 2008 letter, and absent Respondents' clarification of the questions raised by Complainant's financial analyst (items A-H, above), Complainant could not accurately evaluate One Management's ability to pay the penalty proposed in this matter.

Despite Complainant's repeated efforts, to date, Respondents have not provided the information requested in Complainant's October 29, 2008 and January 15, 2009 letters. As the attached declaration of Ms. Coad illustrates, this financial information is critical to perform an accurate analysis of Respondents' ability to pay the proposed penalty and to evaluate the effect of the penalty on Respondents' ability to continue in business. (See CX 8). Specifically, Ms. Coad found that based on the documentation provided to date, she has no basis to conclude that One Management, Inc., would not be able to pay the penalty proposed in EPA's Complaint, and continue in business, noting, "[One Management, Inc.] has shown considerable resourcefulness in managing its real estate holdings to generate cash for continued operations and purchases of properties." (See ¶ 23 of Ms. Coad's declaration.) She also notes that she has no documentation to evaluate the financial capabilities of One Management Investment Group or L&J Investment, Inc., and therefore has no basis to conclude that these entities would not be able to continue in

business, or that these two Respondents are unable to pay the proposed penalty. Finally, she states:

> It is my opinion that any assessment of the entities' ability to pay a penalty and the effect of penalty payment on their ability to continue in business must consider Mr. and Mrs. Watha as well as Huntington Property Holdings LLC. From the investigations conducted to date and described above, it is clear that transactions and assets are intermingled among the entities and therefore must be considered as a whole.

See ¶ 25 of Ms. Coad's declaration. As explained below, these facts and Ms. Coad's expert opinion concerning such facts demonstrate that the financial condition of the Wathas is relevant, material and probative of the corporate Respondents' ability to pay, and that such information is necessary to fairly evaluate the Respondents' ability to pay and the economic impact of the proposed penalty on Respondents' ability to continue in business. The financial information of the Wathas – [redacted] – has significant probative value to the issue of ability to pay, because Mr. and Mrs. Watha legitimately can be considered a potential external source of funding for Respondents, due to the intermingling of assets among the Wathas and One Management, Inc. See Ms. Coad's declaration, ¶ 25; *In re: New Waterbury*, 5. E.A.D. 529, at 546-50 (EAB 1994).

With respect to the proposed penalty in this matter, Complainant has given serious consideration to the issue of Respondents' ability to pay and the issue of each Respondent's ability to continue in business. Even before the Complaint was filed, Complainant sent Notice letters to each Respondent, requesting, among other things, information relevant to Respondents' ability to pay. (See CX 1, CX 2 and CX 3.) Complainant also hired an expert in financial analysis and ability to pay determinations to thoroughly evaluate the limited information

provided by the Respondents, as well as to search for and evaluate factual information available from public records. Complainant took these measures to ensure that Complainant was fairly considering the impact of the proposed penalty on the Respondents, and in order to provide the Court with the most complete picture of Respondents' true financial situation that was possible under the circumstances, and to avoid the situation where the only information available was the self-serving, unsupported oral claims and incomplete documentation provided by the Respondents at hearing. See *In re: New Waterbury,* 5. E.A.D. 529, at 546-50 (EAB 1994) (holding that, where respondent had close financial relationship with another entity from which it had historically received financial assistance, it was appropriate to examine financial status of that other entity in assessing respondent's ability to pay); *In re: Carroll Oil Company*, 10 E.A.D. 635, at 667-68 (EAB 2002) (due to "close financial arrangement" between respondent and related company, which "conferred a financial advantage" to respondent, it was appropriate to examine whether related company could be a source of financial support to respondent).

Respondents' Answer has put Respondents' ability to pay the penalty proposed in the Complaint in issue. However, only Respondent One Management, Inc., an S-Corporation, has submitted tax returns. As noted in ¶ 8 of Ms. Coad's declaration, "As an S-Corporation, One Management, Inc. does not pay income taxes, but rather passes through its income or losses to its owners, [redacted], to be taxed on their individual federal and state income tax returns." The fact that One Management, Inc., does not retain any of its earnings, but rather passes the earnings on to the shareholders, makes the financial con dition of the shareholders

relevant in evaluating One Management, Inc.'s ability to pay.[4] Other than the submission of tax returns for an S-Corporation, and the various documents such as promissory notes, a tax lien, a mortgage foreclosure, information about lawsuits, credit card bills, and a loan document, as noted above, the Respondents have not provided Complainant with sufficient evidence to support an objection to the proposed penalty based on considerations of Respondents' ability to pay, despite explicit invitations to do so before as well as after the filing of the Complaint in this matter.

III. Argument

A. Burden of Proof As to Ability to Pay

The burden of proof as to ability to pay has been explained in decisions by the Environmental Appeals Board ("EAB" or "the Board") since 1994. In that year, the Board decided the case of *In re: New Waterbury Ltd.*, 5 E.A.D. 529 (EAB 1994). *New Waterbury* established that, in an administrative penalty action, Complainant has the burden of proving that the penalty is appropriate, and that this burden encompasses consideration of each statutory penalty factor; where "ability to pay" is a statutory penalty factor, Complainant's case-in-chief must include consideration of this factor. *New Waterbury Ltd.* 5 E.A.D. at 537-38. However, as the Board recognized in that case and subsequent decisions, "although the Region bears the burden of proof as to the appropriateness of the penalty it does not bear a separate burden on each of the [statutory penalty] factors." *New Waterbury*, 5 E.A.D. at 538. Rather, "the burden of proof goes to the appropriateness of the penalty taking *all* factors into account." *New Waterbury*,

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[4] See *United States v. Mun. Auth. of Union Township*, 150 F.3d 259, 268-69 (3rd Cir. 1998) (holding in Clean Water Act case that the financial condition of the defendant company's parent corporation is a relevant consideration in assessing company's ability to pay where parent corporation retained subsidiary's earnings).

5 E.A.D. at 538. Thus, where a respondent has raised the issue of ability to pay, Complainant, to meet its burden, must prove as part of its prima facie case only that the Agency has *considered* the respondent's ability to pay. To prove that the Agency "considered" this factor, Complainant must introduce into the record at hearing some general financial evidence from which it can be inferred that the respondent has the ability to pay the proposed penalty. As the Board explained:

> In our view, a Region, at a penalty *hearing,* must as part of its prima facie case produce some evidence regarding the respondent's *general* financial status from which it can be *inferred* that the respondent's ability to pay should not affect the penalty amount. *See Helena Chemical Co.* (record contains evidence that respondent's gross sales exceeded $ 300 million, thus supporting conclusion that respondent had ability to pay $ 117,400 penalty). Thus, if this part of the Region's prima facie case is not rebutted, there will be evidence in the record to show that the Agency *considered* a respondent's ability to pay in assessing the penalty.

New Waterbury, 5 E.A.D. at 541-42 (emphasis added). The Board clarified later in its decision that the "evidence regarding the respondent's general financial status" would consist of evidence of "sales volume" or "apparent solvency":

> Where ability to pay is at issue going into a hearing, the Region will need to present some evidence to show that it considered the respondent's ability to pay a penalty. The Region need not present any *specific* evidence to show that the respondent *can pay* or obtain funds to pay the assessed penalty, but can simply rely on some *general* financial information regarding the respondent's financial status which can support the *inference* that the penalty assessment need not be reduced. Once the respondent has presented *specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty, the Region as part of its burden of proof in demonstrating the "appropriateness" of the penalty must respond either with the introduction of additional evidence to rebut the respondent's claim or through cross examination it must discredit the respondent's contentions.

New Waterbury, 5 E.A.D. 542-43.

Decisions by Administrative Law Judges (ALJs) have noted that Complainant's initial burden of production on the ability to pay issue is a minimal one. As this very Court explained

In the Matter of Thomas Waterer and Waterkist Corp., d/b/a Nautilus Foods, Docket No. CWA-10-2003-0007, 2004 EPA ALJ LEXIS 2 (January 28, 2004), at 35-36, "[t]his initial burden is minimal, as EPA need only present some general financial information." In another decision, *In the Matter of Community Management, Inc. and LHI, Inc.,* Dkt. No. CWA 03-2001-0407, 2003 EPA ALJ LEXIS 2 (January 15, 2003), this Court explained the shifting burden of production with respect to the ability to pay issue as follows:

> [I]n the realm of demonstrating a respondent's "ability to pay" a proposed penalty, EPA has a minimal burden of production. As the Environmental Appeals Board has noted, in order for EPA to carry its burden regarding ability to pay, it need not present any specific evidence, but rather may rely on some general financial information. See, e.g., In re: Chempace Corporation[,] 2000 WL 696821. (EPA EAB May 18, 2000). If there is no information available for the agency to demonstrate an ability to pay the proposed penalty, it is presumed a respondent can pay the amount sought and the burden shifts to the respondent to demonstrate its inability.

Community Management, Inc. and LHI, Inc., 2003 EPA ALJ LEXIS 2, at 5-6 (emphasis added)

In *New Waterbury*, the EAB explained that, after Complainant produced "general financial information" in support of its *prima facie* case on the ability to pay issue, the burden would then shift to the Respondent to produce "*specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty." *New Waterbury*, 5 E.A.D. at 543. The Board clarified in a later decision, *In re: Chempace Corporation*, 9 E.A.D. 119 (EAB 2000), that the respondent's burden in this regard is to show that it is unable to pay *any* penalty at all: "[a]s we stated in *New Waterbury*, the respondent must show an inability to pay "*any* penalty" to fully meet its burden of production in response to the complainant's *prima facie* case." 9 E.A.D. at 137 (emphasis in original).

If the respondent produces such specific evidence of an inability to pay any penalty, Complainant, "as part of its burden of proof in demonstrating the 'appropriateness' of the penalty, must either respond with the introduction of additional evidence to rebut the respondent's claim, or through cross examination it must discredit the respondent's contentions." *New* Waterbury, 5 E.A.D. at 543 (*citing Kay Dee Veterinary Division of Kay Dee Feed Company*, FIFRA Appeal No 86-1, at 10-11 (CJO, Oct. 27, 1988). *See also In re: Spitzer Great Lakes, Ltd.*, 9 E.A.D. 302, 319-21 (EAB 2000); *and In re: Chempace Corp.*, 9 E.A.D. at 132-33.

As explained above, even at this early stage of the proceedings, Complainant is prepared to produce "some evidence regarding the respondent's general financial status from which it can be inferred that the respondent's ability to pay should not affect the penalty amount." *New Waterbury*, 5 E.A.D. at 541. Not only did Complainant – through its expert, Ms. Coad – review and evaluate the financial information proffered by Respondents, it also investigated public records and located evidence of Respondents' assets (in the form of real estate holdings), and evidence of intimate property transactions between at least one of the corporate Respondents and the shareholders. See Declaration of Gail B. Coad, ¶¶ 17-21, 23-25. Should this case proceed to hearing, once Complainant introduces this evidence, the burden would then shift to Respondents to produce "*specific* evidence to show that despite its sales volume or apparent solvency it cannot pay any penalty." *New Waterbury*, 5 E.A.D. at 543. And as the Board explained in *Chempace*, Respondent's burden in this regard will be to show that it is unable to pay *any* penalty at all. 9 E.A.D. at 137. Thus, to respond to Complainant's evidence, Respondents will need to produce the specific financial evidence described above, and in Ms. Coad's declaration, as such evidence is relevant to and probative of Respondents' ability to pay the proposed penalty.

As the case law discussed above illustrates, to avoid waiver of the issue of ability to pay or the economic impact of the penalty, Respondents bear the burden to produce relevant evidence of their financial condition. The EAB 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 ..." *In re: New Waterbury, Ltd.*, 5 E.A.D. 529, at 542 (EAB 1994). The Board's decision in *New Waterbury* interpreted the rules governing penalty actions (currently codified at 40 C.F.R. Part 22) to "require a respondent to indicate whether it intends to make an issue of its ability to pay, and if so, to submit evidence to support its claim as part of the pre-hearing exchange." *New Waterbury*, 5 E.A.D. at 542 (emphasis added). Therefore, under the procedural rules governing this proceeding, Respondents are required to provide financial information when Respondents file their prehearing exchange.

Further, if Respondents continue to make their ability to pay an issue, they will need to provide the specific financial evidence identified above and in Gail Coad's declaration to meet their burden of production on the issue of ability to pay. Complainant already has compiled evidence sufficient to meet its initial burden at hearing with respect to Respondents' ability to pay. As noted at ¶ 13 of Ms. Coad's declaration, [redacted] These assets support the inference that the penalty proposed in the Complaint should not be reduced. See *New Waterbury*, 5 E.A.D. at 541-43. Complainant's expert financial analyst, Gail Coad of Industrial Economics, Inc., has provided her expert opinion that this evidence supports an inference that Respondents have the ability to pay the proposed penalty of $636,482. (See CX 8.) Finally, Ms. Coad has identified several shortcomings in the financial information submitted by Respondents to date, and (as

explained above) these deficiencies have been brought to Respondents' attention prior to the instant motion. Thus, Respondents have been made aware of exactly what type and degree of financial information are necessary for an ability to pay assessment in the professional opinion of Complainant's financial expert. Ms. Coad's explanations thoroughly discredit any suggestion that the selective financial information proffered by Respondents to date is sufficient to demonstrate an inability to pay, or to accurately reflect the effect of the proposed penalty on Respondents' ability to continue in business. Complainant respectfully submits that, in order to avoid unnecessary delays and further litigation, this Court should amend its Prehearing Order and require Respondents to produce the evidence identified below and it Ms. Coad's declaration. This evidence will enable Complainant's expert and this Court to accurately assess Respondents' financial condition.

B. The Financial Information Identified by Complainant's Expert Is Relevant and Material, and Has Substantial Probative Value

The relevance and probative value of the types of financial records and information identified below are explained in the sworn declaration of Ms. Coad. (See CX 8). Ms. Coad's declaration is supported by decisions of the Environmental Appeals Board and Administrative Law Judges, which have recognized the relevance and probative value of the categories of financial information identified below. See, *e.g., In re Bil-Dry Corp.*, 9 E.A.D. 575, 613-614 (EAB 2001); *In re Carroll Oil Company*, 10 E.A.D. 635, 664-68 (EAB 2002); *In re New Waterbury, Ltd.*, 5 E.A.D. 529, 546-50 (EAB 1994). See also *In the Matter of Vemco, Inc.*, Docket No. CAA-05-2002-0012, 2003 WL 1919589 (E.P.A.) (Court granted Complainant's motion for discovery of information such as "complete and preferably audited financial statements and all corporate minutes for the last three years for Respondent ..."); *and In the*

Matter of Mark Fastow and Fiberglass Specialties, Inc., Docket No. EPCRA-09-97-0013, 1998 WL 422191 (E.P.A.), June 29, 1998 (Court grants complainant's motion for discovery of respondent Fastow's personal federal income tax returns for most recent five years). The courts have also recognized that tax returns alone are often unreliable indicators of a respondent's ability to pay. In *Bil-Dry*, the Board explained that, "Tax returns, of course, calculate the amount of the company's income that is subject to federal corporate taxation. *The whole purpose of tax accounting is to minimize the federal income tax the company pays.* 9 E.A.D. at 613 (emphasis added).

The Watha's own financial records are relevant to evaluate the ability to pay of the three corporate Respondents. By analogy, federal courts have ruled that, in assessing a corporation's ability to pay, it is appropriate to view the corporation's parent company as a potential source of revenue, even where the parent is not legally liable for any penalty assessed against the subsidiary. In *United States v. Municipal Authority of Union Township, Dean Dairy Products Company, et al.*, 150 F.3d 259, at 268-269 (3rd Cir. 1998), a case brought under the Clean Water Act, the Third Circuit Court of Appeals affirmed as proper the district court's decision to look at the assets and finances of the violator's corporate parent in evaluating the potential impact of the penalty on the violator:

> Dean Dairy contends that it was legal error for the district court to consider the financial condition of Dean Foods because the parent corporation was not a party to the action, it did not violate the Clean Water Act, and there was insufficient evidence to pierce the corporate veil. We reject its contention. Notwithstanding the arguments made in the brief and before us orally, it is important to remember that it was not Dean Foods, but only Dean Dairy, the violator, who was penalized. The reference to Dean Foods' financial statement merely assured that the penalty would not be set at a level above Dean Dairy's ability to pay. If the subsidiary does not retain its revenues, as the evidence showed in this case, then its parent's financial resources are highly relevant. Other courts in CWA cases have looked to

> the assets and finances of the violator's parent in evaluating the economic impact of the penalty on a violator, *see Universal Tool,* 786 F.Supp. at 753; *PIRG v. Powell Duffryn,* 720 F.Supp. 1158, 1166 (D.N.J.1989), *reversed in part on other grounds,* 913 F.2d 64 (3d Cir.1990), and we see nothing improper in the same action here.
>
> The consideration of a parent's financial condition in assessing a penalty on a subsidiary is a far cry from piercing the corporate veil and holding the parent liable for the actions of its subsidiary; here the penalty was assessed against the subsidiary alone. Furthermore, the district court only considered Dean Foods' assets as one factor among others; they were not dispositive. The court simply undertook a fact-specific assessment that examined the role of the parent in the operations of the subsidiary, particularly with regard to the issue of pollution of the nearby waters and actions that could have resolved it.

Dean Dairy, 150 F.3d at 268-269.

The EAB's holding in *New Waterbury* is not limited to parent-subsidiary relationships. Even though the Third Circuit's holding in *Dean Diary* is not controlling in the instant matter which arises within the jurisdiction of Sixth Circuit, this case presents additional authority, albeit indirect authority, for Complainant's position. Accordingly, in the instant matter, the issue is not whether the Wathas will be legally obligated to pay the civil penalty proposed in the Complaint against Respondents. Rather, the issue is whether it is relevant and appropriate to examine the financial solvency of the Wathas in assessing the ability to pay of Respondents.

[redacted]

In addition, Ms. Coad has obtained publicly available from County records that demonstrate that the Wathas are intimately involved in financial transactions with One

Management, Inc. As set forth in ¶ 21 of her declaration, these intimate transactions between the Wathas and One Management, Inc. represent the type of intimate financial dealings which warrant discovery into the financial information of the Wathas in order to assess One Management, Inc.'s ability to pay and ability to continue on in business. See *New Waterbury*, 5 E.A.D. at 547-48; *1836 Realty Corp.*, Docket No. CWA-2-I-98-1017, November 6, 1998, 1998 WL 846758 (E.P.A.) (conveyance of mortgage by respondent to related company warranted discovery of related company's financial information).

Information about the current finances and residential properties owned and or managed by One Management, Inc., Mr. Jerry Watha and Mrs. Fattin Watha is clearly relevant to the issue of ability to pay. If any Respondent or Mr. or Mrs. Watha owns or controls the disposition of land or property which could be sold or used as collateral to obtain loans, they could make arrangements to obtain sufficient funds with which to pay a penalty. Information about the value of property and rental income received by the Respondents and Mr. and Mrs. Watha is also relevant to accurately assess all of Respondents' potential sources of funding. See generally *In the Matter of Billy Yee*, Docket No. TSCA-7-99-0009, 2000 WL 777973 (June 6, 2000) (in discussion of ability to pay, Court cited to complainant's production of tax assessor reports and information on value of property owned by respondent, as well as rental income); *In the Matter of Wesley A. Brown*, Docket No. TSCA-7-2000-0029, 2000 WL 33709155 (E.P.A.) (RJO held that complainant appropriately considered records of property ownership by respondent and estimated rental income and value of property in considering ability to pay).

Production of the information requested will not impose an unreasonable burden on Respondents. The information consists of records which Respondents should already have in

their possession. Such records are presumably already organized, as they consist of tax returns, financial statements and property / mortgage records, all of which are records which a company or individual must keep organized and available in order to prepare annual tax returns. All of the information which Complainant is requesting is related to Respondents' financial condition, and all such information is in the control of Respondents and/or Mr. and Mrs. Watha.

In addition to the information provided in the tax returns for the S Corporation, Complainant has already investigated publicly-available sources of information concerning Respondents' financial condition, and has considered this information in its assessment of Respondents' ability to pay and ability to continue in business. However, Complainant cannot obtain the information requested in this motion from any source other than Respondents or their owner(s). Therefore, the information sought by this motion is most reasonably obtained from Respondents or their owner(s).

For these reasons, Complainant requests that the Court amend its Prehearing Order requiring Respondents to provide the requested financial information as part of its initial Prehearing Exchange.

While, under usual circumstances, Complainant would await completion of the prehearing exchange process before filing a motion to obtain this information, the circumstances of this case necessitate Complainant's request that the Court direct Respondents to provide this information with their initial Prehearing Exchange. Respondents' long-standing failure to provide the requested financial information makes it infeasible to await Respondents' eventual prehearing submittal to determine whether Respondents will provide the financial information which Complainant has requested for more than a year, and then to proceed with a motion for

additional discovery. In addition, waiting until the prehearing process has been completed, and filing a motion at that time, would entail substantial risks of delaying the hearing in this matter (as the Complaint was filed in June 2008, Complainant anticipates a hearing date in the summer of this year). For these reasons, Complainant respectfully requests that this Court issue an order amending its Prehearing Order and compelling Respondents to provide the requested financial information when they file their initial prehearing exchange(s).

Therefore, Complainant hereby moves this Honorable Court to amend the Prehearing Order as follows:

As part of their initial prehearing exchange, in addition to the information required by this Court, Respondents shall provide the following documents to the Court and to Complainant, excluding the production of information already provided to Complainant:[5]

For Respondents One Management, Inc., L&J Investment, Inc., and One Management Investment Group:

1. A current list of all residential properties owned and/or managed by One Management, Inc., One Management Company, Inc., One Management Investment Group, L&J Investment, Inc., Mr. Jerry Watha and Mrs. Fattin Watha;

2. The most recent tax statement, bill or other documentation that reflects the current assessed value and payment information for each property identified in response to Item 1;

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[5] Respondents need not resubmit the information provided to Complainant on [dates], but shall supplement any information that was incomplete or inaccurate, and certify to the truth, accuracy and completeness of all information provided.

3. Information regarding the balance owed and property secured by all mortgages with third parties. Provide the most recent mortgage bill for each mortgage, which should include a summary of the terms, balance and payment;

4. Identification of any other liabilities other than mortgages, including balance outstanding, related collateral or liens;

5. Identification of any properties that are under contract to either sell or buy, and provide a copy of the contract;

6. An explanation of the relationships between One Management, Inc., and One Management Company, Inc., and Huntington Property Holdings, LLC.

7. An explanation of why 1 West Nine Mile Road is legally owned by Huntington Property Holdings, LLC, while [redacted];

8. An explanation of why certain real estate was subject to legal transactions initiated by One Management Company, Inc. when [redacted]; and

9. Copies of all mortgage, note or other documentation of loans owed by One Management, Inc., One Management Company, Inc., or Huntington, including any guarantees by Mr. and Mrs. Watha or other related parties, and including all loan applications.

For Mr. and Mrs. Watha:

1. The Wathas shall complete, either individually or together, the personal financial information form enclosed with Complainant's October 29, 2008 letter, at CX 6.

For Respondents One Management, Inc., L&J Investment, Inc., and One Management Investment Group:

1. For each company that has been dissolved, all documents related to the formation and dissolution of each company; and

2. For each company that has been dissolved, all documents relating to the winding down as part of dissolution of each company.

Should Respondents fail to include such evidence in its prehearing exchange Complainant reserves the right to seek leave from this Court to file a motion to ask the Court to find that Respondents have waived the issues of ability to pay and the economic impact of the penalty on Respondents' ability to continue to do business, and that Complainant has considered the effect of the proposed penalty on the Respondents' ability to continue to do business; or in the alternative, to file a motion to compel discovery of this information after the close of the prehearing exchange as provided in 40 C.F.R. § 22.19(e).

Complainant notes that Respondents may assert a claim of business confidentiality under 40 C.F.R. Part 2, Subpart B, for any portion of the financial information that each Respondent submits to Complainant and to the Presiding Administrative Law Judge. Information subject to a business confidentiality claim is available to the public only to the extent allowed by 40 C.F.R. Part 2, Subpart B.

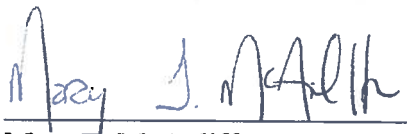
Complainant further wishes to make clear that the financial information requested above is being sought only to the extent that Respondents continue to make their ability to pay or the economic impact of the penalty an issue in this case. If Respondents state in their prehearing exchange (or in a document filed before the prehearing exchange deadline established by the Presiding Administrative Law Judge) that neither Respondents' ability to pay the penalty proposed in the Complaint, nor the effect of the proposed penalty on Respondents' ability to

continue to do business, remains an issue, *and that each Respondent expressly waives any objection to the penalty based (1) on its ability to pay, and (2) on the effect of the penalty on its ability to continue to do business*, then there will be no need for Respondents to provide the financial information described above.

Complainant also respectfully requests that the Respondents be required to include documentation and other information about the dissolution of any Respondent corporation as part of the Respondents' prehearing exchange. This information is necessary in order for Complainant to understand the current status of each Respondent corporation and to prepare for the hearing in this matter.

Respectfully submitted,

U.S. Environmental Protection Agency



Mary T. McAuliffe
Associate Regional Counsel
U.S. Environmental Protection Agency

List of Exhibits

CX 1 November 26, 2007 Notice Letter to One Management, Inc.

CX 2 November 26, 2007 Notice Letter to L&J Investments, Inc.

CX 3 November 26, 2007 Notice Letter to One Management Investment Group, Inc.

CX 4 Tolling Agreement

CX 5 Second Tolling Agreement

CX 6 Complainant's letter of October 29, 2008

CX 7 Complainant's letter of January 15, 2009

CX 8 Declaration of Gail Coad, Principal of Industrial Economics, Incorporated (REDACTED AND UNREDACTED)

In the Matter of One Management, Inc., L&J Investment, Inc., and One Management Investment Group, Docket No. TSCA-05-2008-0012

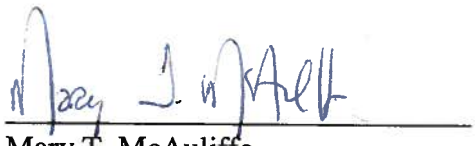
CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of February, 2009, I filed the original and one copy of Complainant's Motion to Amend Prehearing Order (original and redacted) with the Acting Regional Hearing Clerk, U.S. EPA, Region 5, 77 West Jackson Blvd., Chicago, Illinois 60604, and placed for pickup to be mailed a copy of Complainant's Motion to Amend Prehearing Order (original and redacted) by Pouch Mail, along with a copy of the same Motion (original and redacted), on CD, to:

Honorable William B. Moran
United States Administrative Law Judge
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
Mail Code 1900L
1200 Pennsylvania Avenue, N.W.
Washington, D.C. 20460-2001

and placed for pickup to be delivered by Federal Express a copy of Complainant's Motion to Amend Prehearing Order (original and redacted) to:

Michael H. Perry, Esquire
Fraser Trebilcock Davis & Dunlap, P.C.
124 West Allegan Street, Suite 1000
Lansing, Michigan 48933



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