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July 21, 2008

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Ms. Sonja Brooks – Woodard
Regional Hearing Clerk (E-13J)
U.S. EPA , Region 5
77 W. Jackson Blvd.
Chicago, IL 60604-3511

RE: Docket No. EPCRA-05-2008-0005

Dear Ms. Woodard:

Please find enclosed Respondent's Brief in Opposition to Complainant's Motion for Default Judgment. Thank you.

Very truly yours,



Max E. Dehn

Enclosure

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**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 5**

In the Matter of:) Docket No. EPCRA-05-2008-0005
)
LIBRA INDUSTRIES, INC.) RESPONDENT'S BRIEF IN
MENTOR, OHIO,) OPPOSITION TO
) COMPLAINANT'S MOTION FOR
Respondent) DEFAULT ORDER

Complainant, Director of the Land and Chemicals Division, United States Environmental Protection Agency ("EPA"), has moved for a Default Order in this matter. The EPA cites the failure of Libra Industries, Inc. ("Libra") to properly file its Answer as the basis for default.

The Motion should be denied on the following grounds, explained more fully below:

- Libra has acted at all times in good faith in responding to the Complaint, cooperated fully in the preceding investigation, and has no prior record of failure to comply with any state or federal law. Any failure to file an Answer was of a technical nature, and resulted from neither indifference nor an attempt to gain unfair advantage. Further, no party has been unfairly burdened or prejudiced as a result of the failure to file;
- Default judgment is a generally disfavored penalty that precludes matters from being decided on the merits. Further, default is disproportionate and unfair as a response to a party's technical failure to properly file an Answer.

I. Libra has Acted in Good Faith Throughout the Investigative Process and in Response to the EPA Complaint.

Libra has acted in good faith throughout the investigation and Complaint process. The basis of the Motion for Default Order is Libra's failure to properly file its Answer. But, as the EPA is aware, this failure was purely technical.

That is, under 40 C.F.R. §§ 22.7(c) and 22.15(a), Libra's Answer to the Complaint was due on February 11, 2008. On February 8, 2008, the Answer was sent via Federal Express to Judicial Officer Marcy Toney, and was also sent to Ms. Ann Coyle, Associate Regional Counsel, U.S. EPA, Region 5. On February 11, 2008 the Answer was delivered to Ms. Toney, and Ms. Coyle was served on or around the same date. Through apparent oversight, however, the Answer was not filed with Regional Hearing Clerk Sonja Brooks – Woodard.

On at least one occasion after February 11, Libra counsel spoke with Ms. Coyle by telephone to discuss the case. Both parties expressed surprise at the length of time that had elapsed without a hearing being set. Later, in a June 23 conversation with the undersigned counsel, Ms. Coyle indicated that there was no record of the Answer being filed. Subsequently, Libra discovered the misfiling and, on June 27, forwarded an Answer and Motion to File Answer Instantly. The Answer and Motion were received at Region 5 and filed on June 30. As these facts demonstrate, any failure to file was inadvertent.

A further relevant factor is Libra's cooperation in this matter prior to a Complaint being filed. There is no dispute that Libra cooperated fully with the EPA inspection process, and that its records were clear, complete, and made readily available to EPA personnel. Thus, Libra has at no time failed to assist the government in its investigation or otherwise properly engage the process.

The events above reveal no more than good faith error that was quickly rectified upon discovery. Such error, technical in nature, should be insufficient as a basis to

deny an otherwise cooperating Respondent with the opportunity to be heard. This is particularly true as the EPA does not point to any unfair advantage, or unfair burden, that arises as a result of these events.

II. Default is a Disfavored and Disproportionately Severe Penalty.

Because Default judgment strips a party of the right to respond and be heard on their own behalf, it is a penalty reserved for instances where a party has willfully ignored the judicial process. Federal courts explain as follows:

“(T)he default judgment must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights. The default judgment remedy serves as such a protection.”¹

Otherwise, “courts strongly favor resolution of disputes on their merits,” and find it “inherently unfair to use the court's power to enter judgment as a penalty for filing delays.”² Federal courts also apply this standard to EPA administrative actions.³

In its Motion for Default Order, the EPA seeks default in reaction to a delay in filing caused by a good faith mistake. Its Motion is based largely upon the following: “Since the filing of the Complaint, Respondent has filed nothing purporting to justify its

¹ *Jackson v. Beech*, 636 F.2d 831, 836 (D.C.Cir. 1980) (quoting *H. F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe*, 432 F.2d 689, 691 (D.C.Cir.1970).

² *Carpenter Labor-Management Pension Fund v. Freeman Carder, LLC*, 498 F.Supp.2d 237, 240 (quoting *Jackson*, 636 F.2d at 835).

³ *Katzson Bros., Inc. v. U.S. E.P.A.*, 839 F.2d 1396, 1399 (10th Cir. 1988).

failure to Answer.”⁴ But the statement is misleading. First, Libra filed its Answer and Motion to File Answer Instantly on June 30, a full week before the EPA filed its Motion. Second, Ms. Coyle was aware of Libra’s efforts to comply with EPA procedure by virtue of having received the Answer in February, and through conversations with Libra counsel up to and including the conversation of June 23.

In the Complainant’s Supplemental Motion for Default Order, the EPA acknowledges the February filing, and notes the conversation of June 23. But the EPA misstates the date upon which the Regional Hearing Clerk received the Answer and Motion to File Instantly. The EPA’s Supplemental Motion says that the filing occurred on July 3, but the filing was sent via Federal Express on June 27, and received for filing on June 30. It is unclear why Ms. Coyle did not receive the filing until July 3, but there is no question that the Regional Hearing Clerk received the filing on June 30.

More importantly, the EPA has not set forth facts that, if true, provide basis for default. Rather, the EPA has pointed to a mistake in filing that is, without more, insufficient grounds for a Default Judgment.

III. Conclusion

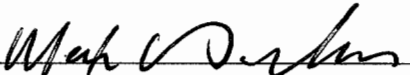
Because default is inappropriate here, Libra need not respond substantively to the EPA’s assertions regarding the prima facie liability case or the appropriateness of the recommended penalty. Rather, Libra intends to demonstrate going forward that the penalty is excessive, as Libra asserted in its Answer.

⁴ Complainant’s Memorandum in Support of Motion for Default Judgment, pg. 5.

The EPA has not demonstrated a basis for Default Judgment. Libra has participated fully and in good faith throughout the entirety of this matter, and should not be denied the right to be heard on the merits of its arguments.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 21st day of July, 2008, a copy of Respondent Libra Industries, Inc.'s Brief in Opposition to Complainant's Motion for Default Order, was sent by ordinary U.S. mail to:

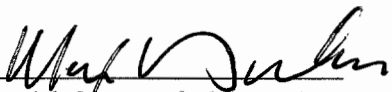
Ms. Ann L. Coyle (C-14J)
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