



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG.11
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REGIONAL HEARING
CLERK

In the Matter of:)
)
Andrew B. Chase, a/k/a Andy Chase,)
Chase Services, Inc., Chase Convenience)
Stores, Inc., and Chase Commercial)
Land Development, Inc.,)
)
Respondents.)

Docket No. RCRA-02-2011-7503

**ORDER ON COMPLAINANT’S MOTION TO PRECLUDE DOCUMENTATION
AND DRAW ADVERSE INFERENCE**

I. Procedural Background

The Complaint in this proceeding was filed on April 7, 2011, and after Respondents filed an Answer denying the alleged violations, a Prehearing Order in this matter was issued on July 12, 2011. Several deadlines were extended pursuant to motions, and the parties submitted Prehearing Exchanges in December 2011. Respondents asserted in their Prehearing Exchange (at 3-4) that none of the Respondents has the financial ability to pay any amount of fine, but they did not include any financial documents in support of the assertion.

Pursuant to motion, the hearing was rescheduled to begin on July 17, 2012 in Plattsburgh, New York. Complainant’s motion for accelerated decision was granted with respect to Respondents’ liability for Counts 1 through 16, 18, 19 and 21.

Complainant filed a “Motion to Compel Production of Financial Records/To Preclude/To Draw Adverse Inference,” dated March 25, 2012, to which Respondents did not respond. Although they were therefore deemed to waive any objection to the motion, it was granted on its merits by Order dated May 11, 2012 (“May 11 Order”), ordering Respondents to serve Complainant with the requested documents on or before May 30, 2012. The May 11 Order specifically warned Respondents that “If Respondents fail to timely submit to Complainant all of the information listed . . . , they may be deemed to have waived any claim of inability to pay a penalty or financial hardship, they may be precluded from introducing any documentation or information relevant to such claim into the record in this proceeding, and/or an inference may be drawn that any such information would be adverse to such claim.”

On June 15, 2012, Complainant submitted a “Motion to Preclude Respondents from Introducing Documentation Relevant to Claim of Inability to Pay/Financial Hardship, and to Draw Adverse Inferences Thereto” (“Motion”). Respondents opposed the Motion with a Declaration of Thomas W. Plimpton (“Opposition”), dated June 25, 2012, and attached exhibits.

II. Parties’ Arguments

In its Motion, Complainant asserts that Respondents have not submitted, for purposes of this litigation proceeding, documentation relevant to their claim of inability to pay the penalty or financial hardship. Complainant asserts further that it has not received any documentation in response to the May 11 Order, and has not received any explanation therefor from Respondents. Complainant acknowledges that it received an “Individual Ability to Pay Claim/Financial Data Request Form” (“FDRF Form”) sent by Respondents’ counsel on June 14, 2012, but asserts that it does not comply with the May 11 Order in substance or in timeliness. Complainant presents copies of emails its counsel sent to Respondents’ counsel on June 1, June 4 and June 8, 2012, stating that documents required by the May 11 Order had not been received, and asking whether Respondents will be submitting any. Motion, Exhibits C, D, E. Complainant concludes that Respondents are in violation of the May 11 Order.

As a remedy, Complainant requests issuance of an order precluding Respondents from introducing evidence that might be relevant to their claim of financial hardship or inability to pay, and drawing appropriate adverse inferences for Respondents’ failure to timely produce the financial documents sought, and granting any additional relief. In support, Complainant argues that it will be prejudiced in preparation for hearing because it does not know what evidence Respondents will present at the hearing in support of their arguments of financial hardship, and therefore has no indication of what evidence to present in rebuttal. Finally, Complainant argues that sanctions are appropriate *a fortiori* where Respondents did not attempt to explain or justify their failure to comply with the May 11 Order.

In the Opposition, Respondents’ counsel requests that the Motion be denied, asserting that Respondents have provided financial information to Complainant. He states that in March 2012, Respondents provided the 2010 tax return, an IRS payment notice for 2009, and a New York State Taxation Notice of Adjustment for Respondent Andrew B. Chase, and the 2008 and 2009 tax returns for corporate Respondents. He asserts that Mr. Chase has not yet filed a 2011 tax return, and that Respondents Chase Services, Inc. (“CSI”), Chase Convenience Stores, Inc. (“CCS”) and Chase Commercial Land Development, Inc. (“CCLD”) ceased operations, sold their assets in 2009, and do not have financial statements or projections, and “the last tax return filed was 2010.” Opposition at 3. He asserts further that “Mr. Chase has, through his tax returns, demonstrated his dire financial situation.” *Id.* Respondents’ counsel argues that precluding copies of financial information from being introduced into evidence “cannot change the Respondents’ ability to pay” and “will not increase the chances of the EPA being able to recoup anything other than what the financial resources of the Respondents actually are” and that the Respondents are in an “incredibly dire financial condition.” *Id.*

III. Discussion and Conclusion

The May 11 Order required Respondents to submit to Complainant the following:

1. Copies of the three most recent years of federal income tax returns for Respondent Andrew B. Chase and for each of the three named corporate Respondents. The copies must be either signed and dated or accompanied by a certification that they are true and correct copies of the ones submitted to the Internal Revenue Service.
2. For each of the three named corporate Respondents, copies of complete financial statements for the three most recent past fiscal years prepared by an outside accountant, and such statements should include all balance sheets, statements of operations, retained earnings and cash flows.
3. For each of the three named corporate Respondents, copies of any financial projections developed for the years 2012 and 2013.
4. For each of the three named corporate Respondents, copies of the asset ledger for all assets owned during the three most recent years.
5. Copies of any other documents for any of the Respondents that they deem relevant and supportive of the claim of inability to pay/financial hardship.
6. If any of the documents requested above do not exist, a statement of Respondents certifying to that fact with respect to each such document.

Respondents do not deny that they failed to submit any documents to Complainant in response to the May 11 Order. They do not assert that all of these documents were previously supplied to Complainant. Instead, they rely on the attachments to the Opposition, and their assertion that certain ones were supplied to Complainant in March 2012, to defeat the Motion.

Attached to the Opposition as Exhibit A are copies of: Mr. Chase's individual income tax return for 2010; a document from the Internal Revenue Service dated June 27, 2011 regarding changes made to Mr. Chase's 2009 income tax return and amount due; a notice of State income tax adjustment dated June 20, 2011; tax returns for the corporate Respondents for 2008 and 2008; tax returns for other corporations associated with Mr. Chase; and the Individual Ability to Pay Claim Financial Data Request Form, dated April 25, 2012. Attached to the Opposition as Exhibit B is a Certification of Andrew B. Chase certifying that the business and property of CSI, CCS, and CCLD were sold in 2009, and that they are no longer in business, "do not have financial statements, other than what is included in the tax returns previously produced," and sold all of their business and property, and therefore there are no projections for 2012 and 2013 or asset ledgers.

These documents do not meet the requirements of the May 11 Order. If the tax returns

attached to the Opposition were indeed provided to Complainant in March 2012, Respondents submitted only one of the three previous years' income tax returns for Mr. Chase. Although there is an indication of his tax account balance in the June 27, 2011 IRS correspondence, it is not equivalent to providing his tax return as it does not show the information that an income tax return would contain. Respondents do not state that Mr. Chase's income tax returns for the other two years do not exist, nor do they provide any explanation for failing to submit them. Therefore, Respondents have refused to comply with the clear directive in Item # 1 of the May 11 Order quoted above with respect to Mr. Chase's tax returns.

Furthermore, Respondents have only provided the corporate Respondents' tax returns for only the two most recent years rather than for the three most recent years of federal income tax returns as required in Item #1. They have not explained why they did not provide any other tax returns. Therefore they have failed to comply with Item # 1 of the May 11 Order with respect to the corporate tax returns.

Finally, Mr. Chase's certification that certain documents do not exist is untimely, having been submitted almost 4 weeks after the May 30 due date. Respondents do not provide any explanation for their failure to submit it on or before the due date.

Respondents failed to respond to the May 11 Order, despite the clear warning therein that if they fail to timely submit all of the information listed in the Order they may be sanctioned. In addition, they failed to explain their lack of response to the May 11 Order. The Opposition conveys their position that they have already demonstrated their financial condition and need not submit additional documentation despite being ordered to do so. Respondents therefore demonstrate a disregard for orders issued in this proceeding. In these circumstances, a sanction is clearly warranted.

The applicable procedural regulations, 40 C.F.R. Part 22 ("Rules") provide in 40 C.F.R. § 22.19(e) with regard to sanctions that if a party fails to provide information within its control as required by order granting a motion for additional discovery, the ALJ may in her discretion "[i]nfer that the information would be adverse to the party failing to provide it," "[e]xclude the information from evidence," or "[i]ssue a default order under § 22.17(c)." 40 C.F.R. § 22.19(g).

For Respondents' failure to provide information within their control as required by the May 11 Order, any of these sanctions may be imposed. Exclusion of financial information from evidence is an appropriate sanction in the circumstances of this case. Respondents have not submitted any documentation in support of their argument that they are unable to pay a penalty in their Prehearing Exchange, yet they have the burden of proof on the issue. *Carroll Oil Co.*, 10 E.A.D. 635, 663 (EAB 2002) ("ability to pay," in order to be considered, must be raised and proven as an affirmative defense by the respondent."). The Prehearing Order specifically directed Respondents to submit in their Prehearing Exchange documents in support of any position that they are unable to pay the proposed penalty or that payment will have an adverse effect on their ability to continue to do business. They chose not to submit any. Further, the

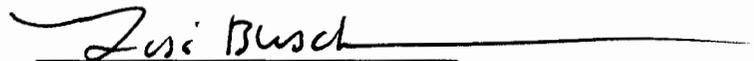
Order issued in this proceeding on March 22, 2012 reminded Respondents that they bear the burden of proving that the proposed penalty should be mitigated based on their inability to pay, citing *Carroll Oil Co.*, 10 E.A.D. 635, 662-63 (EAB 2002). Nevertheless, they chose not to supplement their Prehearing Exchange with any such documentation, despite the fact that they have had their tax returns in their possession. The Rules provide that except as provided in Section 22.22(a), a document that has not been included in the prehearing exchange shall not be admitted into evidence. 40 C.F.R. § 22.19(a).

Even if Respondents were permitted to supplement their Prehearing Exchange with financial information this close in time to the hearing, it would be prejudicial to Complainant to exclude only financial information that has not yet been submitted to Complainant. The fact that Respondents provided some financial information to Complainant in March 2012 and then filed it as part of the Opposition does not establish that it was sufficient for Complainant to assess Respondents' ability to pay a penalty. Respondents' argument that Mr. Chase has adequately demonstrated inability to pay a penalty through his 2010 tax return and the other documents submitted is not persuasive. Respondents have not presented any persuasive argument that exclusion of all financial information is inappropriate or unwarranted. The statement in the Opposition that exclusion of evidence will not change the Respondents' financial condition or the ability of Complainant to collect a penalty does not weigh against imposing the sanction of exclusion of all financial evidence. Therefore, it is appropriate to exclude all financial information and evidence that may be presented in support of any claim of financial hardship or inability to pay a penalty.

As to Complainant's request to draw an adverse inference, there is no need to draw such inference in addition to excluding the information from evidence where Respondents have the burden of proof on the issue.

Accordingly, Complainant's "Motion to Preclude Respondents from Introducing Documentation Relevant to Claim of Inability to Pay/Financial Hardship, and to Draw Adverse Inferences Thereto" is **GRANTED** with respect to precluding evidence as to inability to pay or financial hardship that may be presented by Respondents.

IT IS ORDERED THAT any information or evidence presented by Respondents in support of any claim of inability to pay a penalty or financial hardship **shall not be admitted into evidence** in this proceeding.



M. Lisa Buschmann
Administrative Law Judge

Date: June 28, 2012
Washington, D.C.

**In the Matter of Andrew B. Chase, a/k/a Andy Chase, Chase Services, Inc., Chase Convenience Stores, Inc., and Chase Commercial Land Development, Inc., Respondents.
Docket No. RCRA-02-2011-7503**

CERTIFICATE OF SERVICE

I hereby certify that true copies of this **Order on Complainant's Motion to Preclude Documentation and Draw Adverse Inference** were sent to the following parties on this 28th day of June 2012, in the manner indicated:



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