

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:

**Norcross Footwear, Inc., d/b/a
Servus Footwear Company**

Respondent

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Docket No. 5-EPCRA-95-033

ORDER

It appearing that the complaint in this matter under EPCRA § 325(c), 42 U.S.C. § 11045(c), which was filed on June 30,1995, seeks a penalty totaling \$89,253 for violations of EPCRA §§ 313 and 328 and regulations at 40 C.F.R. Part 372; that under date of July 21, 1995, Respondent filed an answer and request for a hearing; that on February 9, 1996, Respondent filed a voluntary petition for bankruptcy under Chapter 11 of the United States Code in the U.S. Bankruptcy Court for the Western District of Kentucky, Louisville Division, Case No. 96-30580(3), Chapter 11; that this case has been consolidated with an action now styled Red Ball, Inc (n/k/a DBI, Inc.), Case No. 96-30579(3), Chapter 11; that, although counsel for Respondent filed a Notice of Bankruptcy and Automatic Stay, it is well settled that, while any resulting judgment is subject to the control of the Bankruptcy Court, an action for civil penalties for violation of a regulatory statute is not subject to the automatic stay provision of 11 U.S.C. § 362(a);¹ that at a date not certain from the file available to the ALJ, the U.S. Attorney filed a

¹ See, e.g., In re Commonwealth Companies, Inc., 913 F.2d 518 (8th Cir. 1990). Nevertheless, a report from Gail Ginsburg, Regional Counsel, to Chief Judge Susan Biro, dated

proof of claim in the amount of \$89,253 with the Bankruptcy Court; that by an order, dated September 5, 1996, the ALJ, upon motion of Complainant, suspended proceedings to allow the parties time to negotiate a settlement; that by a Status Report, dated May 16, 1997, Complainant reported that a tentative agreement in principle had been reached with the Trustee for Norcross Footwear, Inc. as to the amount of EPA's claim in the bankruptcy proceeding, but that this amount was subject to verification of Norcross' financial condition by financial statements, corporate income tax returns, etc., which documents were not then available; by a Status Report, dated September 12, 1997, Complainant reported that counsel for Norcross had stated that its accountants expected that financial documents would be completed by October 1997, that the parties were hopeful this would enable the parties to reach an agreement as to the amount of EPA's claim, but that it did not appear that the bankruptcy proceeding would be resolved in the immediate future and that EPA had no intention of withdrawing the administrative complaint until its claim was approved by the Bankruptcy Court and paid; that by an undated Status Report, served July 27, 1999, Complainant reported that on July 2, 1999, the Bankruptcy Court had approved with modifications the Debtor's Chapter 11 Plan of Reorganization, but that a creditor and party-in-interest had appealed the Order of Confirmation to the U.S. District Court for the Western District of Kentucky; and by a Status Report, served September 8, 2000, Complainant reported that the U.S. District Court had confirmed the Order of Confirmation issued by the Bankruptcy Court, but that the order of the District Court was being appealed to the Court of Appeals for the Sixth Circuit.

August 10, 1998, states that the automatic stay provision applies to both Norcross and another administrative [penalty] case where the respondent is in bankruptcy.

Attached to the referenced Status Report was a copy of an undated Reorganized Debtor's Report, In re Norcross Footwear, Inc., served on claimants on May 6, 2000, which, inter alia, listed assets of Norcross (NFI), described efforts of the Reorganized Debtor to marshal and collect assets of NFI, referred to ongoing litigation between NFI and its former sole officer, director and majority shareholder, Michael L. Cappy, and certain other parties; stated that a judgment, which with interest totaled \$4,200,000, had been secured against Cappy,² that Cappy had filed for bankruptcy, and alleged that Cappy was attempting to "wear down creditors" so that they would accept a fraction of their claims in the interest of prompt payment and that Cappy had secreted assets outside the jurisdiction of the United States in order to avoid his obligations. The Debtor's Report lists assets totaling \$7,904,987.49 which is to be compared with liabilities totaling \$7,788,859.85, of which \$1,425,599.12 has been paid. Although listed liabilities include \$2,000,000 in disputed claims, this list apparently does not include an unliquidated claim of \$9,500,000 by Red Ball, Inc. now known as DBI, Inc. EPA's penalty claim is either included in unsecured, allowed claims totaling \$4,116,787.36 or it may be included in disputed claims totaling \$2,000,000. Assets, however, include the mentioned judgment against Cappy which is listed as unliquidated. Pending matters include an action by NFI against attorneys, accountants and family members who allegedly assisted Cappy in placing his assets outside the jurisdiction of the United States. Although the Report expresses confidence that Cappy could satisfy the judgment in full by assets he has placed outside the jurisdiction of the United States, it also states that [at present] the judgment against Cappy is uncollectible.

In view of the foregoing, Complainant is directed to reassess the likelihood that it will

² Cappy has appealed this judgment to the Court of Appeals for the Sixth Circuit.

ultimately collect any part of its penalty claim against the bankrupt Respondent so that there is some purpose in carrying this protracted proceeding on my docket. In any event, Complainant is directed to inform the ALJ whether its penalty claim is included in allowed claims in the bankruptcy proceeding or if it is included in disputed claims . If the latter is the case, it is my intention to lift the stay and schedule this matter for hearing.

Complainant shall respond to this order on or before December 14, 2001.

Dated this _____day of November 2001.

Spencer T. Nissen
Administrative Law Judge

In the Matter of Norcross Footwear, Inc., d/b/a
Servus Footwear Company, Respondent
Docket No. 5-EPCRA-95-033

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order**, dated November 20, 2001, was sent this day in the the following manner to the addressees listed below:

Original + 1 copy by Pouch Mail to:

Sonja R. Brooks-Woodard
Regional Hearing Clerk
U.S. EPA - Region 5
77 W. Jackson Blvd., E-19J
Chicago, IL 60604-3590

Copy by Regular Mail to:

William H. Wagner, Esq.,
Assistant Regional Counsel
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Louisville, KY 40202

Rachele D. Jackson
Legal Staff Assistant

Dated: November 21, 2001