UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HARPOON PARTNERSHIP,	)	**Docket No. TSCA-05-2002-0004**
	)	
	)	
RESPONDENT	)	

ORDER DENYING RESPONDENT'S MOTION TO STRIKE ANY ALLEGATION PERTAINING TO ACRES REAL ESTATE, LTD. FROM THE COMPLAINT

Procedural and Factual Background

This civil administrative penalty proceeding arises under the authority of Section 16(a) of the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2615(a). This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-22.32.

On March 19, 2002, the United States Environmental Protection Agency, Region V (the "EPA" or "Complainant") filed a Complaint against Harpoon Partnership ("Respondent"), alleging violations of TSCA and its implementing regulations for the disclosure of lead-based paint and lead-based paint hazards found in 40 C.F.R. Part 745, Subpart F. Complainant seeks a civil penalty of $ 56,980 for these alleged violations in regard to nine units in an apartment building constructed before 1978, owned by Respondent, located at 5134-5136 S Harper Avenue, Chicago, Illinois. The Complainant filed an Amended Complaint on April 10, 2002, and a Second Amended Complaint (hereinafter "Complaint") on April 16, 2003.[1] Respondent filed its Answer and Affirmative Defenses to Amended Complaint on May 20, 2002 and clarified its first affirmative defense in Respondent's Motion to Supplement First Affirmative Defense to the Amended Complaint on January 24, 2003. On May 6, 2003, Respondent answered the Second Amended Complaint (hereinafter "Answer"), denying many of the factual

[1] Complainant's Motion to File the Second Amended Complaint was granted on April 9, 2003, which sought to add, *inter alia*, financial information regarding individual partners that comprise Harpoon Partnership and Respondent's ability to pay, and greater specificity about the Complainant's calculation of the proposed penalty. *See* In the Matter of Harpoon Partnership, Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 24, at *2, *8 (April 9, 2003)(Order Granting Complainant's Motion to File the Second Amended Complaint).

allegations made in the Complaint and raising several affirmative defenses.[2]

Respondent's second affirmative defense[3] contends that its operations and management are unrelated to any other properties in which Gerald M. Fisch ("Gerald Fisch") may have an interest. Thus, Respondent requests that any allegation pertaining to Acres Real Estate, Ltd. ("Acres Real Estate") is irrelevant and should be stricken from the Complaint.

The Complaint first states that Respondent's place of business is located at 1743 East 55th Street, Chicago Illinois, 60615 and that Respondent is an Illinois general partnership comprising Gerald and Mary Fisch, Quentin and Ruth Young, Alice Nelson (deceased), Nancy Cleveland, and Marjorie Fisch. *See* Complaint ¶ 3 at 1. Respondent concedes that those individuals comprise the partnership, but declares that it only receives mail at 1743 East 55th Street, Chicago, Illinois. Respondent further admits that Gerald Fisch is one of the grantees of and received the 2001 tax bill for the property located at 5134-5136 S. Harper Avenue, Chicago, Illinois. *See* Answer ¶¶ 27, 28 at 6. In addition, Complainant identifies Gerald Fisch as the owner, president and secretary of Acres Real Estate, an Illinois corporation located at 1743 East 55th Street, Chicago Illinois, *see* Complaint ¶¶ 30, 31 at 6. Respondent admits the same, but denies that Acres Real Estate has any ownership interest in Respondent or the property located at 5134-5136 S. Harper Avenue, Chicago, Illinois. *See* Answer ¶¶ 30, 31 at 6-7. The Complaint further states that LaSalle Bank National Association provided Complainant, upon its request to obtain every owner or beneficiary with present interest of the 5134-5136 S. Harper, Chicago, Illinois, the identity of Harpoon Partnership as trust beneficiary, with an attention to "Gerald M. Fisch, 1743

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[2] Respondent's First Defense, which consists of its argument that it is not covered by the Lead Disclosure Rule because it is not the lessor as defined by the Rule and did not have fair notice of the EPA's interpretation of the Rule, along with the argument that it contracted away to a third party any of the lessor's responsibilities under the Rule, were rejected in the Order Granting Complainant's Request for Partial Accelerated Decision and Denying Respondent's Request for Partial Accelerated Decision issued on August 4, 2003.

[3] In Respondent's first Answer, its request to strike any allegations pertaining to Acres Real Estate was the Third Affirmative Defense. *See* Respondent Harpoon Partnership's Answer and Affirmative Defenses to the Amended Complaint 20-21. In Respondent's second Answer it omitted its defense regarding ability to pay and therefore the request to strike became the Second Affirmative Defense. *See* Respondent Harpoon Partnership's Answer and Affirmative Defenses to Second Amended Complaint 21. *See also* In the Matter of Harpoon Partnership, Docket No. TSCA-05-2002-0004, 2003 EPA ALJ LEXIS 24, at *2, *8 (April 9, 2003)(Order Granting Complainant's Motion to File the Second Amended Complaint)(noting that the proof of the Respondent's ability to pay is part of EPA's prima facie case, and is not an affirmative defense as alleged by Respondent). Albeit Respondent maintains its inability to pay in its mitigating factors cited in response to Complainant's Proposed Civil Penalty. *Id.* at 20. Furthermore, Respondent mistitled its request to strike allegations from the Complaint as an affirmative defense. An affirmative defense is a respondent's assertion raising new facts and arguments that, if true, will defeat the Complainant's claim, even if all allegations in the complaint are true. *See* BLACKS LAW DICTIONARY 430 (7th ed. 1999). *See also* 2A Moore's Federal Practice 8.27[4] at 8-179 (2d ed. 1996) Hereinafter Respondent's second "affirmative defense" will be treated as Respondent's motion to strike. In effect, this order is ruling on the issue of whether to grant or deny Respondent's motion to strike any allegations pertaining to Acres Real Estate, Ltd. from the Complaint. In kind, Complainant's Response to Respondent's Request to Strike and Complainant's Motion to Strike Respondent's Second Affirmative Defense will be treated as simply its response to Respondent's motion to strike.

East 55th Street ...." *See* Complaint ¶ 25 at 5. Moreover, it is acknowledged that Hyde Park Realty Company, Inc. ("Hyde Park Realty") offered apartments for lease, entered into leases, and controlled all rental payments and operations on behalf of Respondent for the apartments located at 5134-5136 S. Harper, Chicago, Illinois. *See* Complaint ¶ 21 at 5; Answer ¶ 21 at 5. Hyde Park's office is located at 1743½ East 55th Street, Chicago, Illinois, 60615. *See* Complaint ¶ 22 at 5. Finally, the Complaint's civil penalty section mentions personal and real property associated with individual partners of Respondent, including Gerald Fisch and Acres Real Estate, as a factor for assessment of the proposed penalty *See* Complaint at 22.

On May 19, 2003, Complainant moved to strike Respondent's second affirmative defense in its Response to Respondent's Request to Strike and Complainant's Motion to Strike Respondent's Second Affirmative Defense. Complainant contends that Respondent has failed to explain or produce information that supports its depiction of the relationship between Acres Real Estate, Hyde Park Realty, and Harpoon Partnership or how its assertion is a defense to liability or assessment of a penalty. Furthermore, it is Complainant's contention that Respondent's prehearing exchange displays a connection between the entities that warrant striking Respondent's second affirmative defense. In support, Complainant references several letters bearing Hyde Park Realty's letterhead sent to certain tenants of 5134-5136 S. Harper, Chicago, Illinois, which evidence that they were delivered via facsimile from Acres Real Estate on behalf of Respondent. *See* Respondent's Initial Prehearing Exchange Exhibit 1. Complainant relies on two legal arguments to maintain its motion to strike. First, Complainant contends that it is appropriate for the EPA to consider the sources of income for Respondent's partners in meeting its burden of demonstrating a suitable penalty amount. Second, as an evidentiary matter, Complainant contends that the relationship between these entities goes toward impeaching Respondent's witness Joseph Zugalj based on bias.

In turn, on June 3, 2003, Respondent replied to Complainant's motion to strike in its Response to Complainant's Response to Respondent's Second Affirmative Defense claiming that Complainant misunderstands Respondent's defense. First, Respondent asserts that its only request in its second affirmative defense is for "any allegations" pertaining to Acres Real Estate to be stricken from the Complaint and not "any mention" of Acres Real Estate. In support, Respondent maintains that Acres Real Estate is a separate entity, which is neither involved with, nor has any ownership interest in the property at issue in the Complaint. Moreover, Respondent contends that Acres Real Estate is unrelated to Respondent because it does not own any part of Respondent, it is not itself a partner of Respondent, and it is not owned by Respondent. Respondent retorts Complainant's characterizations of the facsimiles contained in Respondent's Exhibit 1 by stating that members of the partnership have, in fact, separate places of business, namely Acres Real Estate, in which its facsimile machine may be utilized to facilitate correspondence with Respondent's counsel. Second, Respondent declares that its second affirmative defense does not attempt to bar rebuttal evidence pertaining to witness testimony by Joseph Zugalj.

For the reasons stated below, Respondent's motion to strike any allegations pertaining to Acres Real Estate is denied.

Standard for Adjudicating Motion to Strike

The Rules of Practice governing judicial proceedings by an administrative law judge do not specify procedures or standards for the resolution of a motion to strike. Notwithstanding, an administrative law judge may refer to the Federal Rules of Civil Procedure for guidance. *In re Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25, 1997 EPA App. LEXIS 27, at *29 n.25 (EAB 1997). Federal Rule 12 (f) affords a preliminary method for objecting to a defense; allowing a court to strike from any pleading any insufficient defense, and immaterial or impertinent matters. *Van Schouwen v. Connaught Corp.*, 782 F.Supp. 1240, 1245 (N.D. Ill. 1991). However, motions to strike are generally disfavored, "because striking a portion of a pleading is a drastic remedy and because it is often sought by the movant simply as a dilatory tactic." *Waste Management Holdings, Inc. v, Gilmore*, 252 F.3d 316, 347 (4th Cir. 2001) (quoting 5A Wright & Miller, Federal Practice & Procedure § 1380, at 647).

Discussion

Complainant relies on *In re Waterbury, Ltd.*, 5 E.A.D. 529, 542-43 (EAB 1994), to support its contention that it is appropriate for the EPA to consider Respondent's individual partners, namely Gerald Fisch's financial status, in establishing Respondent's ability to pay for consideration in the process of determining the suitable penalty amount. While it is true that TSCA and EPA penalty policies dictate that a violator's ability to pay the penalty proposed must be considered as a factor in determining a suitable penalty, *see* 15 U.S.C.§ 2615(a)(2)(B); Section 1018 - Disclosure Rule Enforcement Response Policy 14 (February 2000); Guidelines for the Assessment of Civil Penalties Under Section 16 of the Toxic Substance Control Act, 45 Fed. Reg. 59770 (September 10, 1980) ("1980 TSCA Penalty Policy"), and the burden to prove the appropriateness of the assessed penalty falls on the EPA, *see New Waterbury*, 5 E.A.D. at 537; the Environmental Appeals Board ("EAB") has not authorized unlimited consideration of entities associated with the violator. In *New Waterbury* the EAB referred to the 1980 TSCA Penalty Policy's language authorizing inquires by the EPA into a respondent who is "part of a complex arrangement of interrelated small companies." *Id.* at 547. In pursuit of a respondent's ability to pay, the EAB notes the 1980 TSCA Penalty Policy's recommendation to examine those interrelated corporate arrangements to "establish the respondent's cash flow and likely future course, including the respondent's ability to obtain resources or borrow funds from those related corporate entities." *Id.* at 547 & n.30 (citing 1980 TSCA Penalty Policy, 45 Fed. Reg. at 59,775 n.5).

Specifically, *New Waterbury* involved an individual, Roberts, who owned the majority interest in the respondent, New Waterbury, and solely owned a separately named management company, Winston Management. *See New Waterbury*, 5 E.A.D. at 548. This management company owned a third business, Vanta, which Roberts served as president. *See id.* Vanta was the general partner of New Waterbury and had no assets other than the Respondent, New Waterbury. *See id.* at 548 & n.31. In addition, Roberts controlled the activities of New Waterbury. *See id.* The EAB found appropriate, under the above facts entered into the record, further inquire into the respondent's "related business enterprises" to determine its cash flow and

future path on the issue of ability to pay. *See id.*

Likewise, in the present case Complainant must show a similar interrelatedness between Harpoon Partnership and Acres Real Estate in order for financial information pertaining to Acres Real Estate to be relevant and enter the record and, more important, to be considered when assessing the penalty. If no such connection is made, all financial information pertaining to businesses associated with Respondent, whether in the record or not, will not be utilized when assessing the penalty.

The respondent in this case, when asking for any "allegations" pertaining to Acres Real Estate to be stricken from the record, is asking for a drastic remedy. This is especially true considering the fact that Respondent is denying the ability to pay within its own pleadings. *See* Answer at 21. Under the standard for ruling on a motion to strike the matters sought to be excluded must be immaterial or impertinent. *See Van Schouwen*, 782 F.Supp. at 1245. In light of the unresolved issue of Respondent's ability to pay and Complainant's burden to prove such ability, it is at this time neither immaterial nor impertinent for Complainant to attempt to show other financial resources available to Respondent. Of course, any information sought to be introduced into the record at hearing pertaining to the financial capabilities of businesses related to Respondent must meet both the standards of 40 C.F.R. § 22.22 and the EAB holding in *New Waterbury*. In addition, Complainant may face issues of corporate law depending on the relationship and individual characteristics of the various business entities. *See In re Coast Wood Preserving, Inc.,* EPCRA Appeal No. 02-01, slop op. at 16-26 2003 EPA App. LEXIS 4 (EAB 2003).

Order

Accordingly, Respondent's motion to strike any allegations pertaining to Acres Real Estate is **DENIED**.

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Barbara A. Gunning
Administrative Law Judge

Dated: August 12, 2002
Washington, DC