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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)	
)	
JOSEPH OH)	Docket No. RCRA-10-2011-0164
)	
and)	
)	
HOLLY INVESTMENT, LLC,)	
)	
Respondents.)	
_____)	

COMPLAINANT’S MOTION TO COMPEL DISCOVERY OR, IN THE ALTERNATIVE, MOTION IN LIMINE

Introduction

Complainant U.S. Environmental Protection Agency Region 10 (“Complainant” or “EPA”) files this motion pursuant to Sections 22.16(a) and 22.19(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (“the Consolidated Rules of Practice”), 40 C.F.R. §§ 22.16(a), 22.19, and the Order Rescheduling Hearing and Prehearing Deadlines dated April 18, 2012. Complainant hereby moves for discovery compelling Joseph

In the Matter of: Joseph Oh and Holly Investment, LLC
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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900, ORC-158
Seattle, Washington 98101
206-553-1037

Oh and Holly Investment, LLC (jointly referred to as “Respondents”) to file the information Respondent Joseph Oh was directed to file as part of his Prehearing Exchange by the Presiding Officer in provision 3(A) and (B) of the Prehearing Order issued on December 7, 2012. In the alternative, if Respondents fail to file such information, Complainant moves that the Presiding Officer draw adverse inferences from Respondents’ failure and preclude Respondents from presenting such information as evidence at the hearing scheduled to begin on August 14, 2012. Complainant also moves that Respondents be compelled to specifically identify its unnamed witness and provide a more detailed summary of the testimony its witnesses intend to provide. The legal grounds and factual basis for this motion are set forth below. On June 28, 2012, Complainant’s counsel notified Mr. Oh and his associate, Gregory Tift, of Complainant’s intent to file this motion. Complainant’s counsel has not received a response as to whether or not Respondents intend to oppose this motion.

Procedural and Factual Background

On September 28, 2011, EPA filed an administrative complaint (“Complaint”) against Respondents alleging violations of Section 9003 of the Resource Conservation and Recovery Act (“RCRA”), 42 U.S.C. § 6991b, and the implementing regulations at 40 C.F.R. Part 280. In the Complaint, EPA alleged that Respondents owned and/or operated two underground storage tanks (“USTs”) at the Totem Grocery & Gas at which UST release detection and corrosion protection violations occurred.

On October 27, 2011, Joseph Oh filed "Joseph Oh Answer and Affirmative Defenses To EPA Complaint" ("Answer"). In the Answer, Joseph Oh denied the allegations in paragraph 2.1 of the Complaint. Answer at p. 2. Paragraph 2.1 of the Complaint alleged that since at least October 13, 2006, Joseph Oh and his company, Holly Investment, LLC, have owned and/or operated Totem Grocery & Gas. Complaint at p. 3. In the Answer, Mr. Oh responded to the remaining allegations in paragraphs 1.1 through 3.16 of the Complaint with the following response: "... Joseph Oh lacks sufficient knowledge or information to form a belief as to the truth of the statements and therefore denies the same." Answer at p. 1-6. After further stating that he could not admit nor deny the Compliance Order provisions in paragraphs 4.1 through 4.7 because the order is not final and therefore deny the same, Joseph Oh concluded his response to the Complaint by stating that he denied all allegations, makes no admissions, reserves the right to amend or change his response as more information becomes available by discovery and denied EPA is entitled to any relief or damages against Respondent. Answer at p. 6.

On December 7, 2011, Chief Administrative Law Judge Biro issued a Prehearing Order directing in provision 3 on p. 3, that Respondent submit the following as part of his Prehearing Exchange:¹

¹ In the December 7, 2011 Prehearing Order, Judge Biro determined that because Holly Investment, LLC had not filed an answer, she did not have jurisdiction over the proceeding against the LLC and that the LLC was not subject to the Prehearing Order. Subsequently, in response to the directive in Judge Buschmann's March 13, 2012 Order Scheduling Hearing, Joseph Oh filed a statement clarifying that his Answer and Prehearing Exchange were submitted on behalf of himself and Holly Investment, LLC. Complainant now presumes that the Prehearing Order and all other orders and requirements in this proceeding apply to both Respondents.

(A) a narrative statement, and a copy of any supporting documents, explaining in detail the legal or factual bases for the denials in Paragraphs 2.1 through 2.12, and 3.2 through 3.11, of its Answer;

(B) if Respondent takes the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, 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 it intends to rely in support of such position.

To date, Respondents have addressed neither provisions (A) nor (B) above. Respondents have provided no basis for their denial of the allegations in the Complaint and no detailed narrative statement explaining the precise factual and legal bases for any position that the penalty should be reduced or eliminated, nor copies of any documents upon which they intend to rely in support of such position.

Complainant seeks an order compelling Respondents to file written responses to provisions (A) and (B) above by July 23, 2012, to allow Complainant time to review the responses prior the July 30, 2012 deadline for supplementing prehearing exchanges; otherwise, Respondents should be deemed to have waived any defenses to the allegations in the Complaint and any claim that the proposed penalty should be reduced. Complainant also seeks an order compelling Respondents to specifically identify their unnamed listed witness and to provide a more detailed narrative of what each of their witnesses' testimony is expected to be.

Argument

I. Complainant's Motion to Compel Discovery Should Be Granted

In an administrative proceeding governed by the Consolidated Rules of Practice, discovery, as it is typically thought of under the Federal Rules of Civil Procedure, occurs through a prehearing exchange of information in accordance with 40 C.F.R. § 22.19(a). *In re Aquakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, slip op. at 13 (ALJ Gunning, Order on Complainant's Motion in Limine and Motion to Strike and Respondent's Request for Discovery, June 2, 2010).² The efficient and timely exchange of information pursuant to 40 C.F.R. § 22.19 is central to achieving timely administrative case resolution. *In re Ag-Air Flying Services, Inc.*, FIFRA Appeal No. 06-01, at 9 (EAB, Sept. 1, 2006)(Final Decision and Order). Subsequent to the prehearing exchange, a party may move for additional discovery pursuant to 40 C.F.R. § 22.19(e)(1) and the Presiding Officer may only order the requested discovery, if he or she finds that the following three elements are met: (1) the discovery will not reasonably delay proceedings; (2) the information is not otherwise obtainable; and, (3) the information has significant probative value. *In the Matter of Aquakem Caribe, Inc.*, Docket No. RCRA-02-2009-7110, slip op at 13-14. *See also In re City of New Bedford, Massachusetts*, Docket No. CWA-01-2002-0059, slip op. at 3 (ALJ Moran, Order on Complainant's Motion for Order Compelling Production of Inability to Pay Documents, July 2, 2003)(ordering Respondent to provide

² Respondents should note that all ALJ decisions cited in this motion are posted on the EPA ALJ website at www.epa.gov/oalj and all EAB decisions are posted on the EAB's website at www.epa.gov/eab.

financial information to EPA and noting “where [ability to pay] has become an issue, EPA must be given access to respondent’s financial records *before* the start of the hearing and consistent with the prehearing exchange order)(emphasis in original); *In re Doug Blossom*, Docket No. 10-2002-0131, slip op. at 2 (ALJ Biro, Order on Complainant’s Motion for Order Compelling Production of Ability to Pay Documents, November 28, 2003). Complainant’s discovery request in this case meets all three elements.

The issuance of the discovery order at this juncture of the case would not delay the proceedings; rather would avoid delays later in the proceedings by eliminating surprises which should allow the parties to focus on the relevant issues that are actually in dispute. The hearing is scheduled to begin on August 14, 2012, which should allow ample time for Respondent to provide the information requested and for Complainant to review the information provided. Further, the information Complainant seeks from Respondents is not otherwise obtainable. Only Respondents know why they deny the allegations in the Complaint including some pretty basic allegations such as those in paragraph 2.3 “Holly Investment, LLC is a limited liability company registered to do business in the State of Washington” and in paragraph 2.4 “Joseph Oh is the governing member of Holly Investment, LLC.” Complainant should not be forced to go into hearing guessing why Respondents denied these and the other allegations in paragraphs 2.1 through 2.12 and 3.2 through 3.11, particularly when Respondents were ordered to provide in detail the legal and factual bases for their denials almost seven months ago. Complainant should

also not be forced to guess who will testify for Respondents from Northwest Tank and Environmental Services, Inc., what they will say, what reports they will rely on, what Helen Ho will say about “Totem Grocery and Deli’s operation and conversations with Region 10 EPA personnel concerning compliance” and what Gregory Tift will say about “Joseph Oh, his corporate assets and events that lead up to the EPA hearing.”

Finally, the information Complainant seeks is probative both to the issue of liability for the UST violations alleged and to the issue of penalty payment. Though Respondents have not yet raised the issue of an inability to pay the proposed penalty in their Answer or Prehearing Exchange, they made this claim in discussions with Complainant.³ Complainant assumes that Respondents will raise this claim at hearing, without first having provided the documentation needed (and that Complainant has requested) to support this claim. Although some financial documents concerning Mr. Oh’s financial condition are available on public databases, such databases do not include signed federal income tax returns for Mr. Oh and any of his related companies, nor do they include audited financial statements. Complainant would be at a distinct disadvantage if Respondents are allowed to proffer evidence at the hearing regarding Respondents’ financial situation without providing supporting documentation prior to hearing. Complainant seeks, at a minimum, the financial information described in Exhibit A and B to this

³ See Second Status Report filed on March 29, 2012.

motion, to support any claim that Respondents wish to make that they are unable to pay the proposed penalty.

II. Alternatively, the Presiding Officer Should Draw an Adverse Inference Against Respondents and Exclude Any Evidence that Respondents Should Have Provided in Response to the Prehearing Orders

Section 22.19(g) of the Consolidated Rules of Practice states:

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 the evidence; or
- (3) Issue a default order under § 22.17(c).

40 C.F.R. § 22.19(g).

In accordance with 40 C.F.R. § 22.19(g), the Presiding Officer is allowed to draw factual inferences that are adverse to a party that fails to comply with a discovery order. *In re William E. Comley, Inc. & Bleach Tek, Inc.*, 11 E.A.D. 247, 256 (EAB, January 14, 2004). This sanction is justified when respondents fail to provide any legitimate justification for refusing to provide information required in the Presiding Officer's discovery orders. *Id.* at 257. Respondents have no legitimate justification for failing to comply with the Prehearing Order issued several months ago. If Respondents fail to provide the information requested in the Prehearing Order, they should be subject to the sanction in 40 C.F.R. § 22.19(g)(1) of an adverse inference that Respondents admit the allegations in paragraphs 2.1 through 2.12 and 3.2 through 3.11 of the

Complaint and they do not take the position that the proposed penalty should be reduced or eliminated; and the sanction in 40 C.F.R. § 22.19(g)(2) that any evidence concerning these two points on liability and proposed penalty shall be excluded from evidence at the hearing.

Conclusion

For the foregoing reasons, Complainant respectfully requests that the Presiding Officer order Respondents to file by July 23, 2012: 1) a narrative statement, and a copy of any supporting documents, explaining in detail the factual and legal bases for the denials to paragraphs 2.1 through 2.12 and 3.2 through 3.11 of the Complaint contained in their Answer as ordered in the Prehearing Order issued on December 7, 2011, and 2) an indication whether or not Respondents take the position that the proposed penalty should be reduced or eliminated on any grounds, such as an inability to pay, and if so, then provide a detailed narrative statement explaining the precise factual and legal bases for their position and a copy of any and all documents upon which it intends to rely in support of such position. If Respondents claim that the penalty should be reduced or eliminated because of an inability to pay, then they should be ordered to complete and provide the information and documents requested in Exhibits A and B to this motion. In the alternative, if Respondents fail to provide the requested information, Complainant respectfully requests that the Presiding Officer draw an adverse inference from Respondents' failure to submit the requested information and exclude any testimony or exhibits concerning such denials or arguments that the penalty be reduced. In addition, Complainant

respectfully requests that the Presiding Officer also order Respondents to name the witness they plan to call from Northwest Tank and Environmental Services, Inc., and provide copies of any test reports it receives from that company that have not already been filed as a part of the record in this case; and provide more detail concerning the expected testimony of its three listed witnesses.

Respectfully submitted this 29th day of June, 2012.



Deborah E. Hilsman
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region 10

CERTIFICATE OF SERVICE

In the Matter of Joseph Oh and Holly Investment, LLC, No. RCRA-10-2011-0164, I hereby certify that a copy of COMPLAINANT'S MOTION TO COMPEL DISCOVERY OR, IN THE ALTERNATIVE, MOTION IN LIMINE was sent to the following persons in the manner specified on the date below:

Original and one true and correct copy of the document, by hand delivery:

Candace H. Smith, Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 10, Suite 900
Office of Regional Counsel
1200 Sixth Avenue, Mail Stop ORC-158
Seattle, Washington 98101

A true and correct copy of the document, by Email and Pouch mail to:

The Honorable M. Lisa Buschmann, Administrative Law Judge
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W., Mail Code 1900L
Washington, DC 20460
Email: oaljfilng@epa.gov

A true and correct copy document, by Email and Overnight Mail:

Joseph Oh, FBO
4905 70th Avenue West
University Place, Washington 98467
Email: josephoh405@gmail.com and oh.joseph@ymail.com

A true and correct copy by Email to:

Greg Tift
Email: ipwcci@mail.lawguru

DATED: 6-29-2012


Signature
Print Name: Shalaya Sanders
Title: Assistant

In the Matter of: Joseph Oh and Holly Investment, LLC
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U.S. Environmental Protection Agency
1200 Sixth Avenue, Suite 900, ORC-158
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206-553-1037

Initial Information Request

Joseph and Ester Oh and Related Entities

1. Individual Information

- a. **Federal Tax Returns – true and complete with all supporting schedules (2010 and 2011)**
- b. **Company Control and Affiliation** - provide a list of all entities that you controlled or currently control, or are affiliated with any other entity, domestic or foreign. For each entity named provide the names of senior officers and board of directors, type of control or affiliation (i.e. provides administrative/financial/marketing services), and describe the percentage of ownership and means of control.
- c. **Please complete: Financial Data Request Form (attached)**
- d. **Litigation** - Provide a statement (with relevant details) as to whether you or your businesses currently are, or anticipate being a party to, any litigation which has not been noted in the most recent financial statement and which could impact your financial situation.
- e. **Investigations** Identify and describe any investigations currently underway of for you and/or company officers of companies included in 1b. above that may have an impact on the your financial status.
- f. **Financial Settlements** - A statement with relevant details if you and/or the companies you control are currently or anticipate receiving or paying, a financial settlement which has not been noted in the most recent financial statements or elsewhere in this request..

2. Company Information – Complete for each business owned or controlled (ref: 1b. above). Businesses should include but not be limited to Holly Clover, Inc., Holly Global, Inc., and Holly Investments, Inc.

- a. **Federal Tax Returns** – true and complete with all supporting schedules (2010 and 2011)
- b. **Shareholders** – For each company, beginning with the largest shareholder, provide the names of those shareholders who hold the first 80% of the company's voting stock the amount each holds.
- c. **Annual Financial Statements** For each business provide true and complete copies to include but not limited to an Income Statement and Balance Sheet. If available, also provide Cash Flow Statements and Depreciation Schedules. The fiscal years provided should coincide with the tax year returns requested above.

In the first instance, annual Financial Statements for your business should be those completed by an outside CPA. In order of preference, this would either be an audit, a review, or a compilation - and includes any attached notes. If an outside CPA does not prepare these statements, then the business's internally generated annual financial statements should be provided. In the event that final financial statements are not yet ready for a just completed fiscal year, provide a draft copy.

INDIVIDUAL ABILITY TO PAY CLAIM

Financial Data Request Form

This form requests information regarding your current financial status. The data will be used to evaluate your ability to pay for environmental clean-up or penalties. If there is not enough space for your answers, please use additional sheets of paper. Note that we may request further documentation of any of your responses. We welcome any other information you wish to provide supporting your case, particularly if you feel your situation is not adequately described through the information requested here.

Financial data should be entered for the last day of the month preceding this month.

Certification

I declare that the data provided on this form is true, correct, and complete to the best of my knowledge and belief.

Signature

Date

	Name:		
	Spouse's Name:		
	Address:		
	County of Residence:		

PART I. BACKGROUND INFORMATION

1. MEMBERS OF HOUSEHOLD (List the head of the household and all persons living with you)			
Name	Age	Relationship to Head of Household	Currently Employed?

2. EMPLOYMENT (List all jobs held by persons in household)			
Name	Employer	Length of Employment	Annual Salary

3. INCOME (List all income earned by persons in household. If members of the household other than you and your spouse earn income, please itemize on separate page.)

Source	Gross (Pre-Tax)		Period of Payment (check one)			
			Weekly	Monthly	Quarterly	Yearly
Wages/Salaries						
Sales Commissions						
Investment Income (interest, dividends, capital gains, etc.)						
Net Business Income						
Rental Income						
Retirement Income (Pension, Social Security, etc.)						
Child Support						
Alimony						
Other Income (please itemize)						

PART II CURRENT LIVING EXPENSES

Please list *personal* living expenses which were typical during the last year and indicate if any of these values are likely to change significantly in the current year. **Please do not include business expenses.** If you are the owner of an operating business, please attach any available financial statements.

Expense	Amount	Weekly	Monthly	Quarterly	Yearly	For Agency Use Only
A. Living Expenses						
1. Rent						
2. Home maintenance						
3. Auto fuel, maintenance, other transp.						
4. Utilities						
a. Fuel (gas, oil, wood, propane)						
b. Electric						
c. Water/sewer						
d. Telephone						
5. Food						
6. Clothing, personal care						
7. Medical costs						
B. Debt Payments						
1. Mortgage payments						
2. Car payments						
3. Credit card payments						
4. Educational loan payments						
C. Insurance						
1. Household insurance						
2. Life insurance						
3. Automobile insurance						
4. Medical insurance						
D. Taxes						
1. Property taxes						
2. Federal income taxes						
3. State income taxes						
4. FICA						
E. Other Expenses						
1. Childcare						
2. Current School tuition/expenses						
3. Legal or professional services						
4. Other (itemize on separate page)						

PART III NET WORTH

Please provide the following information to the best of your ability. Data should be as current as possible. Estimates are acceptable. Note estimated items with an "E".

If you are the sole proprietor of a business, list business assets and liabilities in addition to personal assets and liabilities, and mark these business entries with a "B".

1. BANK ACCOUNTS (Checking, NOW, Savings, Money Market, CDs, etc.)		
Name of Bank or Financial Institution	Type of Account	Current Balance
Total Current Balance in Bank Accounts		

2. INVESTMENTS {Stock, Bonds, Mutual Funds, Options, Futures, Real Estate Investment Trusts (REITs), etc.}		
Investment	Number of Shares or Units	Current Market Value
Total Current Market Value of Investments		

3. RETIREMENT FUNDS AND ACCOUNTS {IRA, 401(k), Keogh, vested interest in company retirement fund, etc.}	
Description of Account	Estimated Market Value
Total Estimated Market Value of Retirement Funds and Accounts	

4. LIFE INSURANCE POLICIES (Whole Life, Universal Life, etc.)			
Policy Holder	Issuing Company	Policy Value	Cash Value
Total Value of Life Insurance Policies			

5a. VEHICLES USED FOR COMMUTING PURPOSES (Cars, Trucks, Motorcycles, etc. Only list up to two vehicles used for commuting purposes.)		
Model	Year	Estimated Market Value
Total Estimated Market Value of Vehicles		

5b. OTHER VEHICLES (Cars, Trucks, Motorcycles, Recreational Vehicles, Motor Homes, Boats, Airplanes etc.)		
Model	Year	Estimated Market Value
Total Estimated Market Value of Vehicles		

6. PERSONAL PROPERTY (Household Goods and Furniture, Jewelry, Art, Antiques, Collections, Precious Metals, etc. Only list items with a value greater than \$500.00)	
Type of Property	Estimated Market Value
Total Estimated Market Value of Personal Property	

7a. REAL ESTATE — PRIMARY RESIDENCE (Home — List only one such residence.)			
Location	Description of Property	Balance Owed on Mortgage	Estimated Market Value
Total Estimated Market Value of Real Estate			

7b. OTHER REAL ESTATE (Land, Buildings, Land with Buildings)		
Location	Description of Property	Estimated Market Value
Total Estimated Market Value of Real Estate		

8. OTHER ASSETS	
Type of Asset	Estimated Market Value
Total Other Assets	

9. CREDIT CARDS AND LINES OF CREDIT			
Credit Card/Line of Credit (Type)	Owed To	Monthly Payment	Balance Due
Total Balance Due on Credit Cards and Lines of Credit			

10. VEHICLE LOANS (Cars, Trucks, Motorcycles, Recreation Vehicles, Motor Homes, Boats, Airplanes, etc.)					
Vehicle (Model and Year)	Owed To	Balance Due	Monthly Payment	Start Date	End Date
Total Balance Due on Vehicle Loans					

11. FURNITURE AND HOUSEHOLD GOODS LOANS:					
List Item	Owed To	Balance Due	Monthly Payment	Start Date	End Date
Total Balance Due on Furniture and Household Goods Loans					

12. MORTGAGES AND REAL ESTATE LOANS						
Type of Loan	Owed To	Property Secured Against	Balance Due	Monthly Payment	Start Date	End Date
Total Balance Due on Mortgages and Real Estate Loans						

EXHIBIT NO. B, PG. 8 OF PG. 10

13. Debt Not Disclosed Elsewhere in this Request (Amounts due to individuals or other entity, fixed obligations, taxes owed, overdue alimony, child support, etc.)

Type of Debt	Owed To	Balance Due	Monthly Payment	Start Date	End Date
Total Balance Due on Other Debt					

PART IV ADDITIONAL INFORMATION

Please respond to the following questions. Please provide additional information on separate pages or at the bottom of this page.

1. If you have any reason to believe that your financial situation will change during the next year, please fully explain.
2. If anyone (or any entity) holding real or personal property on your behalf (e.g., a trust, intermediary) please identify the property including location, who is holding it and why, and the estimated value of the property.
3. If you are a Trustee, Executor, or Administrator, please furnish the name of the trust or estate, your responsibilities, and the estimated value of the trust or estate.
4. If you are a participant or beneficiary of an estate or profit-sharing plan, please identify the estate or plan, the estimated value of your share of the estate or plan and when your share will be available to you for withdrawal.
5. If you have declared bankruptcy in the last seven years, please furnish the type of bankruptcy, filing references, and disposition or status.
6. If you receive any type of federal aid or public assistance, please identify the type of aid, amount involved and expected duration.
7. If you been denied a loan or new credit within the last year, please provide documentation of the application and the denial.
8. If you are a party to any pending lawsuit, please identify the parties involved, the issues and status.

EXHIBIT NO. B, PG. 10 OF PG. 10