UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of:	)	
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Aylin, Inc., Rt. 58 Food Mart, Inc., Franklin Eagle Mart Corp., and Adnan Kiriscioglu,	)	**Docket No. RCRA-03-2013-0039**
	)	
	)	
	)	
Respondents.	)	

ORDER ON MOTIONS

I. Procedural History

On March 27, 2013, the United States Environmental Protection Agency ("EPA" or "Agency"), Director of the Land and Chemicals Division of Region 3 ("Complainant"), filed an Administrative Complaint, Compliance Order and Notice of Right to Request Hearing ("Complaint") against Aylin, Inc. ("Aylin"), Rt. 58 Food Mart, Inc. ("Rt. 58"), Franklin Eagle Mart Corp. ("Franklin Eagle"), and Adnan Kiriscioglu d/b/a New Jersey Petroleum Organization a/k/a NJPO ("Kiriscioglu") (collectively, "Respondents"). Charging Respondents in their capacities as the owners and/or operators of the underground storage tanks ("USTs")[1] located at three gas stations in the Commonwealth of Virginia, the Complaint alleges violations of Section 9005(a) of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6991d(a), and certain provisions of the Virginia Administrative Code governing USTs ("VA UST Rules").[2]

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[1] For purposes of this Order, any reference to the term "UST" is meant to encompass the "UST system."

[2] Pursuant to Section 9004 of RCRA, 42 U.S.C. § 6991c, and 40 C.F.R. Part 281, EPA granted final authorization to the Commonwealth of Virginia effective on October 28, 1998, to administer and enforce its own UST management program in lieu of the federal UST management program established under Subtitle I of RCRA, 42 U.S.C. §§ 6991 *et seq.* 40 C.F.R. § 282.96. Set forth at 9 VAC §§ 25-580-10 *et seq.*, and 9 VAC §§ 25-590-10 *et seq.*, the provisions of the program became requirements of Subtitle I of RCRA upon final authorization by EPA, and EPA retains the authority to enforce the program pursuant to Section 9006 of RCRA, 42 U.S.C. § 6991e. *Id.*

More specifically, the Complaint contains a Compliance Order and seeks a civil penalty for the following 17 counts of alleged violations:

> Count 1: failure of all four Respondents to furnish information, in violation of 42 U.S.C. § 6991d(a);
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> Count 2: failure of Respondents Aylin and Kiriscioglu to adequately monitor USTs for releases at the Pure Gas Station in Suffolk, Virginia ("Pure Facility"), in violation of the VA UST Rules;
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> Count 3: failure of Respondents Aylin and Kiriscioglu to adequately inspect the impressed current cathodic protection system for the USTs at the Pure Facility, in violation of the VA UST Rules;
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> Count 4: failure of Respondents Aylin and Kiriscioglu to provide cathodic protection for UST piping at the Pure Facility, in violation of the VA UST Rules;
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> Count 5: failure of Respondents Aylin and Kiriscioglu to conduct annual line tightness testing or monthly monitoring of the underground piping connected to USTs at the Pure Facility, in violation of the VA UST Rules;
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> Count 6: failure of Respondents Aylin and Kiriscioglu to conduct annual testing of automatic line leak detectors for the piping connected to USTs at the Pure Facility, in violation of the VA UST Rules;
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> Count 7: failure of Respondents Aylin and Kiriscioglu to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the USTs at the Pure Facility, in violation of the VA UST Rules;
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> Count 8: failure of Respondents Rt. 58 and Kiriscioglu to adequately monitor USTs for releases at the Rt. 58 Food Mart in Suffolk, Virginia ("Rt. 58 Facility"), in violation of the VA UST Rules;
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> Count 9: failure of Respondents Rt. 58 and Kiriscioglu to provide cathodic protection for UST piping at the Rt. 58 Facility, in violation of the VA UST Rules;
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> Count 10: failure of Respondents Rt. 58 and Kiriscioglu to conduct annual line tightness testing or monthly monitoring of the underground piping connected to USTs at the Rt. 58 Facility, in violation of the VA UST Rules;

Count 11: failure of Respondents Rt. 58 and Kiriscioglu to conduct annual testing of automatic line leak detectors for the piping connected to USTs at the Rt. 58 Facility, in violation of the VA UST Rules;

Count 12: failure of Respondents Rt. 58 and Kiriscioglu to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the USTs at the Rt. 58 Facility, in violation of the VA UST Rules;

Count 13: failure of Respondents Franklin Eagle and Kiriscioglu to adequately monitor USTs for releases at the Franklin Eagle Mart in Franklin, Virginia ("Franklin Facility"), in violation of the VA UST Rules;

Count 14: failure of Respondents Franklin Eagle and Kiriscioglu to provide cathodic protection for UST piping at the Franklin Facility, in violation of the VA UST Rules;

Count 15: failure of Respondents Franklin Eagle and Kiriscioglu to conduct annual line tightness testing or monthly monitoring of the underground piping connected to USTs at the Franklin Facility, in violation of the VA UST Rules;

Count 16: failure of Respondents Franklin Eagle and Kiriscioglu to conduct annual testing of automatic line leak detectors for the piping connected to USTs at the Franklin Facility, in violation of the VA UST Rules; and

Count 17: failure of Respondents Franklin Eagle and Kiriscioglu to demonstrate financial responsibility for taking corrective action and for compensating third parties for bodily injury and property damage caused by accidental releases from the USTs at the Franklin Facility, in violation of the VA UST Rules.

On April 29, 2013, Respondents filed their Answer to Administrative Complaint, Compliance Order and Notice of Right to Request a Hearing ("Answer"). Therein, Respondents claim that they will comply or have already complied with every provision set forth in the Compliance Order. However, they contest liability and the appropriateness of the proposed penalty,[3] which they contend they have an inability to pay.

The parties participated in this Tribunal's Alternative Dispute Resolution ("ADR") process from May 23, 2013, to September 26, 2013. On September 30, 2013, I was designated

[3] The Complaint does not propose a specific penalty to be assessed against Respondents but, rather, refers to the statutory maximum penalty, as adjusted, of $11,000 for violations occurring after January 30, 1997, through January 12, 2009, and $16,000 for violations occurring after January 12, 2009. *See* Complaint at 23 (citing 42 U.S.C. § 6991e(d)(2); 40 C.F.R. § 19.4)).

to preside over the litigation of this matter. On November 5, 2013, I issued a Prehearing Order and Order on Motion to Stay Proceedings ("Prehearing Order"), which set deadlines for the parties' prehearing exchange process and for the filing of dispositive motions regarding liability. Some of those deadlines were later extended by Order dated April 10, 2014.

On February 24, 2014, Complainant filed a Motion for Discovery seeking interrogatories and document production from all four Respondents. Specifically, Complainant requested information on two issues: 1) the business, financial, and operational relationships between Respondent Kirliscioglu, individually, the corporate Respondents, and other entities; and 2) Respondents' inability to pay claim. On March 12, 2014, I issued an Order on Complainant's Motion for Discovery ("Discovery Order"), which required Respondents to respond to Complainant's discovery requests by April 4, 2014. That deadline was later extended to May 5, 2014.

On March 14, 2014, Complainant filed its Initial Prehearing Exchange. On April 7, 2014, Respondents filed their Initial Prehearing Exchange.

On May 7, 2014, Respondent Kirliscioglu filed a Motion for Partial Accelerated Decision ("AD Motion") and Memorandum of Points and Authorities in Support ("AD Motion Memo"), in which Respondent Kirliscioglu seeks the dismissal, with prejudice, of all claims asserted against him in the Complaint. Respondent Kirliscioglu also seeks a hearing on the AD Motion.

Respondent Kirliscioglu simultaneously filed a Motion to Defer Discovery Response ("Motion to Defer" or "MTD") and Memorandum of Points and Authorities in Support ("MTD Memo") on May 7, 2014. Therein, Respondent Kirliscioglu seeks to delay his obligation to respond to Complainant's discovery requests until after I rule on the AD Motion.

On May 20, 2014, Complainant filed its Rebuttal Prehearing Exchange.

On May 21, 2014, Complainant filed a Motion to Strike Respondent Adnan Kirliscioglu's Motion for Partial Accelerated Decision ("Motion to Strike" or "MTS") and Memorandum of Law in Support ("MTS Memo").[4] Complainant asserts that Respondent Kirliscioglu actually seeks two alternative forms of relief in the AD Motion – partial accelerated decision and dismissal – and that Complainant opposes both forms of relief. Complainant requests an order denying all relief sought in the AD Motion, including Respondent Kirliscioglu's request for a hearing on the motion, and an order directing Respondent Kirliscioglu to comply with the discovery requests previously granted.

[4] Complainant's reasons for referring to its response to Respondent Kirliscioglu's AD Motion and Motion to Defer as a motion to strike rather than as an opposition to Respondent Kirliscioglu's motions are unclear. For purposes of this Order, I will treat the Motion to Strike simply as an opposition to the AD Motion and Motion to Defer.

On June 10, 2014, Complainant filed the parties' Joint Motion for Extension of Time ("Joint Extension Motion" or "Jt. Ext. Mot.") and Memorandum of Law in Support ("Extension Memo" or "Ext. Memo"). Therein, the parties request an extension of the time provided by the Prehearing Order for filing dispositive motions regarding liability to 60 days following the disposition of the AD Motion and Motion to Defer.

On August 21, 2014, Complainant filed a Motion to Compel Discovery and Impose Sanctions ("Motion to Compel") and Memorandum of Law in Support ("Compel Memo"), in which Complainant seeks an order compelling Respondents to comply with the March 12, 2014 Discovery Order and with the November 5, 2013 Prehearing Order and, if Respondents fail to comply, an order imposing sanctions pursuant to 40 C.F.R. § 22.19(g). On September 11, 2014, Respondents filed an Opposition to Complainant's Motion to Compel ("Opp. to Motion to Compel").

On September 23, 2014, Respondents filed a Supplemental Discovery Exchange ("Supp. Disc. Exchange") and Exhibit Volume II, which Respondents assert contains Confidential Business Information and Personally Identifiable Information. Respondents further assert that these documents are responsive, in part, to the discovery requests made by Complainant.

On September 30, 2014, and December 4, 2014, Complainant filed Status Reports.

On December 31, 2014, Complainant filed a First Supplemental Prehearing Exchange containing an additional 11 proposed exhibits.[5]

On March 19, 2015, Complainant filed a Motion for Leave to File First Amended Complaint ("Motion to Amend") and Memorandum of Law in Support ("Motion to Amend Memo" or "Mot. to Amend Memo"). According to Complainant, the primary purpose of amending the Complaint is to name three additional corporations as respondents because of their purported ownership of the USTs at issue in this proceeding, and to clarify the roles of the currently named Respondents with respect to the USTs. Complainant simultaneously filed a Second Supplemental Prehearing Exchange containing an additional two proposed exhibits. To date, Respondents have not filed a response to the Motion to Amend.

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[5] I note that Complainant did not seek leave to supplement its prehearing exchange. The parties are hereby reminded that, unless otherwise authorized, any addition of a proposed witness or exhibit to a prehearing exchange shall be filed with an accompanying motion to supplement the prehearing exchange. *See* Prehearing Order at 4.

II. **Complainant's Motion for Leave to File First Amended Complaint**[6]

As noted above, Complainant filed a Motion to Amend and Motion to Amend Memo on March 19, 2015. Complainant attached two documents to its Motion to Amend: 1) a signed, final version of a proposed First Amended Administrative Complaint, Compliance Order and Notice of Right to Request Hearing ("First Amended Complaint"), and 2) an unsigned, redlined version of the proposed First Amended Complaint. Complainant likewise attached two documents to its Motion to Amend Memo: 1) a document consisting of excerpts from the transcript of a deposition of Respondent Kiriscioglu taken on December 18, 2014, and 2) a copy of the affidavit submitted by Respondent Kiriscioglu as an exhibit to his AD Motion. While Complainant noted in the Motion to Amend that Respondents' counsel informed Complainant of his objection to the relief sought therein, Respondents have yet to file a written response.

This proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits ("Rules of Practice"), set forth at 40 C.F.R. Part 22. The Rules of Practice provide, in pertinent part, that once an answer has been filed, "the complainant may amend the complaint only upon motion granted by the Presiding Officer." 40 C.F.R. § 22.14(c). However, the Rules of Practice do not provide a standard for adjudicating such a motion. In the absence of administrative rules on a subject, I may look to the Federal Rules of Civil Procedure ("FRCP") and related case law for guidance. *See, e.g.*, *Envtl. Prot. Servs., Inc.*, 13 E.A.D. 506, 560 n.65 (EAB 2008) (citing *J. Phillip Adams*, 13 E.A.D. 310, 330 n.22 (EAB 2007); *Lazarus, Inc.*, 7 E.A.D. 318, 330 n.25 (EAB 1997)); *Carroll Oil Co.*, 10 E.A.D. 635, 649 (EAB 2002); *Asbestos Specialists, Inc.*, 4 E.A.D. 819, 827 n.20 (EAB 1993).

Rule 15 of the FRCP provides that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Fed. R. Civ. P. 15(a)(2). Consistent with this mandate, the U.S. Supreme Court held in the leading case on the issue, *Foman v. Davis*, 371 U.S. 178 (1962), that leave to amend a pleading should be freely given in the absence of any apparent or declared reason, such as "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [and] futility of amendment." *Id.* at 182. The Court observed that "'[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.'" *Id.* at 181-82 (quoting *Conley v. Gibson*, 355 U.S. 41, 48 (1957)). The Court further stated that "[i]f the underlying facts or

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[6] While I would ordinarily rule on pending motions in the order in which they were filed, my ruling on Complainant's Motion to Amend renders part of Respondent Kiriscioglu's AD Motion moot, as discussed in greater detail below. I thus find a discussion of Complainant's Motion to Amend to be appropriate at the outset of this Order.

circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits." *Id.* at 182.

The Environmental Appeals Board ("EAB" or "Board") has since adopted the liberal stance articulated in Rule 15 and *Foman* as a means of promoting decisions on the merits in the administrative proceedings before it. *Asbestos Specialists*, 4 E.A.D. at 830 ("[I]t is our view that the policy component of Rule 15(a) should apply to Agency practice. The objective of the Agency's rules should be to get to the merits of the controversy."); *Wego Chem. & Mineral Corp.*, 4 E.A.D. 513, 525 n.11 (EAB 1993) ("[A]dministrative pleadings should be liberally construed and easily amended to serve the merits of the action."); *Port of Oakland*, 4 E.A.D. 170, 205 (EAB 1992) ("[T]he Board adheres to the generally accepted legal principle that administrative pleadings are liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted.")(internal quotation marks omitted).

Applying this standard to Complainant's Motion to Amend, I do not discern any bad faith, dilatory motive, futility, undue prejudice, or other reason to deny it. Complainant does not seek to add any new counts, and while it seeks to enlarge the period of violation for Count 13 because it allegedly cited in error a given date as one on which the UST in question passed a release detection test, Complainant does not propose additional penalties. Indeed, the Motion to Amend appears to have been motivated primarily by information related to the ownership of the USTs that became available only after the parties engaged in discovery. Specifically, Complainant seeks to withdraw from the Complaint the allegations that Respondents Kiriscioglu, Aylin, Rt. 58, and Franklin Eagle were "owners," as that term is defined by Section 9001(4) of RCRA, 42 U.S.C. § 6991(4), and 9 VAC § 25-580-10, of the subject USTs at the time of the alleged violations. Instead, Complainant seeks to name as respondents three additional corporations – 5703 Holland Road Realty Corp., 8917 South Quay Road Realty Corp., and 1397 Carrsville Highway Realty Corp. (collectively, "Realty Corporations") – and allege that they were the "owners" of the respective USTs during the relevant period. Complainant avers that it learned of the relationship of the Realty Corporations to the USTs only when Respondent Kiriscioglu admitted to their ownership of the USTs during a deposition taken in December of 2014. Mot. to Amend Memo at 7. Complainant further avers that, prior to these admissions, Respondents had represented that Aylin, Rt. 58, and Franklin Eagle were the owners of the USTs and Complainant thus lacked any basis to amend the Complaint. *Id.* at 8. The documents attached to the Motion to Amend Memo support Complainant's assertions. Thus, Complainant appears to have filed the Motion to Amend in a timely manner and in good faith. Additionally, the basis for the proposed amendment is colorable given that, as discussed in greater detail in the context of Respondent Kiriscioglu's AD Motion, both owners and operators of USTs are subject to the statutory and regulatory provisions at issue. Finally, the addition of new parties to this proceeding does not unduly prejudice Respondents as this matter has not yet been set for hearing. The parties therefore have ample time to respond and engage in any additional fact-finding, as necessary.[7]

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[7] As observed by Complainant in the Motion to Amend Memo, however, further factual

Based upon the foregoing discussion, Complainant's Motion to Amend is hereby **GRANTED**. Upon the filing of the First Amended Administrative Complaint, Compliance Order and Notice of Right to Request Hearing, it shall become the complaint in this matter. Pursuant to Section 22.14(c) of the Rules of Practice, Respondents Aylin, Rt. 58, Franklin Eagle, and Kirisciogiu "shall have 20 additional days from the date of service of the amended complaint to file [their] answer." 40 C.F.R. § 22.14(c). In turn, the Realty Corporations shall have 30 days to file their answer. 40 C.F.R. § 22.15(a).

III. Respondent Kirisciogiu's Motion for Partial Accelerated Decision

As previously noted, Respondent Kirisciogiu filed an AD Motion on May 7, 2014, in which he requests that I dismiss, with prejudice, all claims asserted against him in the Complaint. AD Motion at 1. The root of his grievance is Paragraph 10 of the Complaint, which alleges as follows:

> At all times relevant to this Complaint, Respondent Kirisciogiu has been the "owner" and/or "operator" as those terms are defined in Section 9001(3) and (4) of RCRA, 42 U.S.C. § 6991(3) and (4), and 9 VAC § 25-580-10, of the USTs and UST systems as those terms are defined in Section 9001(10) of RCRA, 42 U.S.C. § 6991(10), and 9 VAC § 25-580-10, that are located at the Pure Facility, Rt. 58 Facility, and Franklin Facility (collectively, "Facilities").

Complaint ¶ 10.

An element of liability for each charge against Respondent Kirisciogiu in the Complaint is that he was an "owner" and/or "operator" of the USTs in question. Specifically, Count 1 of the Complaint charges Respondent Kirisciogiu with a violation of Section 9005(a) of RCRA, 42 U.S.C. § 6991d(a), which provides that "any owner or operator of an underground storage tank . . . shall, upon request of [EPA], furnish information relating to such tanks, their associated equipment, [and] their contents . . . ." Complaint ¶¶ 50-51. The remaining counts charge Respondent Kirisciogiu with violations of certain provisions of the VA UST Rules. Complaint ¶¶ 59, 65, 74, 86, 96, 101, 108, 115, 123, 129, 133, 140, 147, 153, 159, 163. Subject to exceptions not at issue here, the VA UST Rules apply to "all owners and operators of an UST system." 9 VAC § 25-580-20; 9 VAC § 25-590-20. Thus, Complainant is required to demonstrate as part of its *prima facie* case that Respondent Kirisciogiu was an "owner" and/or "operator" of the USTs at the Facilities in order to establish his liability for each of the alleged violations.

Given my ruling on Complainant's Motion to Amend, which grants Complainant's request to withdraw the allegation that Respondent Kirisciogiu was an "owner" of the USTs, I

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inquiry is expected to be minimal "where, as here, the proposed parties' UST ownership has been admitted." Mot. to Amend Memo at 10.

find his AD Motion to be moot with respect to that allegation. I therefore am considering the AD Motion only with respect to the allegation that Respondent Kiriscioglu was an "operator."

A. Liability of a Corporate Officer as an "Operator"

The term "operator" is defined by Subtitle I of RCRA as "any person in control of, or having responsibility for, the daily operation of the underground storage tank." 42 U.S.C. § 6991(3). The definition of the term set forth in the VA UST Rules is essentially identical. *See* 9 VAC § 25-580-10; 9 VAC § 25-590-10.

The circumstances under which an officer of a corporate operator may be held personally liable as an operator of the given facility was discussed in *Southern Timber Products, Inc.*, 3 E.A.D. 880 (JO 1992), a case cited by both Respondent Kiriscioglu and Complainant for the notion that an officer of a corporate operator is considered to be a "co-operator" where the officer "exercises active and pervasive control over the overall operation of the facility at issue." *Id.* at 895-96. The Judicial Officer presiding in *Southern Timber* found a multitude of factors to be relevant in determining whether an individual wielded such control, including the individual's role in the corporation; percent of ownership of stock in the corporation; authority to hire, fire, and direct employees; degree of physical presence at the facility; authority to make financial decisions concerning the facility; authority and involvement in making decisions related to the facility's operation and compliance with the laws and regulations at issue; delegation of responsibility to others; and identification as the operator of the facility, rather than simply as a representative of the corporation, on documents submitted to the Agency. *Id.* at 892-95 (citing *Wisconsin v. Rollfink*, 475 N.W.2d 575 (Wis. May 23, 1991); *United States v. Envtl. Waste Control, Inc.*, 710 F. Supp. 1172 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991); *United States v. ILCO, Inc.*, 32 ERC (BNA) 1977, 1990 U.S. Dist. LEXIS 20976 (N.D. Ala. Dec. 10, 1990)).

B. Appropriate Standard for Adjudicating Respondent Kiriscioglu's Motion for Partial Accelerated Decision

As observed by Complainant in its Motion to Strike, Respondent Kiriscioglu appears to raise two alternative arguments in favor of his dismissal from the Complaint: 1) that Complainant failed to allege sufficient facts in the Complaint to support the legal conclusion contained in Paragraph 10 that he was an "operator" of the USTs; and 2) that no genuine issue of material fact exists with respect to Respondent Kiriscioglu's purported status as an "operator." *See, e.g.*, AD Motion Memo at 10. Given these divergent lines of argument, Respondent Kiriscioglu seemingly makes two motions, a motion to dismiss and a motion for accelerated decision. Accordingly, the parties' arguments will be presented and analyzed under the legal standards for adjudicating both of these types of motions.

C. Motion to Dismiss

1. Legal Standard

Section 22.14 of the Rules of Practice requires a complaint to include, among other elements, "[a] concise statement of the factual basis for each violation alleged." 40 C.F.R. § 22.14(a)(3). A respondent may challenge the sufficiency of a complaint pursuant to Section 22.20, which authorizes the presiding Administrative Law Judge to dismiss a proceeding, upon motion of the respondent, "on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant." 40 C.F.R. § 22.20(a).

Motions to dismiss under Section 22.20(a) of the Rules of Practice are analogous to motions for dismissal under Rule 12(b)(6) of the FRCP. *Asbestos Specialists*, 4 E.A.D. at 827. While the FRCP do not apply to administrative proceedings, Rule 12(b)(6) and federal court decisions construing it provide useful guidance in adjudicating a motion to dismiss under the Rules of Practice. *See, e.g.*, *Euclid of Virginia, Inc.*, 13 E.A.D. 616, 657-58 (EAB 2008) ("While it is appropriate for Administrative Law Judges and the EAB to consult the Federal Rules of Civil Procedure . . . for guidance, these rules are not binding upon administrative agencies."); *Commercial Cartage Co., Inc.*, 5 E.A.D. 112, 117 n.9 (EAB 1994) ("Although the [FRCP] are not applicable here, we have found them to be instructive in analyzing motions to dismiss.").

Rule 12(b)(6) of the FRCP provides that a complaint filed in federal court may be dismissed for "failure to state a claim upon which relief can be granted." Fed. R. Civ. Pro. 12(b)(6). The general rules of pleading set forth in Rule 8 of the FRCP state, in part, that "[a] pleading that states a claim for relief must contain . . . a short and plain statement of the claim showing that the pleader is entitled to relief." *Id.* at 8(a)(2).

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), the U.S. Supreme Court discussed the standard for evaluating whether the factual allegations set forth in a given complaint are sufficient to withstand a motion to dismiss. As the Court explained in *Iqbal*:

> [T]he pleading standard Rule 8 announces does not require detailed factual allegations, but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation. A pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do. Nor does a complaint suffice if it tenders naked assertion[s] devoid of further factual enhancement.
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> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it

> asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement of relief.
>
> Two working principles underlie our decision in *Twombly*. First, the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice. (Although for the purposes of a motion to dismiss we must take all of the factual allegations in the complaint as true, we are not bound to accept as true a legal conclusion couched as a factual allegation.) Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions. Second, only a complaint that states a plausible claim for relief survives a motion to dismiss. . . . [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not show[n] [as required by Rule 8(a)(2)]—that the pleader is entitled to relief.
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> In keeping with these principles a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations. When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.

Iqbal, 556 U.S. at 678-79 (internal quotation marks and citations omitted).

The Court thus applied a two-pronged approach to evaluating the sufficiency of the factual allegations set forth in a complaint: 1) identify the allegations in the complaint that are not entitled to a presumption of truth because of their conclusory nature; and 2) determine whether the factual allegations plausibly suggest an entitlement to relief. *Iqbal*, 556 U.S. at 680-81. As the Court explained in *Twombly*, however, "[a]sking for plausible grounds to infer an [element of the cause of action at issue] does not impose a probability requirement at the pleading stage; it simply calls for enough fact to raise a reasonable expectation that discovery will reveal evidence of [that element]." 550 U.S. at 556.

Relying on the standard for dismissal articulated in the FRCP, the EAB has held that, "[i]n determining whether dismissal is warranted, all factual allegations in the complaint should be presumed true, and all reasonable inferences therefrom should be made in favor of the complainant. In addition, in the event dismissal appears to be appropriate, dismissal of a complaint should ordinarily be without prejudice." *Commercial Cartage*, 5 E.A.D. at 117. The EAB elaborated on the appropriateness of dismissal with prejudice in *Asbestos Specialists*, first citing with approval the holding of the U.S. Court of Appeals for the Eleventh Circuit in *Bank v.*

Pitt, 928 F.2d 1108 (11th Cir. 1991), that "[w]here a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." 4 E.A.D. at 827 (citing *Bank v. Pitt*, 928 F.2d at 1112). The EAB also noted the objective, discussed above, of deciding cases on their merits. *Id.* at 830 (citing *Wego Chem.*, 4 E.A.D. at 525 n.11; *Port of Oakland*, 4 E.A.D. at 205 n.84). It then held:

> Therefore, as a general rule, dismissal with prejudice under the Agency's rules should rarely be invoked for the first instance of a pleading deficiency in the complaint; instead, it should be reserved for repeat occasions or where it is clear that a more carefully drafted complaint would still be unable to show a right to relief on the part of the complainant.

Id. at 830.

2. Arguments of the Parties

a. Respondent Kiriscioglu's Arguments

Respondent Kiriscioglu first argues for the dismissal of the claims against him in the Complaint "on the basis of inadequate pleading by . . . Complainant." AD Motion Memo at 2. Specifically, Respondent Kiriscioglu contends that the Complaint is devoid of factual allegations supporting the legal conclusion set forth in Paragraph 10 that Respondent Kiriscioglu was an "operator" of the USTs at issue in this proceeding. *Id.* at 1-2, 8-9. He argues that Complainant appears to be relying merely on his role as the sole corporate officer of Aylin, Rt. 58, and Franklin Eagle to argue that he was a "co-operator,"[8] but that "[a]s a corporate officer, Respondent Kiriscioglu should not be considered a 'co-operator' where there is no factual allegation made by EPA in its Administrative Complaint or documents provided in the initial prehearing exchange that he exercised active and pervasive control over the overall operation of the Facilities." *Id.* at 9 (citing *Southern Timber*, 3 E.A.D. at 895-96). He further contends that "[f]undamental fairness under both the Administrative Procedures Act and the Federal Rules [of Civil Procedure] dictate that EPA should be required to set forth sufficient and plausible factual allegations in its Administrative Complaint as to how Respondent Kiriscioglu personally is . . . an 'operator' in order to ignore or pierce the corporate framework." *Id.* at 2. In the absence of such allegations, Respondent Kiriscioglu maintains, he lacks the ability to understand how he is personally responsible for the alleged violations and how best to defend himself in this proceeding. *Id.* at 2, 9.

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[8] The Complaint alleges that Respondent Kiriscioglu is the President of Aylin, Rt. 58, and Franklin Eagle, Complaint ¶ 3, and Respondents admit to this allegation in their Answer, Answer ¶ 3.

b. Complainant's Arguments

Complainant counters in its Motion to Strike that Respondent Kiriscioglu "overestimates the pleading requirements" established by *Iqbal* and *Twombly*. MTS Memo at 12. Challenging the proposition that it was obligated to "set[] forth all factual allegations required to prove that Mr. Kiriscioglu is an . . . operator," Complainant argues that "EPA must simply plead factual content sufficient for the court to infer that the defendant is liable for the misconduct in order to meet the low standards of 40 C.F.R. § 22.20(a) and FRCP 12(b)(6)." *Id.* Complainant then contends that it met this standard, maintaining that "[t]he Complaint alleges sufficient factual information that, if presumed to be true and all reasonable inferences made in favor of Complainant, this Court can determine that a prima facie case exists given [sic] rise to a right of relief against Respondent Kiriscioglu." *Id.* at 15.

As an example, Complainant points to Count 2 of the Complaint. MTS Memo at 15. Count 2 alleges that Respondent Kiriscioglu failed to monitor the USTs located at the Pure Facility for releases at least every 30 days as required by 9 VAC § 25-580.140.1.[9] Complaint ¶ 58. Complainant proceeds to identify the elements of the charged violation and the allegations set forth in the Complaint that support it:

> The elements of this violation require a showing that: (1) there is a petroleum UST system; (2) Respondent Kiriscioglu is an owner or operator of the petroleum UST system; (3) the petroleum UST system was not monitored at least every 30 days using a method in 9 VAC § 25-580-160.4-8; and (4) that no exceptions set out in 9 VAC § 25-580-140.1(a)-(c) are applicable.
>
> In the Complaint, EPA alleges that Mr. Kiriscioglu was, at all times relevant to the violations in the Complaint, the "owner" or "operator" of the UST systems at the facility (Complaint ¶ 10); that there is an UST system at the Pure Facility (Complaint ¶ 14); and that Respondent Kiriscioglu as the "owner" or "operator"

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[9] While Count 2 alleges a violation specifically of 9 VAC § 25-580.140.1, Complainant roughly quotes the language of subdivision C.1 of 9 VAC § 25-580-140 in its Motion to Strike. MTS at 15. That provision reads as follows:

> C. Owners and operators of petroleum UST systems not required to have secondary containment under subdivision 7 of 9 VAC 25-580-50 must provide release detection for tanks and piping as follows:
>
> > 1. Tanks. Tanks must be monitored at least every 30 days for releases using one of the methods listed in subdivisions 4 through 8 of 9 VAC 25-580-160 except [for a number of exceptions not relevant here].

9 VAC § 25-580.140.C1.

> selected automatic tank gauging ("ATG") as the method of tank detection for the UST system at Pure Facility from August 1, 2006 to at least June 2, 2011, in compliance with 9 VAC § 25-580-140 (Complaint ¶ 55), but failed to perform release detection every 30 days as required by 9 VAC 25-580-140.1 from at least August 1, 2006 through May 31, 2011. (Complaint ¶ 58). Respondent Kiriscioglu provided documents of a passing tank tightness test on June 3, 2011 (Complaint ¶ 56), which ended the period of non-compliance for failing to perform release detection every 30 days. (Complaint ¶ 56).

MTS Memo at 15-16. If those allegations are presumed to be true, Complainant argues, it has sufficiently pled a *prima facie* case that Respondent Kiriscioglu violated 9 VAC § 25-580-140 as charged in Count 2. *Id.* at 16 (citing *Iqbal*, 556 U.S. at 679). Complainant further contends that "discovery has revealed additional evidence that Respondent Kiriscioglu acted as an 'operator' of the UST systems at the facilities." MTS Memo at 16.

3. Discussion

Upon consideration, I find Respondent Kiriscioglu's arguments regarding the sufficiency of the Complaint to be unpersuasive. As first observed by Respondents in their Answer, the allegation set forth in Paragraph 10 of the Complaint that Respondent Kiriscioglu has been an "operator" of the subject USTs at all times relevant to the Complaint constitutes a legal conclusion. In order to survive a motion to dismiss, the Complaint is required to allege facts that, when presumed to be true, support that legal conclusion and plausibly suggest that Respondent Kiriscioglu was indeed an "operator," as that term is defined by Section 9001(3) of RCRA, 42 U.S.C. § 6991(3), and 9 VAC § 25-580-10, and as it was construed by the Judicial Officer in *Southern Timber*.

Contrary to Respondent Kiriscioglu's claims, the Complaint *does* contain factual allegations from which I could reasonably infer that Respondent Kiriscioglu exercised sufficient control over the USTs to satisfy the definition of "operator." For instance, as acknowledged by Respondent Kiriscioglu, the Complaint alleges that he is the President of Aylin, Rt. 58, and Franklin Eagle, which are also charged as "operators" of the USTs. Complaint ¶ 3. As pointed out by Complainant, the Complaint further alleges that, along with the alleged corporate operators of the respective Facilities, Respondent Kiriscioglu "selected" automatic tank gauging as the method of release detection for the USTs pursuant to 9 VAC § 25-580-160(4). Complaint ¶¶ 55, 104, 136. When these allegations are presumed to be true,[10] and all reasonable inferences therefrom are made in favor of Complainant, I find that the Complaint plausibly suggests that Respondent Kiriscioglu was actively involved in rendering decisions related to the operation of the USTs and their compliance with governing law. Such involvement was identified in *Southern Timber* as a factor weighing in favor of a finding that an officer of a corporate operator

[10] Respondents do, in fact, admit to these allegations in their Answer. Answer ¶¶ 3, 55, 104, 136.

is a "co-operator." The Complaint thus sets forth sufficient facts to withstand a claim that it fails to establish a *prima facie* on the basis of alleging only a legal conclusion with respect to the element of liability that Respondent Kirisciolu was an "operator" of the USTs during the alleged period of violation. Accordingly, to the extent that Respondent Kiriscioglu makes a motion to dismiss, it is hereby **DENIED**.

D. Motion for Accelerated Decision

1. Legal Standard

Section 22.20(a) of the Rules of Practice authorizes Administrative Law Judges to:

> render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law.

40 C.F.R. § 22.20(a). This standard is analogous to the standard governing motions for summary judgment prescribed by Rule 56 of the FRCP, and while the FRCP do not apply here, the EAB has consistently looked to Rule 56 and its jurisprudence for guidance in adjudicating motions for accelerated decision filed under Section 22.20(a) of the Rules of Practice. *See, e.g.*, *Consumers Scrap Recycling, Inc.*, 11 E.A.D. 269, 285 (EAB 2004); *BWX Techs., Inc.*, 9 E.A.D. 61, 74-75 (EAB 2000); *Clarksburg Casket Co.*, 8 E.A.D. 496, 501-02 (EAB 1999). Federal courts have endorsed this approach. For example, the U.S. Court of Appeals for the First Circuit described Rule 56 as "the prototype for administrative summary judgment procedures" and the jurisprudence surrounding it as "the most fertile source of information about administrative summary judgment." *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600, 607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995) (rejecting the argument that federal court rulings on motions for summary judgment are "inapposite" to administrative proceedings).

As for the particular standard set forth in Rule 56, it directs a federal court to grant summary judgment upon motion by a party "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In construing this standard, the U.S. Supreme Court has held that a factual dispute is material where, under the governing substantive law, it might affect the outcome of the proceeding. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1985). In turn, a factual dispute is genuine if a fact finder could reasonably resolve the dispute in favor of the non-moving party under the evidentiary standards applicable to the particular proceeding. *Id.* at 248, 250-52.

The Supreme Court has held that the party moving for summary judgment bears the burden of showing an absence of a genuine dispute as to any material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). This burden consists of two components: an initial

burden of production, which shifts to the non-moving party once it is satisfied by the moving party, and the ultimate burden of persuasion, which always remains with the moving party. *Celotex Corp. v. Catrett*, 477 U.S. 317, 330 (1986) (Brennan, J., dissenting) (citing 10A C. Wright, A. Miller, & M. Kane, Federal Practice and Procedure § 2727 (2d ed. 1983)). To discharge its initial burden of production, the moving party is required to support its assertion that a material fact is not genuinely disputed either by "citing to particular parts of materials in the record," such as documents, affidavits or declarations, and admissions, or by "showing that the materials cited do not establish the . . . presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Once the moving party satisfies its initial burden of production, the burden shifts to the non-moving party to show that a genuine dispute of material fact exists by similarly "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence . . . of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." *Id.*

In determining whether a genuine issue of material fact exists for trial, a federal court is required to construe the evidentiary material and reasonable inferences drawn therefrom in a light most favorable to the non-moving party. *See Anderson*, 477 U.S. at 255 ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor."); *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962) ("On summary judgment the inferences to be drawn from the underlying facts contained in [the moving party's] materials must be viewed in the light most favorable to the party opposing the motion."). The court is then required to consider whether a fact finder could reasonably find in favor of the non-moving party under the applicable evidentiary standards. *Anderson*, 477 U.S. at 252-55. Where the evidence viewed in the light most favorable to the non-moving party is such that the fact finder could not reasonably find in favor of the non-moving party, summary judgment is appropriate. *See Adickes*, 398 U.S. at 158-59. Conversely, where conflicting inferences may be drawn from the evidence and a choice among those inferences would amount to fact-finding, summary judgment is inappropriate. *Rogers Corp. v. EPA*, 275 F.3d 1096, 1105 (D.C. Cir. 2002). Even where summary judgment appears technically proper, sound judicial policy and the exercise of judicial discretion may support denial of the motion in order for the case to be more fully developed at hearing. *Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979).

The EAB has applied the foregoing principles in adjudicating motions for accelerated decision under Section 22.20(a) of the Rules of Practice, holding that the moving party "assumes the initial burden of production on a claim, and must make out a case for presumptive entitlement to summary judgment in his favor." *BWX*, 9 E.A.D. at 76. Where the moving party bears the burden of persuasion on an issue, it is entitled to an accelerated decision only if it presents "evidence that is so strong and persuasive that no reasonable [fact finder] is free to disregard it." *Id.* Where the moving party does not bear the burden of persuasion, it has the "lesser burden of 'showing' or 'pointing out' to the reviewing tribunal that there is an absence of evidence in the record to support the nonmoving party's case on that issue." *Id.* Once the moving party has discharged this burden, the burden of production shifts to the non-moving

party bearing the burden of persuasion on the issue to identify specific facts from which a finder of fact could reasonably find in its favor on each element of the claim. *Id.*

As noted by the EAB, "neither party can meet its burden of production by resting on mere allegations, assertions, or conclusions of evidence." *BWX*, 9 E.A.D. at 75. Likewise, a party opposing a properly supported motion for accelerated decision is required to "provide more than a *scintilla* of evidence on a disputed factual issue to show their entitlement to a[n] . . . evidentiary hearing: the evidence must be substantial and probative in light of the appropriate evidentiary standard of the case." *Id.* at 76.

Consistent with the jurisprudence of Rule 56, the EAB has held that a tribunal adjudicating a motion for accelerated decision is required to consider whether the parties have met their respective burdens in the context of the applicable evidentiary standard. *BWX*, 9 E.A.D. at 75. As prescribed by Section 22.24(b) of the Rules of Practice, 40 C.F.R. § 22.24(b), the evidentiary standard that applies here is proof by a preponderance of the evidence. Section 22.24(a) provides that the complainant bears the burdens of presentation and persuasion that a violation occurred as set forth in the complaint, and the respondent bears the burdens of presentation and persuasion for any affirmative defenses.

2. <u>Arguments of the Parties</u>

a. Respondent Kiriscioglu's Arguments

Respondent Kiriscioglu also argues for the dismissal of the claims against him in the Complaint on the basis that no genuine issue of material fact exists as to whether he exercised active and pervasive control over the day-to-day operation of the USTs located at the Facilities, such that he was an "operator." AD Motion Memo at 9-10. Relying upon an affidavit that he attached to the AD Motion ("Kiriscioglu Affidavit"), Respondent Kiriscioglu maintains:

> Mr. Kiriscioglu's residence is in New York State, and his office is in Northern New Jersey – both several hundred miles from the Facilities. Kiriscioglu Affidavit ¶¶ 2, 3. He is owner of corporations that own and operate 22 retail gas stations, including the Facilities. *Id.*, at ¶ 4. Mr. Kiriscioglu's primary day-to-day involvement with the Facilities was setting the "street prices" for the gasoline. *Id.*, at ¶ 10. Environmental compliance activities associated with the USTs were the responsibility of the manager of the Facilities. *Id.*, at ¶¶ 9-11.

AD Motion Memo at 9 (footnote omitted).

To further demonstrate the absence of a genuine dispute as to his status as an "operator," Respondent Kiriscioglu points to a section of the VA UST Rules requiring owners and operators of USTs to designate and train individuals for three distinct classes of operators, identified as

"Class A," "Class B," and "Class C," to perform certain enumerated operational activities.[11] AD Motion Memo at 9-10 (citing 9 VAC § 25-580-125). Arguing that this section "go[es] to the essence of day-to-day operational control of the USTs at the Facilities," Respondent Kirliscioglu maintains that he does not satisfy the Class A, Class B, or Class C designations "[g]iven the manager's job duties, his or her geographic proximity to the Facilities, Mr. Kiriscioglu's limited, daily involvement with the Facilities (other than setting retail or street prices for the gaoline [sic]), and Mr. Kiriscioglu's geographic distance from the Facilities." AD Motion Memo at 10.

b. Complainant's Arguments

In opposition, Complainant argues that genuine issues of material fact exist on the question of Respondent Kiriscioglu's liability with respect to his status as an "operator," and that Respondent Kiriscioglu is therefore not entitled to an accelerated decision. MTS Memo at 2. To support its position, Complainant first cites the factors identified in *Southern Timber* as relevant to the inquiry of whether a person is an "operator" of a facility. MTS Memo at 9-10 (citing *Southern Timber*, 3 E.A.D. at 894-95). Complainant then points to proposed documentary evidence submitted as part of Complainant's prehearing exchange ("CX") and documentation attached as an exhibit to its Motion to Strike ("Exhibit 1") in order to demonstrate that Respondent Kiriscioglu exercised control over the maintenance and operation of the UST systems at the Facilities under the trade name New Jersey Petroleum Organization ("NJPO") at all times relevant to the alleged violations. MTS Memo at 10-11.

Specifically, Complainant asserts that NJPO entered into contracts with vendors to maintain, test, and upgrade the UST systems. MTS Memo at 11 (citing CX 12, EPA 113, 132, 144, 167, 172, 202; CX 22; CX 23A, EPA 461a, 461j, 461mm, 461jj[12]; CX 29, EPA 548, 563, 565, 577; CX 34, EPA 754j). Complainant contends that the evidence of this activity refutes the claim of Respondent Kiriscioglu in his affidavit that NJPO was merely a "moniker" used by vendors and third parties. MTS Memo at 10-11 (citing Kiriscioglu Affidavit ¶ 6). Complainant

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[11] For purposes of that section, a "Class A operator" is defined as "an operator who has primary responsibility to operate and maintain the underground storage tank system and facility," including "managing resources and personnel, such as establishing work assignments, to achieve and maintain compliance with regulatory requirements." 9 VAC § 25-580-125.A.1. A "Class B operator" is defined as "an operator who implements applicable underground storage tank regulatory requirements and standards in the field or at the underground storage tank facility" and who "oversees and implements the day-to-day aspects of operations, maintenance, and recordkeeping for the underground storage tanks . . . ." 9 VAC § 25-580-125.A.2. Finally, a "Class C operator" is defined as "the person responsible for responding to alarms or other indications of emergencies caused by spills or releases from underground storage tank systems and equipment failures," such that the person, "generally, is the first line of response to events indicating emergency conditions." 9 VAC § 25-580-125.A.3.

[12] This citation appears to be erroneous. It likely was meant to be 461jjj.

also asserts that Respondent Kirisciogluobtained the services of Crossroad Fuels Service, Inc., to remove gasoline and diesel fuel from tanks at the Rt. 58 Facility. MTS Memo at 11 (citing Exhibit 1). Finally, Complainant asserts that Respondent Kirisciogluwas responsible for the daily gasoline inventory records at the Rt. 58 Facility. MTS Memo at 11 (citing CX 22, 23).

Complainant concludes, "Obviously, Respondent's operation of the UST systems at the facilities is a genuine issue of a material fact which may affect the outcome of this proceeding with respect to the violations alleged in the Complaint against Respondent as 'operator.'" MTS Memo at 11 (citing *Mayaguez Reg'l Sewage Treatment Plant*, 4 E.A.D. 772, 781 (EAB 1993), *aff'd sub nom.*, *Puerto Rico Aqueduct & Sewer Auth. v. EPA*, 35 F.3d 600 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995)). Based upon the evidence currently in the record, Complainant maintains, accelerated decision in favor of Respondent Kirisciogluis inappropriate "because the facts in support of Respondent's motion are conclusory, and contradictory inferences can be drawn from the evidence in the record." MTS Memo at 11-12 (citing *Rogers Corp.*, 275 F.3d at 1103; *O'Donnell v. United States*, 891 F.2d 1079, 1082 (3d Cir. 1989)).

3. Discussion

When the evidence cited by the parties and the reasonable inferences drawn therefrom are construed in a light most favorable to Complainant, little doubt exists as to the genuine issues of material fact present in this case. The extent of Respondent Kirisciogluʼs control over the USTs, the Facilities, and the corporations owning those assets are all factual questions that are material to his liability for the alleged violations as an "operator" and are genuinely in dispute given the conflicting inferences that may be drawn from the evidentiary record.

For example, as the Kirisciogluaffidavit reflects, the personal and business addresses of Respondent Kirisciogluare hundreds of miles from the Facilities, and Respondent Kirisciogluavers that he was physically present at the Facilities only periodically because of that distance. Kirisciogluaffidavit ¶¶ 2, 3, 10. Respondent Kirisciogluavers that he "had little involvement with routine underground storage tank compliance activities." *Id.* at ¶ 11. This evidence arguably suggests that Respondent Kirisciogluacked a sufficient level of control and responsibility to render him an "operator" of the USTs based upon the factors identified in *Southern Timber*.

On the other hand, the record also contains evidence from which I could reasonably find in favor of Complainant with respect to the issue of Respondent Kirisciogluʼs status as an "operator." For example, Respondent Kirisciogluelates in his affidavit that the manager hired to oversee the day-to-day operation of the Facilities "was assigned authority and responsibility by [Respondent Kirisciogluu] for a number of matters," including "day-to-day environmental compliance activities." Kirisciogluaffidavit ¶ 9. According to *Southern Timber*, such delegation may be affirmative evidence of a corporate officer's overall responsibility of a facility, which lends support to a finding that the corporate officer was a "co-operator." 3 E.A.D. at 893-94, 896. Additionally, the Kirisciogluaffidavit reflects that Respondent Kiriscioglu

retained the authority to oversee financial matters at the Facilities, such as "setting the street or retail selling prices for the motor fuels," "consulting regularly with the manager to ensure that the three facilities were being operated in a financially-proper manner," and making "periodic decisions on the renewal of underground storage tank leak insurance." Kirisciogiu Affidavit ¶¶ 10, 11. This consideration was also cited in *Southern Timber* as a factor demonstrating a corporate officer's measure of control and responsibility at a facility. 3 E.A.D. at 893 (citing *Wisconsin v. Rollfink*, 475 N.W.2d 575 (Wisc. May 23, 1991)). Finally, while Respondent Kirisciogiu denies the allegation that he conducts business as "New Jersey Petroleum Organization" and/or "NJPO," Answer ¶ 4, and maintains that "NJPO" was simply a "moniker" used by third parties to describe the staff at his business address who provide such services as employee training and fuel inventory, Kirisciogiu Affidavit ¶ 6, at least one of the documents cited by Complainant suggests an affiliation between NJPO and Respondent Kirisciogiu and reflects that NJPO was directly involved in the operation and maintenance of the USTs. Dated July 26, 2011, and entitled "Certificate of Storage Tank System Testing," this document appears to be a compliance report for the Rt. 58 Facility that was prepared by Crompco, LLC, for Respondent Kirisciogiu acting under the name New Jersey Petroleum Organization. CX 23A at EPA 461j (identifying the "client" as "New Jersey Petroleum Organization (Adan Kirisciogly [sic])"). While I need not decide at this time whether the foregoing evidence is sufficient to conclude that Respondent Kirisciogiu was, in fact, an "operator" of the USTs, it certainly points to a degree of "active and pervasive control" that places the evidence cited by Respondent Kirisciogiu into question and renders accelerated decision in his favor inappropriate.

As genuine issues of material fact are present on the record before me, Respondent Kirisciogiu's request to be dismissed from the Complaint, to the extent that it constitutes a motion for accelerated decision, is hereby **DENIED**.

E. Hearing on the AD Motion

Without offering any reasons in support, Respondent Kirisciogiu requests a hearing on the AD Motion. AD Motion at 1. Complainant seeks a denial of the request. MTS at 1; MTS Memo at 2, 17.

The Rules of Practice provide that "[t]he Presiding Officer . . . may permit oral argument on motions in its discretion." 40 C.F.R. § 22.16(d). This authority is consistent with Rule 78(b) of the FRCP, which states that a court "may provide for submitting and determining motions on briefs, without oral hearings." Fed. R. Civ. Pro. 78(b). Some federal courts have construed Rule 78(b) to recognize the discretion of a trial court with respect to granting oral argument on motions for summary judgment in particular. *See, e.g.*, *Bratt v. Int'l Bus. Machs. Corp.*, 785 F.2d 352, 363 (1st Cir. 1986) ("[A] district court should have 'wide latitude' in determining whether oral argument is necessary before rendering summary judgment.") (quoting *Cia. Petrolera Caribe, Inc. v. Arco Caribbean, Inc.*, 754 F.2d 404, 411 (1st Cir. 1985); *Spark v. Catholic Univ. of America*, 510 F.2d 1277, 1280 (D.C. Cir. 1975) ("While it is clear that due process does not include the right to oral argument on a motion, there is a division of authority

among the circuits on the issue of whether a motion for summary judgment may ever be granted without affording a hearing to the adverse party. . . . We . . . adopt the construction of the Rules which permits the District Court to dispense with oral arguments in appropriate circumstances in the interest of judicial economy . . .").

Here, the evidentiary record clearly reflects a genuine dispute of a material fact, and Respondent Kirisciogiu fails to offer any arguments in support of his request for a hearing on the AD Motion. Accordingly, in my discretion, Respondent Kiriscioglu's request for a hearing on the AD Motion is hereby **DENIED**.

IV. Respondent Kiriscioglu's Motion to Defer Discovery Response and Complainant's Motion to Compel Discovery and Impose Sanctions

In his Motion to Defer, Respondent Kiriscioglu seeks to delay his obligation to submit his personal financial information in response to Complainant's Motion for Discovery, which I granted in the Discovery Order of March 12, 2014, until after a ruling on his AD Motion has been issued or "until the penalty phase of the proceeding." MTD at 1; MTD Memo at 1-2. Respondent Kiriscioglu cites the "highly personal and confidential nature" of the information sought by Complainant as the basis of his request. MTD Memo at 2. He argues that the requested delay "will neither unreasonably delay the proceeding nor unreasonably burden the Complainant" because his financial information "has nothing to do with the liability phase of the proceeding." *Id.* at 2-3. Respondent Kiriscioglu further contends that "[t]here is no significant probative value to [his] personal financial information as to the question of liability for the alleged violations" and that the parties can address his finances as part of any settlement negotiations in which they engage prior to a ruling on the AD Motion. *Id.* at 3.

Aside from urging me in its Motion to Strike to order Respondent Kiriscioglu to comply with the Discovery Order of March 12, 2014, Complainant did not file a response to the Motion to Defer by the deadline established by the Rules of Practice. On August 21, 2014, however, Complainant filed its Motion to Compel and Compel Memo, wherein Complainant seeks an order requiring Respondents to comply with the Discovery Order and requesting the imposition of sanctions for their failure to comply, as necessary. Motion to Compel at 1; Compel Memo at 9. Complainant represents that "[o]n May 6, 2014, Respondents filed a partial response to the Discovery Order,"[13] but that as of the date of the Motion to Compel, "Respondents have neither fully responded to the interrogatories nor produced all the documents in derogation of this

[13] While the Headquarters Hearing Clerk was copied on a letter addressed to counsel for Complainant and dated May 6, 2014, to which Respondents purportedly attached a partial response to Complainant's requests for discovery, Respondents do not appear to have filed the partial response with the Headquarters Hearing Clerk. Thus, any partial response that Respondents may have provided to Complainant on that date is not a part of the record of this proceeding.

Court's Discovery Order of March 12, 2014, and the Prehearing Order of November 5, 2013."[14] Compel Memo at 3-4. In particular, Complainant asserts that it has not received "complete tax returns, financial statements, balance sheets or profit and loss statements, nor have Respondents provided Complainant with any documents with respect to items 71-87 and 91-98 [from the list of documents sought in its Motion for Discovery]." Compel Memo at 4-5. Complainant thus requests an order requiring Respondents "to provide all of the documents ordered in the Discovery Order and Prehearing Order, and to specify precisely which documents do not exist." Compel Memo at 8.

Complainant further requests the imposition of sanctions in the event that Respondents fail to comply. Compel Memo at 8-9. Arguing that "Respondents have clearly violated this Court's Discovery and Prehearing Orders," Complainant points to portions of the Rules of Practice authorizing the imposition of sanctions where a party fails to comply with a prehearing exchange requirement, including responding to additional discovery ordered by the presiding Administrative Law Judge. Compel Memo at 5-6 (citing 40 C.F.R. §§ 22.4(c), 22.19(g)). For example, Complainant contends, I may "infer that Respondents can afford to pay the proposed penalty, or exclude any evidence that Respondents eventually provide regarding their claim that they are unable to pay the proposed fine." Compel Memo at 8.

On September 11, 2014, Respondents filed an Opposition to Complainant's Motion to Compel, to which Respondents attached a letter addressed to counsel for Complainant and dated September 10, 2014, that purports to memorialize a telephone conversation between counsel for

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[14] Complainant refers specifically to the provision of the Prehearing Order directing Respondents to submit as part of their prehearing exchange the following information:

> (B) all factual information Respondents consider relevant to the assessment of a penalty and any supporting documentation; and
>
> (C) if Respondents take the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, then provide a detailed narrative statement explaining the precise factual and legal bases for its position and a copy of any and all documents upon which they intend to rely in support of such position.

Compel Memo at 2 (quoting Prehearing Order at 3). As previously noted, Respondents claimed an inability to pay the proposed penalty in their Answer. Answer at 13. Respondents assert in their Initial Prehearing Exchange that they "already have provided financial information to Complainant to enable Complainant to make an initial ability-to-pay analysis" and that "Complainant has asked for additional information from the Respondents that is expected to be provided with the Respondents' discovery responses to be submitted by May 5, 2014." Respondents' Initial Prehearing Exchange at 7.

the parties ("Exhibit A"). Therein, Respondents explain their intention to file documents on September 19, 2014, that are related to the finances of Respondents Aylin, Rt. 58, and Franklin Eagle and that "will be fully responsive to the information sought by Complainant." Opp. to Motion to Compel at 1-2; Exhibit A. Respondents subsequently filed their Supplemental Discovery Exchange and Exhibit Volume II on September 23, 2015. In their Supplemental Discovery Exchange, Respondents respond to each request for documents listed in Complainant's Motion for Discovery. Supp. Disc. Exchange at 2-3. Notably, Respondents assert that they "have not provided Mr. Kiriscioglu's personal tax returns or Individual Ability to Pay Claim form in requests 91-92, because of their pending motion to dismiss Mr. Kiriscioglu, as an individual, from this case." *Id.* at 3.

Because I have denied Respondent Kiriscioglu's Motion for Partial Accelerated Decision, his arguments against providing his personal financial information are now moot.[15] Respondents are expected to comply with the Discovery Order to any extent they have not already done so, and accordingly, Complainant's Motion to Compel is **GRANTED**. Complainant's request for the imposition of sanctions is premature at this time, but as observed by Complainant, a failure to comply with orders issued by this Tribunal may subject Respondents to the following sanctions set forth in Rule 22.19 of the Rules of Practice:

> (g) Failure to exchange information. Where a party fails to provide information within its control as required pursuant to this section, the Presiding Officer may, in his discretion:
>
> (1) Infer that the information would be adverse to the party failing to provide it;
>
> (2) Exclude the information from evidence; or
>
> (3) Issue a default order under § 22.17(c).

40 C.F.R. § 22.19.

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[15] I note, however, that his arguments are not persuasive. Contrary to his position, this proceeding is not bifurcated into liability and penalty phases, and evidence related to his personal finances may be relevant to both a finding of liability and a determination as to the appropriate penalty to assess in the event that liability is established. Further, the parties may settle this matter at any time, regardless of the information that has been entered into the record. Finally, while I understand Respondent Kiriscioglu's concerns about his personal financial information being unnecessarily disseminated, this Tribunal employs certain procedures for safeguarding Confidential Business Information and Personally Identifiable Information, of which Respondents availed themselves in providing Exhibit Volume II.

V. Joint Motion for Extension of Time

As noted above, Complainant filed the parties' Joint Extension Motion and Extension Memo on June 10, 2014. Therein, the parties seek an extension of the time provided by the Prehearing Order for filing dispositive motions regarding liability. Jt. Ext. Mot. at 1. Specifically, the parties request that the filing deadline for such motions be extended to 60 days following the disposition of the other motions pending in this matter and disposed of herein. Jt. Ext. Mot. at 2; Ext. Memo at 3. In support of their request, the parties contend that it satisfies the standard for granting extensions of filing deadlines set forth by Rule 22.7(b) of the Rules of Practice. Ext. Memo at 2-3. This rule provides, in pertinent part, that "the Presiding Officer may grant an extension of time for filing any document: upon timely motion of a party to the proceeding, for good cause shown, and after consideration of prejudice to other parties." 40 C.F.R. § 22.7(b).

Given my ruling on Complainant's Motion to Amend and the addition of new parties to this proceeding, I find the Joint Extension Motion to be moot. As set forth below, this Order establishes deadlines for Respondents[16] to file a supplement to the Initial Prehearing Exchange filed by Respondents Aylin, Rt. 58, Franklin Eagle, and Kiriscioglu on April 7, 2014, that is responsive to the amendments to the Complaint authorized by this Order, and for Complainant to file any rebuttal to Respondents' supplement. The Order then establishes a deadline for the parties to file any additional dispositive motions regarding liability.

ORDER

1. Complainant's Motion for Leave to File First Amended Complaint is **GRANTED**. On or before **August 17, 2015**, Complainant shall file and serve on Respondents the proposed First Amended Administrative Complaint, Compliance Order and Notice of Right to Request Hearing attached to its Motion to Amend.

2. Respondent Kirisciogl u's Motion for Partial Accelerated Decision is **DENIED**.

3. Respondent Kirisciogl u's Motion to Defer Discovery Response is **DENIED**.

4. Complainant's Motion to Compel Discovery is **GRANTED**. On or before **September 11, 2015**, Respondents shall file a response to Complainant's Motion for Discovery, in accordance with the Order on Complainant's Motion for Discovery dated March 12, 2014, to the extent that Respondents have not already done so.

5. The parties' Joint Motion for Extension of Time is **DENIED**.

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[16] Unless otherwise specified, this Order hereinafter uses the term "Respondents" to refer to Aylin, Rt. 58, Franklin Eagle, Kiriscioglu, and the Realty Corporations collectively.

6. The parties shall engage in a settlement conference on or before **September 25, 2015**, and attempt to reach an amicable resolution of this matter. Complainant shall file a status report regarding such conference and the status of settlement on or before **October 2, 2015**.

7. On or before **October 9, 2015**, Respondents shall file a supplement to the Initial Prehearing Exchange filed by Respondents Aylin, Rt. 58, Franklin Eagle, and Kiriscioglu on April 7, 2014, that is responsive to the amendments to the Complaint authorized by this Order. Complainant shall file any rebuttal to Respondents' supplement to their Initial Prehearing Exchange on or before **October 23, 2015**.

8. Any additional dispositive motions regarding liability, such as a motion for accelerated decision or motion to dismiss under Section 22.20(a) of the Rules of Practice, 40 C.F.R. § 22.20(a), shall be filed no later than **November 20, 2015**.

Christine Donelian Coughlin
Christine Donelian Coughlin
Administrative Law Judge

Dated: August 10, 2015
Washington, D.C.

In the Matter of *Aylin, Inc., RT. 58 Mart, Inc., Franklin Eagle Mart Corp., and Adnan Kirisciogl d/b/a New Jersey Petroleum Organization a/k/a NJPO*, Respondents.
Docket No. RCRA-03-2013-0039

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Order on Motions, dated August 10, 2015, was sent this day in the following manner to the addressees listed below.

Mary Angeles
Lead Legal Staff Assistant

Original and One Copy by Hand Delivery to:

Sybil Anderson
Headquarters Hearing Clerk
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Dated: August 10, 2015
Washington, D.C.