

8/17/72

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)	
)	
TIFA LIMITED,)	I.F. & R. Docket No. II-547-C
)	
Respondent)	

ORDER ON MOTIONS

Both Complainant and Respondent have filed Motions, and Responses to Motions relating to interrogatories and production of documents. Complainant has also filed a Motion to Amend its Complaint. For the reasons discussed below:

- 1) Respondent's Motion to Compel Interrogatories and Document Request is **Denied as moot.**
- 2) Complainant's Motion for Document Request, and Motion to Exclude Exhibit 9 and to Strike Respondent's Defenses to Counts 33 and 34 of the Complaint is **Denied as moot.**
- 3) Complainant's Motion to Preclude Respondent from Litigating Issue of its Claimed "Inability to Pay" is **Denied.** Complainant's Motion for Production of Financial Documents is **Denied in part as moot and Denied in part.**
- 4) Complainant's Motion to Amend its Complaint is **Granted.**

1. Respondent's Motion to Compel Interrogatories and Document Request

In its response to Respondent's Motion to Compel Interrogatories, Complainant agrees not to oppose Respondent's requests for interrogatories provided that Complainant is permitted to submit a comparable set of interrogatories to Respondent. Interrogatories have since been exchanged by the parties pursuant to their own agreement.

In addition to interrogatories, Respondent requests that Complainant produce all passages of a notebook kept by EPA inspector Dr. Enache that relate to Respondent. Complainant has agreed, in its response to Respondent's Motion, to provide all passages of Dr. Enache's notebook requested by Respondent, while reserving the right to assert the deliberative process privilege in future cases.

Accordingly, Respondent's Motions are denied as moot.

2. Complainant's Motion for Document Request and Motion to Exclude Evidence Relating to Exhibit 9 and to Strike Respondent's Defenses to Counts 33 and 34 of the Complaint

Complainant Motion for Document Request requests production of page 2 and any other missing pages of Respondent's Prehearing Exchange Exhibit 9. Complainant further requests that in the event Respondent fails to produce a complete copy of its Exhibit 9, that Exhibit 9 be excluded from evidence and that Respondent's defenses to counts 33 and 34 of the Complaint, which rely upon Exhibit 9, be stricken.

Respondent voluntarily provided a complete copy of this document with its response to Complainant's Motion to Exclude and Strike. Accordingly, Complainant's Motion for Document Request and Motion to Exclude Exhibit 9 and Strike Respondent's Defenses 33 and 34 is denied as moot.

3. Complainant's Motion to Preclude Respondent from Litigating Issue of its Claimed "Inability to Pay" and Complainant's Motion for Production of Financial Documents

Complainant moves to preclude Respondent from litigating the issue of its ability to pay on grounds that Respondent waived its ability to assert "inability to pay" by not raising this defense in its answer or amended answer and not providing documentation supporting its claim during the prehearing exchange process. While Respondent did not raise the issue of its ability to pay in its answer, it did raise it in its initial prehearing exchange and provided supporting documentation in the form of its corporate tax returns for the years 1995, 1996, 1997.


Complainant's argument for precluding Respondent from litigating the issue of its ability to pay is not persuasive. While the defense of inability to pay should have been raised in the Answer, the hearing in this case is still two months away, and no prejudice is caused by the Respondent pursuing the defense at this time. Accordingly, Complainant's Motion to Preclude Respondent from Litigating the "Inability to Pay" issue is denied. However, in response to Complainant's objection that the tax returns provided by Respondent were unsigned copies, Respondent is directed to provide within 15 days of this Order either signed copies of its corporate tax returns for the years 1995, 1996, and 1997 or, if signed copies are for some reason unavailable, Respondent shall provide Complainant with a sworn statement to the effect that the unsigned tax returns submitted are identical to the signed copies of the returns filed with the Internal Revenue Service, except for the absence of signatures. Any other differences in the returns shall be explained in detail in the sworn statement.

In the alternative, Complainant moves for production of certain financial documents and information by Respondent. In response to this Motion, Respondent has agreed to produce all documents requested by Complainant with the exception of an analysis from Jack Nahama, Respondent's ability to pay witness, in support of Respondent's contention that it has gross revenues of less than \$1 million. Respondent asserts that it is improper and unfair for Complainant to ask it to create a document for production.

The documents Respondent has agreed to produce should provide Complainant with the information necessary to determine Respondent's revenues. Complainant has not provided a persuasive argument for imposing on Respondent the additional burden of producing a document that does not currently exist. If Complainant is unable to construct an accurate picture of Respondent's revenues based on the information Respondent has agreed to provide, Complainant may renew its motion at a later date. Accordingly, Complainant's request for production of an analysis by Mr. Nahama of Respondent's claims regarding its gross revenues is denied. The remainder of Complainant's motion for production of financial documents is denied as moot.

4. Complainant's Motion to Amend its Complaint

Respondent did not oppose Complainant's Motion to Amend the Complaint. Accordingly, Complainant's Motion to Amend the Complaint is granted.



 Susan L. Biro
 Chief Administrative Law Judge

Dated: _____

8/12/98
 Washington, D.C.

In the Matter of Tifa Limited., Respondent
IF&R Docket No. II-547-C

CERTIFICATE OF SERVICE

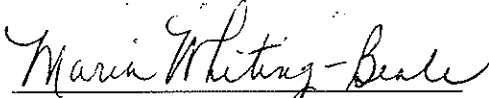
I certify that the foregoing **Order On Motions**, dated August 12, 1998, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to: Karen Maples
Regional Hearing Clerk
U.S. EPA
290 Broadway, 17th Floor
New York, NY 10007-1866

Copy by Regular Mail to:

Attorney for Complainant: Damarus Cristiano, Esquire
Assistant Regional Counsel
U.S. EPA
290 Broadway, 16th Floor
New York, NY 10007-1866

Attorney for Respondent: David C. Roberts, Esquire
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P.O. Box 1018
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Maria Whiting-Beale
Legal Staff Assistant

Dated: August 12, 1998